(16,970 and 16,971.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 385.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND G. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, ET AL., APPELLANTS,

vs.

THE FARMERS' BANK OF KENTUCKY.

No. 386.

THE FARMERS' BANK OF KENTUCKY, APPELLANT,

vs.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND G. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, ET AL.

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Circuit Court of the United States, Sixth Circuit and District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
S. H. STONE, ETC., Defendants. } No. 274.

5 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term, begun and held at the Federal court hall, in the city of Frankfort, on Monday, June 13, 1898.

Present: Honorable John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

FARMERS' BANK OF KENTUCKY, Complainant,
versus
S. H. STONE, ETC., Defendants. } 274.

Be it remembered that heretofore, to wit, on May 8, 1897, came the complainant, Farmers' Bank of Kentucky, by its counsel, W. S. Pryor and Jno. W. Rodman, and filed in the clerk's office of our said court *their* bill of complaint and exhibits against the above-named defendants, S. H. Stone, etc., which bill of complaint is in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The Farmers' Bank of Kentucky brings this its bill of complaint against Samuel H. Stone, Charles Finley, George W. Long, The Board of Councilmen of the City of Frankfort, County of Franklin, City of Henderson, County of Henderson, City of Georgetown, County of Scott, and thereupon complainant says:

I.

The complainant is a corporation duly incorporated by and organized under the laws of the State of Kentucky, and a citizen of said State; that it was incorporated by an act of the General
6 Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Farmers' Bank of Kentucky," approved May 16, 1850.

II.

The defendant, Samuel H. Stone, is the auditor of public accounts of the State of Kentucky; the defendant, Charles Finley, is the secretary of the State of Kentucky; the defendant, George W. Long, is the treasurer of the State of Kentucky; the defendant, The Board of Councilmen of the City of Frankfort, is a municipal corporation duly incorporated by and organized under the laws of the State of

Kentucky; the defendant, The County of Franklin, is a municipal corporation duly created by and organized under the laws of the State of Kentucky; the defendant, The City of Henderson, is a municipal corporation duly created by and organized under the laws of the State of Kentucky; the defendant, The County of Henderson, is a municipal corporation duly created and organized under the laws of the State of Kentucky; the defendant, The City of Georgetown, is a municipal corporation duly created by and organized under the laws of the State of Kentucky; the County of Scott is a municipal corporation duly incorporated by and organized under the laws of the State of Kentucky.

III.

The complainant was created a body politic and corporate by said act of the General Assembly of the Commonwealth of Kentucky, approved February 16, 1850. By this act it was given full power and authority to acquire, hold, possess and enjoy all such real estate, goods, effects and chattels as should be convenient for the transaction of its business, and which might be conveyed to it as surety for any debt, or purchased in satisfaction of any judgment or decree in its favor, or in the purchase of any property in which it might have a lien.

It was directed that it should have and keep its principal office of discount and deposit in the city of Frankfort, and that it might have offices of discount and deposit in other parts of the State. Its business was declared to be that of loaning money, discounting promissory notes and bills, and dealing in exchange, and it was given authority to issue bills or bank notes, payable to the bearer on demand, at any of its offices of discount and deposit, but not of less denomination than five ($5.00) dollars. It was given the general power of a banking corporation.

It was authorized by its charter to create a branch at Henderson, Kentucky, and a branch at Georgetown, Kentucky.

The said corporation was duly organized under the terms of the said act of incorporation, and said two branches were established and located at Henderson and at Georgetown, Kentucky, in accordance with the provisions of its said charter and the amendments thereto, and its corporate life, including said branches, has
7 ever since continued; and it has performed all the duties imposed upon it by its act of incorporation and the amendments thereto and the laws of the land. It duly established and has ever since maintained a branch at Henderson, Kentucky, and a branch at Georgetown, Kentucky, and has fully performed the duties required by its said charter and amendments thereto.

IV.

By its original charter, which, as aforesaid, was approved February 16th, 1850, it was provided that the complainant should continue a body politic and corporate until the 1st day of May, 1880.

By an act of the General Assembly of the Commonwealth of Ken-

tucky entitled "An act extending the charter of the Farmers' Bank of Kentucky," approved March 10th, 1876, it was provided that the charter privileges of the complainant should continue in full force for twenty-five (25) years from the first day of May, 1880. Said act of extension reads as follows:

"Be it enacted, etc.—

"SECTION 1. That the charter of the Farmers' Bank of Kentucky as amended, be extended for the period of twenty-five (25) years from the termination of its charter as therein fixed: *Provided*, that said charter and amendments shall be subject to amendment or repeal by the General Assembly by general or special acts, and, *Provided further*, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

So by reason of said act of March 10th, 1876, its charter life will not expire until the first day of May, 1905.

V.

By the 15th section of its original charter it was provided as follows:

"It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1851, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth fifty (50) cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full for all tax or bonus: *Provided*, that no tax shall be paid until said bank goes into operation; and *provided further*, that the tax or bonus hereby proposed to be imposed on each share of stock in this bank, or such as shall hereafter be imposed on each share, is hereby set apart and forever dedicated to the cause of education on the common-school system; and that whenever the same, or any part thereof, shall be diverted otherwise by legislative enactment, said bank shall then be exonerated from the payment of any tax or bonus whatever."

8

Complainant states that said tax of fifty (50) cents on each share of its stock was a tax then largely in excess of the ordinary rate of taxation paid by other moneyed capital or property in the State of Kentucky, including municipal and county taxes; and it continued to be so in excess until a long time thereafter. The complainant says its capital stock as it now exists is much less than that originally authorized by its charter—the original amount authorized was two million three hundred thousand dollars, whereas its present capital stock is nine hundred and ninety thousand four hundred dollars. The complainant paid each year this tax thus levied upon it, down to July 1st, 1886, from which time it has paid a different amount, as will be hereinafter explained.

VI.

The complainant says that by the settled course of decisions of the highest court of this State the meaning of these provisions in

its charter has been fixed and determined. That by a decision rendered by the Kentucky court of appeals, the highest court in Kentucky, on the — day of November, 1869, in the case of the complainant against the Commonwealth and Greenup county, reported in 6th Bush, page 127, it was determined that this above-quoted language in said section 15 meant to include taxation by any of the municipal subdivisions of the State, and prevented such municipal subdivisions from taxing the real estate of the complainant although situated within their boundaries.

The Commonwealth of Kentucky and Greenup county instituted proceedings in the Greenup county court to assess certain real estate held by the bank and which it acquired by purchase, in order to collect some of its debts. The county court upon the issues raised by the parties declared that it could not be taxed for any such purpose, and the case was taken to the Kentucky court of appeals, and on the 24th day of November, 1869, the said court rendered an opinion in said case, which reads as follows:

"By the first section of 'An act to incorporate the Farmers' Bank of Kentucky,' p. 7, Session Acts 1849–'50, full power is conferred on the bank to acquire, hold, possess, use, occupy and enjoy, and the same to sell, convey and dispose of, all such real estate, goods, effects and chattels as shall be convenient for the transaction of its business, or which may be conveyed to said bank as surety for any debt, or purchased in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which said
9 bank may have a lien. In section 15 of said act it is provided that it shall be the duty of the cashier of the principal bank, on the 1st day of July, 1851, and on the 1st day of July of each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus, etc. By a compliance with the section last quoted the bank was to be discharged from the payment of all and every other tax. From the amplitude of the language no other rational construction can be given to it. The property which is attempted here to be taxed was doubtless taken by the bank or purchased in satisfaction or part satisfaction of a debt, and represents the assets of the bank to its value, and is no more subject to taxation than the notes or bills held by the bank or money in its vaults. The court below therefore erred in refusing to correct the assessments for the years 1867 and 1868 at the request of the bank. Wherefore the judgment is *reversed*, and the cause is remanded with directions to the court to correct said assessment-lists so far as said bank is concerned, and enter a judgment releasing said bank from paying tax on the lands in the notice described, from the payment of taxes for county and State purposes for the year 1868; it having been already released from the payment of the State revenue for 1868."

A certified copy of said opinion is filed herewith as part hereof, together with a copy of the mandate from said court in said case, and complainant says that judgment was rendered in the county

court of Greenup county in conformity with the opinion of the Kentucky court of appeals.

By a decision rendered by the Kentucky court of appeals on June 5th, 1888, it was determined (confirming the judgment of the Franklin circuit court) that the said 15th section as aforesaid constituted a contract between the complainant and the State, by which the State could not tax the complainant at a greater rate than 50 cents on each hundred dollars of stock; that this included all taxation of all kinds, State, county and municipal, and upon all kinds of property of the said bank.

VII.

On March 18th, 1876, there was approved an act of the legislature of Kentucky, entitled, "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court." By the second section of this act it was made the duty of the chief officer of any bank doing business or owning property in the county, to list with the assessor all the property of the bank.

By the third section of the act it was provided that all the property thus listed and assessed should be subject to an equal and uniform rate of taxation.

Under this act the Franklin County Court, being the fiscal authority of the defendant, The County of Franklin, attempted to assess, for county taxation, the property and choses in action of the complainant situated in Franklin county, where complainant's principal bank was situated. Thereupon complainant filed a bill in equity in the circuit court of Franklin county against the said Franklin County Court for an injunction against the said Franklin County Court, restraining and enjoining it from endeavoring to collect any tax on the basis of such assessment. In said suit the complainant set forth and claimed its contract with the State by virtue of the provisions of its charter as hereinbefore set out, and claimed that the same was inviolable and that the act of 1876, so far as it attempted to repeal or *impair* the same was unconstitutional and void. The said Franklin County Court, being duly brought before the court, the cause came on for hearing, and resulted in a judgment establishing the right of the complainant to relief upon the basis of its said contract, and enjoining the said Franklin County Court from endeavoring to enforce the said assessment.

About the same time the Board of Councilmen of the City of Frankfort caused certain real estate belonging to the complainant, and situated in the city of Frankfort, to be assessed for taxation, and attempted to collect taxes thereon; whereupon the complainant filed a bill against the Board of Councilmen of the City of Frankfort in said Franklin circuit court, making similar allegations to those above mentioned in reference to the suit against the Franklin County Court, and praying for an injunction against the Board of Councilmen of the City of Frankfort restraining them from attempting to collect the said taxes against the said complainant's

real estate. And this cause coming on to be heard, judgment was rendered in this cause also; and thereupon the said Board of Councilmen of the City of Frankfort was perpetually enjoined from attempting to collect the said tax. In both of these causes the contract between this complainant and the State of Kentucky, as hereinbefore set up, was fully pleaded and alleged, and relief was asked for upon the basis thereof, and in each of the cases the court adjudged that the said contract was in existence and continued during the charter life of the bank as extended, and rendered judgment accordingly. Each of these defendants, The Franklin County Court, and The Board of Councilmen of the City of Frankfort, prayed an appeal to the Kentucky court of appeals from said judgments, and the causes coming on to be heard in the court of appeals, the judgment in each case was affirmed by the said court of appeals, the said court holding that the said 15th section of complainant's charter was a contract by which the legislature could tax the
11 complainant, at the most, fifty cents on each one hundred dollars of its stock; that this was in lieu of all other taxation of every kind, State, county, and municipal, upon the property of every kind of the said complainant. That the said contract existed not only during the original charter life of the complainant, but during the charter life of complainant as extended by the act above referred to, and that said acts were not repealable by the State of Kentucky, and were beyond the power of the legislature to repeal or modify. A certified copy of the entire record of both cases as they appear in the Kentucky court of appeals, together with a copy of the opinion of the court in all the cases including the above two cases, is filed herewith as part hereof marked "Exhibit A" and "Exhibit B."

The complainant pleads and relies upon the said records and said judgments and opinions of the Kentucky court of appeals as conclusive upon the defendants.

VIII.

By an act approved May 17th, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky" it was provided that the cashier of all State and national banks should annually, on the first day of July of each year, make report of their condition to the auditor, and should pay into the State treasury 75 cents on each share of their capital stock, and should in addition, pay into said treasury on their surplus, undivided profits, and accumulations, in excess of 10 per cent. of their capital stock, a tax at the same rate as the real property should be assessed; and it was distinctly provided by the act that the said taxation should be in full of all tax, State, county and municipal, except that the real estate and the buildings owned and used by the banks in conducting their business should not be exempted from tax for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes as other real estate was taxed.

As a condition to its operation upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. Each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its assent to the levying of said tax, and agree to pay the same as hereinbefore provided, and waive and release all right under the act of Congress or under the charter of the State banks, to a different mode or a smaller rate of taxation, which consent and agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth, and said agreement and consent being delivered, and in consideration thereof, such bank
12 and its shares of stock shall be exempt from all other taxation whatsoever, so long as said taxation shall be paid, during the corporate existence of the bank."

The consent provided for by this act, and the notice to the governor, were further required to be given before the next meeting of the General Assembly; provided, the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the complainant on the 6th day of December, 1887, a quorum of the stockholders and a majority thereof being present, such stockholders, and a majority in interest thereof, did give their consent to a levying of said tax, and to the waiver and release of all right under its charter to a different mode or a smaller rate of taxation, and said consent of complainant to the waiver and release aforesaid, and the said agreement, was certified in writing, under the seal of the bank by the proper corporate authority to the governor of the Commonwealth and delivered to him before the next meeting of the General Assembly after the passage of said act. That the complainant files herewith as part hereof a duly certified copy of said resolution, consent and agreement, marked "Exhibit C."

IX.

The complainant, through its cashier, made its report and paid into the State treasury in 1886 the full tax required by the act described in the foregoing paragraph, and which is commonly known as the "Hewitt act," and in conformity with said Hewitt act, has made its reports in proper form to the auditor of public accounts on the 1st day of July in each and every year up to this time, and until the year 1893 paid into the State treasury, on or about the 1st day of July of every year from 1886, the full tax required by the said Hewitt act, being 75 cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State, upon its surplus, undivided profits and accumulations in excess of 10 per cent. of its capital stock. These reports continued to be made by the complainant; but on July 1, 1893, the auditor refused to receive the tax under the Hewitt law, although the complainant tendered the same. He refused to receive it on the 1st of July, 1894, although the complainant again tendered the same. The complainant paid the same about the first of July, 1895, and on or about the 1st of July, 1896, and in

the spring of 1896, at the request of the auditor, and after certain litigation had been determined in its favor, paid to the auditor the difference between the amount paid by it on July 1, 1893, and July 1, 1894, and the amount which it tendered at these times, and which was the amount due under the Hewitt law; so that it is now true that the complainant has every year, down to and including 1885, paid the full tax called for under its charter;
13 and from 1886 to 1896, the full tax called for under the Hewitt law. It has also, during this period (1886 to 1896), paid in full to the municipalities where its banking-houses are situated the full tax thereon. The legislature of Kentucky passed an act which went into force on November 11, 1892. The third article of said act dealt with the assessment of certain corporations, among others banks. By this act it is provided in substance that every incorporated bank shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is provided, in order to determine the value of the franchise, the banks shall each file reports on or before the 1st day of March in each year, which reports shall be made up to and including the 31st day of the preceding December. These reports are to be verified by a chief officer of the bank, and show the following facts: the name and principal place of business of the bank; the amount of capital stock; number of shares; amount of stock paid up, nominal and real value thereof; highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which this statement is required to be made; amount of surplus funds and undivided profits, and the value of all other assets; total amount of indebtedness as principal; amount of gross or net earnings, including interest on investments, and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require. Upon this information, and such other information as the board can obtain, it is authorized and directed to fix the value of the capital stock of the bank, and from the amount thus fixed to deduct the assessed value of all tangible property assessed in the State, or in the counties where situated, and the remainder thus found is to be the value of the corporate franchise subject to taxation under the said act.

It is further provided that the said board shall apportion the value of such franchise among the several taxing jurisdictions entitled to a share of said tax. It is further provided that the auditor of the State, at the expiration of 30 days after the final determination of such values, shall certify to the county clerk of the counties where any portion of the corporate franchise of such banks shall be liable

to local taxation, the amount thereof liable for county or
14 State taxes; and such certificate is, by the county clerk, to be filed in his office, and by him certified to the collecting officer of the county and city for collection.

It is further provided that the taxes assessed by the State board of valuation and assessment shall be due and payable on July 1st succeeding such report.

It is further provided that in the event the banks fail to make such report and pay such tax a penalty of 10 per cent. on the amount of tax shall attach, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, is to be deemed guilty of a misdemeanor and upon conviction is to be fined for each day it remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction.

X.

The complainant states that the amount of its capital stock on the 31st day of December, 1894, on the 31st day of December, 1895, and on the 31st day of December, 1896, was $991,400.00 and its contingent fund and fund to cover losses on each of said dates was as much as $170,000.00, that the amount of the value of its capital stock as fixed by the board of valuation and assessment as of December 31, 1892, was $1,163,919.27, of which there was apportioned to the city of Frankfort and Franklin county, $495,919.27, to the city of Henderson and Henderson county, $359,000.00, to the city of Georgetown and Scott county, $300,000.00.

That this was substantially the same valuation and apportionment as of December 31, 1893, and this would be substantially the same valuation and apportionment as of December 31, 1894, December 31, 1895, and December 31, 1896; that the tax rate in the city of Frankfort for the year 1895 was $1.45 on $100, for 1896 the tax rate was $1.45, and for 1897 it has been fixed at $1.45.

That the tax rate for the county of Franklin for the year 1894 was 56⅔ cents, for 1895 56⅔ cents, for 1896 55 cents; the tax rate for 1897 has not been fixed, but will be approximately 55 cents.

The tax rate in the city of Henderson for 1894 was 70 cents; for the year 1895 was $1.25; for the year 1896 it was $1.47; for 1897 it is about the same as 1896. The tax rate for the county of Henderson for 1894 was 57½ cents; for 1895 it was 57½ cents; for 1896 it was 57½ cents; for 1897 it has not been fixed, but will approximately be the same as for 1896.

The tax rate in the city of Georgetown for the year 1895 was 70 cents; for the year 1896 it was 90 cents; for 1897 it will be the same as 1896. The tax rate for the county of Scott for 1894 was 74 cents; for 1895 it was 82½ cents; for 1896 it was 94 cents; for 1897 it has not been fixed, but will approximately be the same as for 1896.

15 The rate of State taxation was 42½ cents on the $100.

So the complainant says that the amount of taxes which it

would have to pay under the board of valuation and assessment law over and above what it would have to pay under the Hewitt law would be more than $15,000 per annum.

Complainant further states that it has been the policy of the State, by legislation, sustained by judicial decision, to lessen the rate of taxation on the full amount of the capital stock of the bank, because the banks pay tax on the full par value of its capital stock, and because of their being prevented by law from loaning their money at a greater rate of interest than 6 per cent., whereas the citizens and other tax-payers, under our system of valuation, are, by giving in their property for taxation at not exceeding one-half of the value of the property assessed; thereby making the banks, even under the 75-cent rate, pay as much, and more, tax than other tax-payers.

XI.

Complainant says that this scheme of taxation violates the contract made between it and the State in its charter and the amendments thereto, and violates the contract made between it and the State under the Hewitt law, and is very largely in excess of the taxation provided for by its charter, or by said Hewitt law; and the act of the legislature of Kentucky instituting such a method of taxation is violative of the Constitution of the United States, and particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract, and is void.

XII.

The said method of taxation is also violative of the constitution of the State of Kentucky in this, that by the said constitution of the State of Kentucky it is expressly provided that the General Assembly shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect taxes, in this, that the said law provided for an assessment of the capital stock of corporations, among others banks, by a State board of valuation and assessment, and provided for the certification of such value by the State board to counties and municipalities where any such capital stock is situated or franchise employed, giving to said State board the right to apportion the same among the taxing districts, and providing that the corporation shall pay to such taxing districts local taxes thereon.

XIII.

The said law having been thus passed in 1892 the State board of valuation and assessment valued the capital stock of the complainant, and deducting therefrom the assessed value of its real estate (which is small in proportion) certified to the authorities of
16 the defendant-, The County of Franklin, The Board of Councilmen of the City of Frankfort, The City of Henderson, The County of Henderson, The City of Georgetown, The County of Scott,

the proportion of such value found to be taxable by the county of Franklin, the city of Frankfort, the county of Henderson, the city of Henderson, the county of Scott and the city of Georgetown for the year 1893. The county of Franklin caused to be placed in the hands of R. D. Armstrong, the sheriff of said county and the collector of its revenues, the tax bill made out accordingly; and the board of councilmen of the city of Frankfort caused a tax bill to be made out upon such valuation for the collection of city taxes thereon, and the city of Henderson caused a tax bill to be made out upon such valuation for the collection of city taxes thereon.

XIV.

On the 22d day of December, 1893, the complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the county of Franklin and R. D. Armstrong, sheriff of said county, in apt terms setting forth in the petition the contract between it and the State in regard to taxation under its original charter and under the Hewitt law, claiming the benefit of such contract, and claiming that no taxes could be collected from the complainant except in pursuance thereof, during its charter life; and claiming that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of their contracts, and praying the court to establish their contracts and to enjoin the said Franklin county and R. D. Armstrong, sheriff, from attempting to collect any taxes contrary thereto.

Issue having been joined upon complainant's said suit, a judgment was rendered by the Franklin circuit court in said case to the effect, that the act of November 11, 1892, did not violate any contract between the complainant and the State, and judgment was entered accordingly.

Thereupon this complainant appealed from said judgment to the court of appeals of Kentucky. In that court, its appeal having come on to be heard, the court adjudged that the judgment of the lower court was erroneous, and remanded the case to the Franklin circuit court for a judgment in conformity with its opinion.

Thereupon the said Franklin circuit court, on January 21, 1896, entered the following judgment, which has ever since and does now remain in full force and effect:

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals, heretofore filed reversing the former judgments of this court, and the court being sufficiently advised, it is adjudged that article 2 of the act of
17 the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886, (Gen'l Stats., chapter 92, art. 2,) and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of it

charter, be assessed for taxation or taxed for State purposes in a different mode or at a smaller rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and of the act of November 11, 1892, (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax, for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this case at the commencement of the action be and the same is now hereby made perpetual, and the defendants be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise or property of the plaintiff, except taxes on its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

A duly certified copy of the record in said case as it appears in the court of appeals is filed herewith as part hereof, marked "*Exhibit D*," and the complainant states that the said exhibit contains the whole proceedings in said cause except the decree of the Franklin circuit court on January 21, 1896, the terms of which have been given above, and a duly certified copy whereof is filed herewith as part hereof, marked "*Exhibit E.*"

XV.

The complainant further states that the said board of valuation and assessment, acting under said law of November 11, 1892, having certified to the city of Frankfort as set forth in a preceding paragraph, the amount of its proportion of the valuation of complainant's franchise, and the board of councilmen of the city of Frankfort attempting to collect municipal taxes thereon, the complain-
18 ant on the 6th day of September, 1894, filed in the Franklin circuit court, which is a court of general equity jurisdiction, its petition against the said board of councilmen of the city of Frankfort, setting forth its contract under its original charter and under the Hewitt law with the State, and relying upon the same, and setting forth the attempted violation thereof under the act of November 11, 1892, and praying judgment against the defendant, The Board of Councilmen of the City of Frankfort, etc., that the said contracts between the complainant and the State be adjudged of full force and effect and the said act of November 11, 1892, be declared unconstitutional and void, and the complainant's right to

establishment and enforcement of its contract, during its charter life, be established, declared and enforced.

Issue being joined, the cause came on to be heard, and resulted in a judgment of the Franklin circuit court that the said act of November 11, 1892, did not violate any contract between the complainant and the State, and adjudged that the complainant was not entitled to relief against said tax.

And thereupon the complainant appealed to the court of appeals of the State of Kentucky. The cause then came on to be heard and was argued by counsel for the board of councilmen of the city of Frankfort, and by the attorney general of the State, insisting that the said contract did not exist and had not been violated, and thereupon the cause having come on for decision, the court of appeals rendered its opinion and issued a mandate directing that the judgment of the lower court should be reversed, and a new judgment entered in conformity with the opinion transmitted, and thereupon the cause having been transmitted to the Franklin circuit court, came on for judgment on January 21, 1896, whereupon the following judgment was entered, being in words and figures as follows:

"This day came the parties by their attorneys, and this cause having been submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed reversing the former judgment of this court, and the court being sufficiently advised, it is adjudged that article 2 of the act of the General Assembly entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, (Gen'l Stats., chapter 92, art. 2,) and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former, by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business;

19 that the provisions of the present constitution of this State and of the act of November 11, 1892, (art. 3, chap. 103, Acts 1891–'2–'3,) in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax, for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants be and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes on its real estate

used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

The complainant files herewith as part hereof a duly certified copy of the proceedings in the cause, being the full record of the court of appeals marked "*Exhibit 'F,'*" which contains the entire record of the cause, except the decree of judgment entered upon the return of the cause, a copy of which judgment is filed herewith as part hereof, marked "*Exhibit 'G.'*"

XVI.

The complainant further states that the said board of valuation and assessment, acting upon said law of November 11, 1892, having certified to the city of Henderson, as set forth in a preceding paragraph, of the valuation of complainant's franchise, and the said city of Henderson attempting to collect municipal taxes thereon, the complainant, on the — day of ——, 1895, filed in the Henderson circuit court, which is a court of general equity jurisdiction, its petition against said City of Henderson, setting forth its contract under its original charter and under the Hewitt law with the State, and relying on the same, and setting forth the attempted violation of the same under the act of November 11, 1892, and praying judgment against the defendant, The City of Henderson, that the said contracts between the complainant and the State be adjudged in full force and effect, and the said act of November 11, 1892, be declared unconstitutional and void, and the complainant's right to the establishment and enforcement of its contract during its charter life be established and enforced.

Issue having been joined, the cause came on to be heard, and resulted in a judgment of the Henderson circuit court that the
20 said act of November 11, 1892, did not violate any contract between the complainant and the State, and adjudging that the complainant was not entitled to the relief against the said tax, and thereupon the complainant appealed to the court of appeals of the State of Kentucky. The cause came on to be heard, and was argued by counsel for the city of Henderson and by the attorney general of the State, insisting that the said contract did not exist and had not been violated, and thereupon the cause came on for decision, and the court of appeals rendered its opinion therein and issued a mandate directing that the judgment of the lower court should be reversed and a new judgment entered in conformity with the opinion transmitted; thereupon, the cause having been transmitted to the Henderson circuit court and the mandate of said court of appeals filed, the said Henderson circuit court rendered judgment in said case in conformity with said opinion of the Kentucky court of appeals, establishing said contracts and adjudging said acts to be unconstitutional. A certified copy of said entire record, as it appears in the Kentucky court of appeals, is filed herewith as part hereof, marked "*Exhibit 'H,'*" and a certified copy of said judgment of the Henderson circuit court is filed herewith as part hereof, marked "*Exhibit 'K.'*"

XVII.

The premises considered, the complainant says that it has been fully and finally adjudicated in a proceeding between it and the defendants, The Board of Councilmen of the City of Frankfort, The County of Franklin and The City of Henderson—

That complainant's contract is valid and enforceable, and that the complainant can be subjected to no greater rate of taxation than that agreed to by it under the Hewitt law, or if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for under the complainant's charter and amendments.

XVIII.

The complainant has always been ready to pay, and it has paid all the taxes due by it under the provisions of the Hewitt act, but if it should be determined that the State of Kentucky has the right to retire from that contract, then the complainant submits that it is entitled to be restored to its former position, and it will then be ready and willing to pay all taxes that may be exacted from it according to the terms of its charter and amendments.

XIX.

The complainant says that the defendants, Samuel H. Stone, Charles Finley and George W. Long are threatening, and unless restrained by this honorable court, will proceed to value the franchise of the complainant in the manner set forth under the
21 act of November 11, 1892, for the years 1895, 1896 and 1897, and certify such value to the county clerks of Franklin county, Henderson county and Scott county, to be by each of the clerks of said counties certified to the collecting officers of each of said respective counties, and to the collecting officers of each of said cities of Henderson and Georgetown, and to the collecting officers of the board of councilmen of the city of Frankfort; that such assessments will be illegal; in violation of the complainant's contract, as has been heretofore in causes between the complainant and the several defendants adjudged, and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise; cause a multiplicity of suits to be brought against complainant, and damage it in a way that cannot be repaired or estimated at common law; and from these threatened wrongs the complainant has no remedy at the common law, but its only remedy is by a bill in equity; and unless restrained by this honorable court, the defendants, The Board of Councilmen of the City of Frankfort, The County of Franklin, The City of Henderson, The County of Henderson, The City of Georgetown and The County of Scott, will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the harassment of many suits, and cast a cloud upon its franchise and property, and an effort will be

made to enforce penalties against this complainant, as hereinbefore set out.

XX.

The premises considered, the complainant prays that the said Samuel H. Stone, Charles Finley and George W. Long be perpetually enjoined and restrained from assessing the value of complainant's capital stock under the act of November 11, 1892, for the years 1895, 1896 or 1897, or any other year, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said several municipalities, and that the said several municipalities, the board of councilmen of the city of Frankfort, the county of Franklin, the city of Henderson, the county of Henderson, the city of Georgetown and the county of Scott be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract, as hereinbefore set up, by making the payments under the Hewitt law or under its charter, no other or further taxes shall be exacted from it under any form or by any authority.

May it please your honors to grant unto your complainant a writ of subpœna under proper authority to be issued against the said Samuel H. Stone, Charles Finley and George W. Long, the Board of Councilmen of the City of Frankfort, the County of Franklin, the City of Henderson, the County of Henderson, the City
22 of Georgetown and the County of Scott, under suitable penalty to be therein fixed, and upon a day therein named, to appear and answer to this bill of complaint, but not under oath, answer under oath being waived, and to stand to and abide by all the orders and decrees that this court may enter in the premises; and your orator will ever pray for this and all other appropriate relief.

W. S. PRYOR,
JOHN W. RODMAN,
Complainant's Solicitors.

STATE OF KENTUCKY, } *sct:*
Franklin County, }

Thomas Rodman says he is the president of The Farmers' Bank of Kentucky, the complainant; that the facts stated herein, so far as stated from his personal knowledge, are true, and so far as stated from information he believes to be true.

THOMAS RODMAN.

Subscribed and sworn to before me by Thomas Rodman this 8th day of May, 1897.

[SEAL.]

CHAS. N. WIARD,
Deputy Clerk,
For W. G. CHAPMAN,
Clerk U. S. Courts for Dist. of Kentucky, at Frankfort.

Exhibit A reads as follows:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 5th day of June, A. D. 1888, Chief Justice W. S. Pryor, Joseph H. Lewis, W. H. Holt, and Caswell Bennett sitting.

FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellants,
versus
THE FARMERS' BANK OF KENTUCKY, Appellee.

Be it remembered that heretofore, to wit, on the 16th day of July, A. D. 1884, the appellants by their counsel filed in the clerk's office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

STATE OF KENTUCKY:

Proceedings before the Honorable C. S. French, judge of the court of common pleas for Franklin county, at the court-house, in the city of Frankfort, on the 17th day of May, 1884.

Be it remembered that on the 6th day of September, 1883, the following petition was filed in the clerk's office of the court aforesaid:

23 Franklin Common Pleas Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Defendants.
} Petition in Equity.

The plaintiff, The Farmers' Bank of Kentucky, says that by an act of the General Assembly of Kentucky entitled, "An act to incorporate the Farmers' Bank of Kentucky" approved February 16, 1850, the plaintiff was established a bank by the name aforesaid with the capital named in said act to be divided into shares of $100 each, and to be subscribed and paid for by individuals, companies and corporations, which subscribers and shareholders, their successors and assigns were by said act created a body politic and corporate by the name and style aforesaid, and to continue such until the first day of May, 1880, and by that name to be competent to contract and be contracted with, to sue and be sued, &c., "with full powers to acquire, hold, possess, use, occupy and enjoy and the same to sell, convey and dispose of all such real estate goods, effects and chattels as shall be convenient for the transaction of its business, or which may be conveyed to said bank in surety for any debt or purchase in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which the said bank may have a lien," and by the 15th section of said act the cashier of the principal bank — re-

quired on the first day of July, 1857, and on the first day of July in each succeeding year during the continuance of said charter to pay to the treasurer of this Commonwealth fifty cents on each hundred dollars of stock held and paid for in said bank, "which shall be in full of all tax or bonus."

Plaintiff says that by an act of said General Assembly approved March 10th, 1876, entitled "An act extending the charter of Farmers' Bank of Kentucky," the charter of said bank, as amended, was extended for the period of twenty-five years from its termination as therein provided, to wit, from the said first day of May, 1880. Said several acts and all amendments thereto are referred to as part hereof.

Plaintiff says that soon after the adoption of said original charter, and in conformity with its terms and provisions, said bank was organized and established, and has ever since been, and still is, in regular operation doing the business authorized by its said charter and amendments thereto; and for the location of its principal office of discount and deposit in the city of Frankfort, and for the safe and convenient transaction of its business the plaintiff purchased a lot or lots of ground situated on the north side of Main street, in said city, and erected thereon a building suitable for a banking-house, which building includes rooms suitable for and used as a residence for the cashier of said bank, and for one or more of its clerks,
24 said building being so constructed and arranged as to secure and promote the convenient transaction of the business of said bank and the protection and safety of the property under its control; that neither said building nor the lot of ground on which it stands, nor any part of either is used, or was purchased or intended for any other purpose or object than as stated, and all of said building and ground are convenient and necessary for the transaction of said business and for the safety and security of said property.

Plaintiff further says that pursuant to and in conformity with the terms and requirements of its charter, it has on the first day of July in each and every year since said bank went into operation, including the first day of July in the present year, 1883, by the cashier of its principal bank, paid to the treasury of the Commonwealth of Kentucky, fifty cents on each hundred dollars of stock held and paid for in said bank, which payments were and are in full of all tax or bonus. Yet, the plaintiff says, that notwithstanding the premises, the county court of Franklin county, on the 14th day of March, 1883, upon the motion of the county attorney, made and entered of record an order ordering in substance that a summons be issued by the clerk of said court against the plaintiff and others returnable on the 2nd day of April "to list or show cause why it shall not list their property in Franklin county for taxation for county purposes, as required by law," and on the day last aforesaid a summons was issued in conformity with said order, and was served upon the plaintiff, requiring plaintiff to appear before the Franklin county court on Monday, April 2, 1883, and list, or show cause why it shall not list, all the property of said bank, situated in said county, for

assessment and taxation for county purposes for the years 1876, 1877, 1878, 1879, 1880, 1881, 1882 and 1883, as required by the law of this State.

The plaintiff appeared in said court in obedience to said summons and filed its demurrer and objection to said proceedings, denying that said court had any jurisdiction of the subject-matter thereof, or any authority to require plaintiff to list or show cause why it shall not list, its property or any part thereof in Franklin county, for taxation for county purposes. Plaintiff also filed its response, in which it was alleged in substance that plaintiff had paid to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, which payments were by the terms of its charter in full of all taxes or bonus; also that plaintiff had purchased ground in the city of Frankfort, on which it had erected suitable buildings for the transaction of its business, all of which was paid for with the stock of plaintiff and used for no other purpose; and also that all the other property of plaintiff, except a small amount of office furniture, consisted of notes, bills, accounts, choses in action and evidences of debt, and that the aggregate thereof is fully covered by its indebtedness to its stockholders, depos-
25 itors and other creditors, and that it holds and owns no balance under the provision of section 5, art. 1, chap. 92 of General Statutes.

But said county court overruled said demurrer and objections, and held said response insufficient, and without hearing any evidence except as hereinafter shown, entered in said proceedings the following order:

Franklin County Court, Saturday, April 7, 1883.

COMMONWEALTH, for FRANKLIN COUNTY, *versus* FARMERS' BANK OF KENTUCKY. } Rule to List Property for Taxation.

In the matter of the summons and rule heretofore awarded herein, it appearing from the sheriff's report made to the clerk of this court that the Farmers' bank at Frankfort failed and refused after demand made to list its property, or any part thereof, for taxation for county purposes for the years 1877, 1878, 1879, 1880, 1881, 1882 and 1883, and the assessor and the sheriff being unable to ascertain of or to list said property, it is now ordered and adjudged that the demurrer of the Farmers' bank to this proceeding be overruled, and the demurrer of attorneys for the county to the response of said bank be sustained, and the bank still refusing to list or show further cause the clerk of the court is hereby ordered to list and assess the property of the Farmers' bank at Frankfort, situate in Franklin county, to wit, its notes, bonds, bills, money, choses in action and evidences of debt, after deducting therefrom its indebtedness (except the amount of its so-called liability to its stockholders) and $100 additional, said balance of property, as appears from the detailed statement furnished herein by the said bank, amounted in the year

1883 to the sum of $309,292; in the year 1882 $300,963.87; in the year 1881 to $293,393.87; in the year 1880 to $300,722.41; in the year 1879 to $289,719.51; in the year 1878 to $375,518.51; in the year 1877 to $568,020.22. The clerk will also list and assess the banking-house and real estate of said bank in Frankfort for each of said years at the valuation fixed thereon by said bank, as appears by its statements filed herein, viz: For the year 1883, $41,812; for the year 1882, $43,136.13; for the year 1881, $43,306.13; for the year 1880, $42,577.09; for the year 1879, $28,481.49; for the year 1878, $27,381.49; for the year 1877, $27,580.77. All the foregoing property to be assessed and taxed according to the amount of the *ad valorem* county levy tax for each of said years respectively, as appears by the record of this court. And the clerk will certify the foregoing lists to the sheriff of Franklin county for collection.

Plaintiff says that the "detailed statements" maintained and referred to in the foregoing order were furnished by the plaintiff and filed herein as evidence, and were filed and furnished
26 under and by virtue of the following written agreement made by and between the plaintiff and defendant, Franklin County, to wit:

"It is agreed that the statement of the condition of assets and liabilities of the Farmers' bank, at Frankfort office, or principal bank, for the years 1877–'78–'79–'80–'81–'82 and '83, as filed herein, may be read as evidence in the further trial — this proceeding, subject to all legal exception, and this was all the evidence offered or heard on the trial in the county court herein."

Said statement truly and correctly set forth the assets and property of the plaintiff situated in Franklin county in the several years mentioned, except as — the item of "banking-house and real estate." The true value of said banking-house and ground was estimated for each of said years at the sum of $16,240, and plaintiff owned no other real estate in either of said years situated in Franklin county. The excess of said value, over and above said sum of $16,240, consisted of the value of other real estate situated in other counties, and which had been purchased by the plaintiff in satisfaction of judgment in its favor, and this excess was inadvertently added to the value of said banking-house and ground.

Plaintiff says that the clerk of said Franklin county court made and certified a perpetual "assessment of the property" of the Farmers' Bank of Kentucky, pursuant to a judgment of said court, &c., a copy of which assessment and certificate is filed herewith as part hereof, marked (K); and said defendant, J. W. Gaines, as sheriff of Franklin county, — to act under said assessment, as certified to him, has levied on the plaintiff's banking-house and ground on which it stands, as hereinabove described, and also on certain office furniture of plaintiff, including safes, tables, chairs and bookcases, all of which are indispensable to plaintiff in carrying on its lawful and daily business, and said Gaines will, unless prevented, proceed to sell said real estate and personal property to satisfy said taxes. The entire record of said proceedings in said Franklin court, including the order made by said court on the 14th of March, 1883,

the summons and return thereon, the demurrer and response of plaintiff, the statement of the condition of said plaintiff for the years 1877 to 1883, inclusive, and agreement under which the same were allowed to be read as evidence and the judgment and order of said court made April 7, 1883, is filed herewith as part hereof, marked (A).

Plaintiff says that all the property and assets owned by it situated in Frankfort or in Franklin county in or during the years 1877 to 1883 inclusive are shown and set forth in said statements, corrected as to said item of "banking-house and real estate," that the aggregate amount of all its assets and property is and was during all of said years fully equalled and covered by its indebtedness to its stockholders, depositors and other creditors, and that it does not, and did not in either of said years own any balance whatever subject to taxation for either State or county purposes under the pro-
27 visions of chapter 92, article 1, section 5 of the General Statutes, or otherwise; that said county court of Franklin county had no jurisdiction to make or order to be made any assessment or list of plaintiff's said property for taxation for county purposes or for any purpose whatever, and no right or authority to assess, levy or collect an *ad valorem* tax on plaintiff's property at any rate of tax on the $100.00 worth of property for each or either of the years aforesaid; that said pretended assessment as made by said court or under its order was and is of and upon the capital stock of plaintiff and was and is a wrongful and unlawful attempt to tax said capital stock in violation of plaintiff's said charter and the amendments thereto.

Plaintiff says that it is without remedy at law; that it would sustain great and irreparable injury from a sale by the said sheriff of the property levied on by him as hereinbefore shown; that no previous injunction herein has been asked or applied for or refused by the court or any circuit judge.

Wherefore plaintiff prays that the defendants, J. W. Gaines, sheriff as aforesaid, and Franklin County and all others be enjoined and restrained from enforcing or attempting to enforce the levy made by said sheriff on plaintiff's property and from subjecting or attempting to subject any property of plaintiff to sale under said assessment or tax list, or otherwise to satisfy any taxes alleged or claimed to be due Franklin county on any property of plaintiff and from assessing or attempting to assess or collect any tax whatever on plaintiff's property for county or other purposes, and plaintiff asks judgment for its costs herein and for all other proper relief.

A. DUVALL,
For Plaintiff.

Thomas Rodman says he is president of The Farmers' Bank of Kentucky (plaintiff), and that he believes the facts stated in the foregoing petition to be true.

THOMAS RODMAN.

Sworn to before me by Thomas Rodman, this 6th day of September, 1883.

E. S. THEOBALD,
Notary Public.

Franklin Common Pleas Court.

FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
JOHN W. GAINES, Sheriff of Franklin County, and FRANKLIN County, Defendants.

The plaintiff applying for an injunction, and the defendants appearing by their attorney and waiving notice of the time or place of said application, and the judge of this court and the judge of the Franklin circuit court being absent from Franklin county, an injunction is granted and will be issued by the clerk of this
28 court as prayed for in the petition herein, upon the plaintiff's executing bond before the said clerk with good security, to the effect that the plaintiff will pay to the defendants such damage as they will sustain, not exceeding double the amount enjoined, if it be finally decided that the injunction ought not to have been granted September 6, 1893.

W. FRANKLIN, *C. F. C. C.*

Franklin County Court, Wednesday, March 14, 1883.

FRANKLIN COUNTY
versus
DEPOSIT BANK, FARMERS' BANK OF KENTUCKY, at Frankfort, Branch Bank of Kentucky, at Frankfort. } Information.

Upon motion of the county attorney it is ordered that a summons be issued by the clerk of this court against the Deposit bank, Farmers' Bank of Kentucky, at Frankfort, and Branch Bank of Kentucky, at Frankfort, returnable on the 2d day of April, to list or show cause why it shall not list their property in Franklin county for taxation for county purposes, as required by law.

Commonwealth of Kentucky to the sheriff of Franklin county:

You are commanded to summon the Farmers' Bank of Kentucky, at Frankfort, to appear before the Franklin county court on Monday, April 2, 1883, and list (or show cause why it shall not list) all the property of said bank situate in Franklin county, for assessment and taxation for county purposes for the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883, as required by the laws of this State, and warn it that upon failure to answer or list said property, the same will be listed and twenty-five per centum added to the value thereof as a penalty for such failure and refusal, and its "chief officers or agents" will be proceeded against for contempt.

Witness our hand this 14th day of March, 1883.

——, ——.

The following endorsement was made on the foregoing summons:

Executed on Thomas Rodman, president of the Farmers' Bank of Kentucky, at Frankfort, by delivering to him a copy of the within summons March 17, 1883.

J. W. GAINES, *S. F. C.*,
By G. B. THOMPSON, *D. S.*

29 Franklin County Court.

FRANKLIN COUNTY
versus
FARMERS' BANK OF KENTUCKY. } Dem. and Response of Def't.

The defendant, Farmers' Bank of Kentucky, demurs and objects to this proceeding because the court has no jurisdiction of the subject-matter thereof, and no authority to require this bank to list, or show cause why it shall not list, its property, or any part thereof, in Franklin county, for taxation for county purposes.

And for response herein defendant says that by the terms of its charter, approved February 16, 1850, it was made the duty of the cashier of the principal banks on the first day of July, 1857, and on the first day of July in each succeeding year during the continuance of said charter, to pay to the treasurer of this Commonwealth fifty cents on each hundred dollars' stock held and paid for in said bank, which shall be in full of all tax or bonus. The defendant says its cashier did, on the first day of July in each succeeding year up to the present year, pay to said treasury fifty cents on each one hundred dollars of stock held and paid for in said bank, and defendant pleads and relies upon said payment in bar of this proceeding.

For further response, defendant says that in conformity with its charter it has purchased a lot of ground in the city of Frankfort, on which it has erected its banking-house and cashier's residence, all of which was and is necessary for the convenient transaction of its business and for the protection of its own property and the property of others entrusted to its care and keeping. Said real estate, and the buildings and improvements thereon, were paid for with the stock of defendant, and is still held by it and used for the purposes aforesaid, and for no other purpose or use.

Defendant says that all of its other property except a small amount of office furniture, not exceeding $—, consists of notes, bills, accounts, choses in action and evidences of debt, and that the aggregate thereof is fully balanced by its indebtedness to its stockholders, depositors and other creditors, and that it holds and owns no balance under the provisions of section 5, art. 1, chapter 92 of General Statutes.

A. DUVALL,
For Defendant.

Franklin County Court.

COMMONWEALTH, ETC.,
vs.
FARMERS' BANK OF FRANKFORT. } Agreement.

It is agreed that the statement of the condition (or assets and liabilities) of the Farmers' bank, at Frankfort office, or principal bank, for the years 1877, 1878, 1879, 1880, 1881, 1882, and 1883, as filed herein, may be read in evidence in the further trial of this proceeding, subject to all legal exceptions, and this was all the evidence offered or heard on the trial in the county court herein.

IRA JULIAN,
Attorney for Franklin County.
A. DUVALL,
Attorney for Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at the Frankfort Office, January 8th, 1877.

Assets.

Cash and stamps	$43,406.20
Suspended debt	31,011.67
Bonds and stocks	67,376.50
Notes and bills	770,863.32
Banking-house and real estate	27,580.77
Expense account	891.88
Due from banks	207,403.88
	$1,148,583.22

Liabilities.

Capital stock	$496,600.00
Circulation	19,001.00
Dividends unpaid	10,311.00
Premium, discount and interest	1,538.30
Deposits	569,091.26
Contingent fund and fund to pay losses	38,980.74
Due to banks	13,011.92
	$1,148,534.22

Frankfort, Ky., April 23, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at the Frankfort Office, January 7th, 1878.

Assets.

Cash and stamps	$30,383.42
Suspended debt	28,011.67

Bonds and stocks	42,500.00
Notes and bills	695,036.70
Stamped checks and books	116.85
Banking-house and real estate	27,381.49
Expense account	497.47
Due from banks	208,114.61
	$1,032,042.21

31 Liabilities.

Capital stock	$403,000.00
Circulation	18,510.00
Dividends unpaid	1,812.00
Premiums, discount and interest	945.04
Deposits	523,390.66
Fund to pay losses, etc.	61,841.25
Due to banks	22,543.26
	$1,032,042.21

Frankfort, Ky., April 23rd, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at the Frankfort Office, January 10th, 1879.

Assets.

Cash and stamps	$17,334.31
Suspended debt	22,681.10
Bonds and stocks	53,740.00
Notes and bills	544,577.48
Banking-house and real estate	28,481.49
Expense account	419.79
Due from banks	94,780.18
	$762,014.35

Liabilities.

Capital stock	$328,300.00
Circulation	17,914.00
Dividends unpaid	9,229.00
Premiums, discount and interest	777.54
Deposits	323,379.76
Contingent fund, and fund to pay losses	43,742.33
Due to banks	38,671.72
	$762,014.35

Frankfort, Ky., April 23, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at the Frankfort Office, January 10, 1880.

Assets.

Cash and stamps	$17,272.27
Suspended debt	35,492.31
Bonds and stocks	40,900.00
Notes and bills	459,602.67
Banking-house and real estate	42,577.09
Expense account	141.65
Due from banks	167,479.10
	$763,465.09

32 Liabilities.

Capital stock	$343,300.00
Circulation	16,822.00
Dividends unpaid	7,889.00
Premium, discount and interest	955.30
Deposits	318,699.05
Fund to cover losses, and contingent fund	53,439.80
Due to banks	22,348.19
Protest account	1.75
	$763,465.09

Frankfort, Ky., April 23, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at the Frankfort Office, January 10, 1881.

Assets.

Cash and stamps	$27,946.35
Suspended debt	23,478.69
Bonds and stocks	58,000.00
Notes and bills	595,451.62
Banking-house and real estate	43,306.13
Expense account	88.95
Due from banks	151,470.49
	$899,742.23

Liabilities.

Capital stock	$336,800.00
Circulation	16,454.00
Dividends unpaid	9,963.00
Premium, discount and interest	449.81
Fund to pay taxes	2,479.50
Deposits	397,890.57

Contingent fund, and fund to pay losses	57,410.97
Due to banks	78,284.38
	$899,742.23

Frankfort, Ky., April 23, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at Frankfort Office, January 9, 1882.

Assets.

Cash and stamps	$16,430.98
Suspended debt	21,598.00
Bonds and stocks	24,900.00
Notes and bills	631,200.88
Banking-house and real estate	43,136.13
Expense and probate account	55.79
Due from banks	60,400.53
	$797,722.31

33 Liabilities.

Capital stock	$347,200.00
Circulation	16,454.00
Dividends unpaid	10,346.00
Fund to pay State taxes and expenses	2,682.85
Premium, discount and interest	1,808.42
Deposits	325,648.80
Contingent fund and fund to cover losses	58,330.87
Due to banks	35,251.37
	$797,722.31

Frankfort, Ky., April 23, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

Statement of the Condition of the Farmers' Bank of Kentucky, at Frankfort Office, January 8, 1883.

Assets.

Cash and stamps	$22,144.29
Suspended debt	19,048.00
Bonds and stocks	27,050.00
Notes and bills of exchange	590,229.08
Banking-house and real estate	41,812.00
Expense account	91.38
Due from banks	54,131.14
	$754,555.89

Liabilities.

Capital stock	$350,200.00
Circulation	16,227.00
Dividends unpaid	9,815.00
Law expense	597.16
Due to depositors	251,143.03
Fund to cover losses, and contingent fund	59,410.40
Due to banks	64,244.34
Premiums, discount and expenses	440.46
Fund to pay State taxes	2,478.50
	$754,555.89

Frankfort, Ky., April 21, 1883.

GRANT GREEN,
Cashier Farmers' Bank of Kentucky.

34 Franklin County Court, Saturday, April 7, 1883.

COMMONWEALTH, for FRANKLIN COUNTY, *versus* FARMERS' BANK OF KENTUCKY. } Rule to List Property for Taxation.

In the matter of summons and rule heretofore awarded herein, it appearing from the sheriff's report made to the clerk of this court that the Farmers' bank at Frankfort failed and refused after demand to list its property or any part thereof for taxation for county purposes for the years 1877, 1878, 1879, 1880, 1881, 1882, and the assessor and sheriff being unable to ascertain the amount of or to list said property, it is now ordered and adjudged that the demurrer of the Farmers' bank to this proceeding be overruled and the demurrer of the attorneys for the county to the response of said bank be sustained, and bank still refusing to list or show further cause the clerk of this court is hereby ordered and directed to list and assess the property of the Farmers' bank at Frankfort situate in Franklin county, viz: Its notes, bonds, bills, money, choses in action and evidences of debt, after deducting therefrom its indebtedness (except the amount of its so-called liability to its stockholders) and $100 additional, said balance of property as appears from the detailed statement furnished herein by said bank amounted in the year 1883 to the sum of $309,292, in the year 1882 to $303,963.87, in the year 1881 to $293,393.87, in the year 1880 to $300,722.41, in the year 1879 to $289,719.51, in the year 1878 to $375,518.51, in the year 1877 to $568.020.23. The clerk will also list and assess the banking house and real estate of said bank in Frankfort for each of said years at the valuation fixed thereon by said bank as appears by its statements filed herein, viz: For the year 1883 $41,812, for the year 1882 $43,136.13, for the year 1881 $43,306.13, for the year 1880 $42,577.08, for the year 1879 $28,481.49, for the year 1878 $27,381.49, for the year 1877 $27,580.77. All the foregoing property to be assessed and taxed according to the amount of the *ad valorem* county levy tax for each of said years, respectively, as appears by

the records of this court. And the clerk will certify the foregoing lists to the sheriff of Franklin county for collection.

STATE OF KENTUCKY, *County of Franklin,* } *sct:*

I, James G. Crockett, of the county court of the county aforesaid, certify that the foregoing thirteen pages contained a true and correct copy of the proceedings of court in the matter of The County of Franklin *vs.* The Farmers' Bank of Kentucky, as on file and of record in my said office.

Given under my hand, this 28th day of August, 1883.

JAMES G. CROCKETT, *Clerk,*
By W. D. GRAVES, *D. C.*

35 Property listed with clerk of county court, Farmers' Bank of Kentucky; property assessed under judgment of county court for taxation for county purposes for the year—

1877	$595,601.00
1878	402,900.00
1879	318,201.00
1880	343,299.50
1881	336,700.00
1882	347,100.00
	$2,343,591.50

STATE OF KENTUCKY, *County of Franklin,* } *sct:*

I, James G. Crockett, clerk of the county court aforesaid, certify that the foregoing is a true copy of the assessment of the property of the Farmers' Bank of Kentucky as made by me as clerk aforesaid, pursuant to a judgment of said court, which judgment was entered on the 7th day of April, 1883, and is of record in my said office.

Given under my hand this 28th day of August, 1883.

JAMES G. CROCKETT, *C. F. C. C.,*
By W. D. GRAVES, *D. C.*

Franklin Common Pleas Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
J. W. GAINES, &c., Defendant. } Injunction Bond.

We undertake that the plaintiff, The Farmers' Bank of Kentucky, shall pay to the defendants, John W. Gaines, sheriff of Franklin county, and Franklin County Court, the damages, not exceeding $16,500, which they or either of them may sustain if it be finally decided that the injunction ought not to have been granted.

Witness my hand this 6th day of September, 1883.

FARMERS' BANK OF KENTUCKY,
By THOMAS RODMAN, *President.*
THOMAS RODMAN.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon Franklin County Court and John W. Gaines, sheriff of Franklin county, to answer on the 1st day of next November term a petition in equity filed against them in the Franklin common pleas court by the Farmers' Bank of Kentucky, and warn them that, upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the 1st day of the next November term of said court.

36 Witness W. Franklin, clerk of said court, this 6th day of September, 1883.

W. FRANKLIN, *C. F. C. C.*,
By ROB'T B. FRANKLIN, *D. C.*

Executed on J. W. Gaines, sheriff of Franklin county, and R. A. Thompson, judge of Franklin county court, by delivering to each of them a copy of the within summons.

W. L. COLLINS, *S. F. C.*
JOHN L. TOBIN, *D. S.*

September 7, 1883.

At a court held on the 1st day of December, 1883—

The defendants filed a demurrer to the plaintiff's petition and the cause was submitted on said demurrer, and the court not being sufficiently advised, took time.

Franklin Common Pleas Court.

FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
J. W. GAINES, &c., Defendants. } Demurrer.

The defendants, J. W. Gaines and Franklin County Court, state that the petition herein is *in*sufficient in law and demurs to said petition.

IRA JULIAN,
JAMES A. VIOLET,
W. H. JULIAN,
For Defendants.

At a court held on the 17th day of May, 1884—

The demurrer to the petition being heard, the court overruled the demurrer and defendants except, and defendants by their attorney declining to answer, it is adjudged that the injunction in this cause be perpetuated, and the defendants are perpetually enjoined and restrained from further proceeding to collect the taxes mentioned in the action, and that plaintiff recover against the defendants its costs herein expended, to all of which defendants except and pray an appeal to the court of appeals, which is granted.

KENTUCKY:

Franklin Court of Common Pleas.

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing 31 pages and the above lines contain a full, true and complete transcript of the record and proceedings had in the cause therein mentioned.

Witness my hand this 13th day of June, 1884.

W. FRANKLIN, *C. C. P. Ct.*

37 Upon which transcript was endorsed the following statement:

Court of Appeals of Kentucky.

THE FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellant-,
vs.
THE FARMERS' BANK OF KENTUCKY, Appellee. } Statement.

The judgment appealed from may be found on pages 31–32 of this record, and was rendered at the May term, 1884, of Franklin common pleas court.

Appeal granted below and no summons is desired.

IRA JULIAN,
Attorney for Appellants.

Afterwards at a court of appeals, begun and held for the Commonwealth of Kentucky at the capitol, in the city of Frankfort, on the 18th day of November, A. D. 1884, the following order was entered:

FRANKLIN COUNTY, &c.,
vs.
BANK OF KENTUCKY. } Franklin.

SAME
vs.
FARMERS' BANK OF KENTUCKY. } Franklin.

SAME
vs.
L. & N. R. R. Co. } Franklin.

Ordered that these causes be continued for oral argument.

Afterwards, at a court of appeals, held as aforesaid on the 23rd day of February, 1886, the following order was entered:

FRANKLIN COUNTY COURT
vs.
FARMERS' BANK OF KENTUCKY.

SAME
vs.
DEPOSIT BANK OF KENTUCKY.

SAME
vs.
BANK OF KENTUCKY.

These causes came on and were argued by D. W. Lindsey for appellee, W. H. Julian for appellants, and laid over for further argument.

Afterwards at a court of appeals, held as aforesaid on the 25th day of February, 1886, the following order was entered herein:

These causes were argued by Wm. Lindsay for appellees, John Rodman for appellant, and laid over.

Afterwards at a court of appeals, held as aforesaid on the 27th day of February, 1886, the following order was entered:

These causes came on and were argued by Alvin Duvall for Farmers' bank, and laid over for further argument.

Afterwards at a court of appeals, held as aforesaid on the 2nd day of March, 1886, the following order was entered:

These causes were argued by Ira Julian for appellant and submitted.

Afterwards at a court of appeals held as aforesaid on the 5th day of June, 1888, the following order was entered:

38 FRANKLIN COUNTY COURT, &c., Appellant,
versus
FARMERS' BANK OF KENTUCKY, Appellee.
— Appeal from Franklin Common Pleas Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that the said judgment be affirmed, which is ordered to be certified to said court. It is further considered that appellees recover of appellant its costs herein.

At the same time, to wit, June 5, 1888, the court, through Judge Caswell Bennett, delivered the following opinion, to wit:

THE FRANKLIN COUNTY COURT, &c., Appellant,
vs.
BANK OF KENTUCKY, Appellee.

THE SAME, Appellant,
vs.
THE FARMERS' BANK OF KENTUCKY, Appellee.

THE SAME, Appellant,
vs.
THE DEPOSIT BANK OF FRANKFORT, Appellee.

THE CITY OF FRANKFORT, Appellant,
vs.
THE BANK OF KENTUCKY, Appellee.

THE SAME, Appellant,
vs.
THE FARMERS' BANK OF KENTUCKY, Appellee.

The Franklin County Court, appellant, having assessed for county taxation all the corporate property in Franklin county of the appellees, including their notes, bonds, bills, money and choses in action, the appellees brought their separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

The City of Frankfort, appellant, having assessed the real estate of the appellees within the corporate limits of Frankfort for the purpose of taxation, the appellees brought separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

The lower court having perpetuated the appellees' injunction in each action, the appellants have separately appealed to this court. It is agreed that the cases may be heard together. They will be noticed in the order in which they stand.

39 FRANKLIN COURT
versus
THE BANK OF KENTUCKY.

The appellee, The Bank of Kentucky, was chartered in 1834 by an act of the legislature of this State. This incorporating act provides that the appellee shall have and keep its principal office of discount and deposit in the city of Louisville, and it shall be the appellee's duty to establish not less than four nor more than six branches, and one branch shall be located at the seat of government, "to aid in the management of the fiscal affairs of the State." The act authorizes the appellee to have "a capital stock of five millions of dollars, divided into shares of one hundred dollars each;" that the amount of capital that "shall be employed at the principal bank, and the several branches, shall be under the control of the president and directors of the principal bank;" that the appellee

shall have "full power and authority to acquire, hold and enjoy such real estate as shall be convenient for the transaction of its business, or which may be received in the discharge of any debt, or purchased in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which the said bank may have a lien." The 15th section provides:

"That it shall be the duty of the cashier of the principal bank on the first day of July, 1836, and on the first day of July in each succeeding year, during the continuance of this charter, to pay to the treasury of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus; *Provided*, that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

In 1837 the legislature fixed fifty cents as the sum that the appellee should pay into the treasury on each one hundred dollars of its capital stock, "which shall be in full of tax or bonus." By the act of 1834 the appellee's charter was to continue in force until the first day of October, 1864.

The legislature, by an act approved February 15th, 1858, enacted that the chartered privileges and rights of the appellees should continue in force for twenty years from the first day of October, 1864. "But said extension of the charter of said bank shall be subject to the following restrictions and provisions."

1. It shall be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation. * * * 3. After this act of extension takes effect the amount of circulation shall not be greater than the amount of capital actually paid in. * * * 4. The appellee shall establish a branch at the town of Columbus, Ky., with a capital of $150,000. * * * 5. The appellee shall, within a year from the 10th day of May, 1858, by a vote of a majority of its stockholders, determine whether it will accept the "proposed extension;" and if it determines to accept, it shall notify the governor of the Commonwealth of the acceptance by the certificate of its president and directors, and this act shall be in force from that date.

The 6th section provides that the appellee "shall pay annually to the commissioners of the sinking fund fifty cents upon each one hundred dollars of the contingent fund now held, or may hereafter accrue, to said bank over and above the amount now required to be retained by its charter."

By an act of the legislature, approved February 1, 1872, the appellee was authorized to purchase from the Commonwealth the stock which she owned in its bank. But the "bank shall annually, on the first day of January, pay into the treasury a tax of fifty cents on each share of one hundred dollars of its increased capital stock, which shall be in full of all tax or bonus on such increased capital stock."

The 5th section provides: "That the charter of the Bank of Kentucky be, and the same is hereby, extended twenty-five years."

The appellant's first contention is, that the legislature had no

constitutional power to exempt the appellee from the common burden of taxation except "in consideration of public services." It contends that the exemption of the appellee from all taxation, except fifty cents on each one hundred dollars of its capital stock, was not "in consideration of public services," and, therefore, void.

At the time the appellee was chartered, and for years afterwards, the Federal Government issued no paper currency. Banks and banking were the creatures of the respective States. It was the policy of this Commonwealth to charter banks, with authority to issue paper currency, based upon a gold and silver redemption upon the demand of the holder. The issue of these banks constituted, in the main the circulating medium in the Commonwealth for individual, commercial and public uses. While the aggregation of capital for banking purposes was, on the part of the projectors, for the purpose of individual gain, yet, the Commonwealth accepted the overture as auspicious to the purpose of furnishing a currency as stable as in the nature of things it could be made, for the private, commercial and public benefit of her citizens, also to aid her in the management of her fiscal affairs, which not only consisted in the providing of means to meet the ordinary administration of State affairs, but sometimes extended, at least might extend, to the borrowing of money to meet any extraordinary or unforeseen emergency. Therefore, we should hesitate to decide, were it material to decide the question, that the granting of the charter to the appellee, and the fixing of a specific tax of fifty cents on each share of its capital stock was not in consideration of public services. But the right of the State to grant the charter to the appellee and exempt it from the payment of all taxes, except fifty cents on each share of
41 its capital stock, rests upon the power of the State to make, for a valuable consideration, a valid and irrevocable contract.

The State of Kentucky, in the management and control of her affairs, in her relation to the other States, in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States, to the Federal Government, or one denied to the States, is sovereign by right. It is, by virtue of her sovereignty, that she has the power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the State makes contracts with individuals; that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign. Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contract, does not barter away his sovereignty; he for a valuable consideration, simply exercises it; for a valuable consideration coming to him from the other party to the contract he surrenders something and reserves something in its stead, which he deems as an equivalent. Whether the one or the other has in fact received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevoca-

bly binding. In thus contracting he does not surrender his sovereign power, he merely exercises it. Upon precisely the same principle the Commonwealth contracts.

If her contract is without any valuable consideration it is a *nudum pactum*, so is that of the citizen, but if there is a valuable consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State possessing the power to make, for a valuable consideration, a binding contract, she falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts, she stands upon precisely the same footing that she does in reference to the contracts made between individuals—she shall pass no law impairing their obligation. In accordance with the foregoing views, the Supreme Court of the United States, ever since the Dartmouth College case (4 Wheaton, 518), have consistently held that the creation of a corporation, especially banks, by the legislature of a State, whereby it was agreed that the corporation, in consideration of paying to the State a specific tax or bonus, was to be released from the payment of all other taxes, constituted a binding contract from which the State could not recede without the consent of the corporation; unless the State, in making the contract, expressly reserved the power to alter or amend it; or unless there was a general law in force at the time of making the
42 contract which authorized the State, by subsequent legislation, to alter or amend it, and there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. State Bank of Ohio *vs.* Knoop, 16 Howard, 369; New Jersey *vs.* Yard, 95 U. S., 104; Farrington *vs.* Tennessee, 95 U. S., 679. This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recognized by the courts of last resort of all the States, that a decision by us, holding the contrary, would be regarded as eminently sporadic.

Does the provision in appellee's charter and amendments declaring that the payment of fifty cents on each one hundred dollars of its capital stock "shall be in full of all tax or bonus," exempt the appellee from the payment of county or city taxes? The appellant contends that it does not.

It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank and the means of conducting its operations. The bank cannot increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations for the benefit of its stockholders. The shares of the capital stock

are represented by certificates. Each holder is a beneficiary to the extent of his ownership. But he cannot control or withdraw a dollar of the principal; that must remain as the basis of the appellee's business operations. The shareholder is entitled only to share in the profits. So, the capital stock and the shares of the capital stock are distinct things, and both may be taxed. So, also, the franchise—the right of the bank to exercise its powers in the prosecution of its business as a distinct right from its capital stock—may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, but only its earnings which are not a part of its capital stock, may be taxed. Angell & Ames on Corporations, sections 556, 557; Bradley *v.* The People, 4 Wall., 459; National Bank *v.* Commonwealth, 9 Wall., 353.

If, when the State granted to the appellee its charter, she had been silent as to her right to tax it, she would have the absolute right to tax it, under the for-going heads, without being amenable to the objection of being guilty of imposing double taxation. Nor could it be successfully maintained that the appellee would not be liable to be taxed by the appellant, The County Court, under the act of the 17th of March, 1876, and by the applicant, the City of Frankfort, under its charter. But the State did not choose to be silent. It did speak. It said, that in consideration of the
43 appellee's paying into the treasury fifty cents on each $100 of its capital stock paid in without reference to its real value, such payments should be "in full of all tax or bonus." To say that this language has reference to the capital stock of the appellee, and not to the shares of its stockholders, or *vice versa*, or that it has no reference to the real estate of the appellee, acquired or used in its legitimate business, would be to torture the meaning of language. The State agrees that, in consideration of receiving fifty cents on each $100 of the appellee's capital stock paid in, the same shall be in full of all tax or bonus. It is conceded that this language binds the State to make no other assessment; and well may the concession be made, because, regarding the fifty cents in the light of a payment on the stock as capital stock proper or as the stockholder's shares, yet the contract says that that payment "shall be in full of all tax or bonus." Also regarding the appellee's real estate as a separate subject of taxation (and so is the capital stock and shares) yet the contract says that the payment of the fifty cents shall be in full of all taxation. If any part of appellee's property, its franchise, its capital stock, or the shares of its capital stock, or its real property, used in the operation of its business, is to be taxed in addition to the fifty cents, then it cannot be truthfully said that the payment of the fifty cents is "in full of all tax or bonus." As before said, it is conceeded that the terms of the contract bar the State from imposing any additional taxation; but it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position, counsel clearly overlooks the fact that the county and city are integral parts of the State, and that they cannot levy and collect taxes

without the authority of the State conferring that right upon them; so, the absurdity is presented, that the State contracts with the appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of "all tax or bonus"—this is the meaning of the language—and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off the appellee, but may, notwithstanding, authorize all of its subdivisions, if the appellee's property and business were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract. "Under such a contract between individuals a doubt could not exist." The State, when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing.

In The Bank of Cape Fear *vs.* Edwards, 5 Ired., 516, where the charter provided that the bank should pay annually into the treasury of the State twenty-five cents on each share of its stock owned by individuals, and that the bank should not be liable
44 to any further tax, it was held that the bank was liable to no other tax, State or county. See also, Farrington *vs.* Tennessee, 95 U. S., 679, and New Jersey *vs.* Yard, 95 U. S., 104, and the authorities there cited. Also, in the case of The Farmers' Bank (one of the present appellees) *vs.* Commonwealth and Greenup County, 6 Bush, 127, where the bank's charter provided that the annual payment into the State treasury of fifty cents on each one hundred dollars of the bank's capital stock "shall be in full of all tax or bonus," it was held that said provision exempted the bank from the payment of all other tax, whether State or county, including the bank's real estate, purchased for debt.

The appellant's next contention is that, if the appellee's charter exempted it from all taxation except that herein provided for, the same expired on the first day of October, 1864, and the act of the 15th of February, 1858, extending the charter for twenty years, created a new corporation, which the legislature, under the act of February 14, 1856, reserved the right to amend at pleasure; and that the act of the 17th of February, 1876, authorizing counties that levied and collected *ad valorem* taxes, to assess banks and other corporations within said counties, operated as a valid amendment of the appellee's charter to the extent of authorizing the collection of said taxes.

The act of the 14th of February, 1856, provides:

"SECTION 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

"SEC. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

There is a broad distinction between the extension of a charter and the grant of a new one. An act which continues the life of a charter to a period beyond the time fixed in the charter for its expiration, and reserves the corporate organization, privileges, powers, duties and rights, is an extension of the charter. Thus extended, it is the same charter with a continued lease of life, under which the organization must be kept up; to which the company must look for its powers, privileges and rights; by which it is to be governed and controlled. The act of extension relates back to the date of the charter. The legislature and the company are presumed to contract for the extension with reference to that event, by which the respective rights of the contracting parties were agreed on, which agreement, in consideration of the continuous discharge of the obligations therein expressed, is to be continued beyond
45 the time first agreed on. See Angell & Ames on Corporation, section 780; Temple *vs.* Marshall, 1 Gillman, Illinois, 672; Exeter Bank *vs.* Rogers, &c., 7 New Hampshire, 32; Lincoln and Kennebec Bank *vs.* Richardson, 1 Greenleaf, 72.

Here the legislature, by the act of 15th of February, 1858, continued the chartered privileges and rights of the appellee twenty years from the first day of October, 1864. This extension did not have the effect of creating a new charter, but merely extended the life of the old one which was already in existence. Therefore the act of the 14th of February, 1856, does not apply, for the third section expressly provides that the act shall only apply "to charters and acts of incorporations to be granted" thereafter.

Conceding, however, that the act of 15th of February, 1858, creates a new charter, was it not the intention of the legislature, "plainly expressed," not in so many words, it is true, that the first section of the act of 1856 should not apply to it? Let us see. The act of 1858, as an additional consideration for the extension, provides that the appellee should establish a bank at Columbus, Ky.; that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should in addition to the fifty cents per share on its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension. In addition to this the act of the 1st of March, 1872, authorized the appellee to purchase the stock that the State held in its bank, upon which it was to pay annually fifty cents upon each one hundred dollars, which was to "be in full — all tax or bonus" on such increased stock; also, her charter was "extended twenty five years." That the appellee, in addition to its former obligation, agreed to pay annually fifty cents on each hundred dollars of its contingent fund and increased capital stock for the period of twenty-five years; that it was to be exempt from all other taxation thereon during that period; that it was to establish another branch at Columbus, Ky.; that it was to restrict its circu-

lation; that its business involved a large capital, the profits of which were limited to six per cent. interest; that well-defined and permanent rules were essential to its successful management; that changes in its chartered privileges might hazard its success and safety, and render uncertain and precarious a business whose success depended upon a steady adherence upon the part of the State to its plighted faith. These considerations induce the belief that the acts of 1858 and 1872 were intended to continue in force an irrevocable contract.

FRANKLIN COUNTY COURT
versus
FARMERS' BANK.

The appellee was chartered in 1850, which was to continue in force until the — day of ——, 1880. By the 15th section of said charter the appellee was required to pay annually into the
46 State treasury fifty cents on each one hundred dollars of its capital stock, "which," according to said section, "shall be in full of all tax or bonus." By an act of the legislature, approved March the 10th, 1876, the appellee's charter was extended for the period of twenty-five years from and after the expiration of the time fixed in said charter. The principles announced in the Bank of Kentucky case, *supra*, apply to this case.

FRANKLIN COUNTY COURT
versus
DEPOSIT BANK OF FRANKFORT.

The appellee was chartered March 3d, 1863, to continue twenty years. There was no specific tax agreed on in the charter; but by the general law then in force the appellee was required to pay annually into the State treasury fifty cents on each one hundred dollars of its stock. It may be conceded that, as the appellee and the State, by the terms of the charter, made no contract in reference to taxation, the State would have the power to subject the appellee to the payment of such taxes as are imposed upon persons generally; and that the appellant would have the right to tax the appellee, under the law of 1876. But the legislature, by an act approved March 18th, 1871, declared "that the tax or bonus now paid by said bank in future shall be in full of all taxation; but this shall not be construed to apply to city tax upon real estate owned by it." By an act approved February 23d, 1882, the appellee's charter, together with the foregoing amendment, was extended and continued in force for twenty years from the 3rd of March, 1883.

The language of the amendment of 1871, "in full of all taxation," not only exempts the appellee from the payment of any other tax, whether county or State, but its meaning is made doubly clear by the succeeding clause, that excepts from the exemption city taxes on its real estate. Also, if the act of 1876, in the light of the act of 1856, should ordinarily be construed as repealing the exemption from taxation, so far as the appellant is concerned, the act of 1882

puts that matter at rest; for, by said act, the act of 1871 is expressly continued in force, thereby showing that it was the intention of the legislature that the act of 1876 should not apply to the appellees.

THE CITY OF FRANKFORT
versus
THE FARMERS' BANK OF KENTUCKY.

From what has been said in the case of The Franklin County Court *vs.* The Bank of Kentucky, it follows that the appellant, The City of Frankfort, has no authority to tax the real estate belonging to either of the appellees.

The judgment of the lower court in each case is affirmed.

47 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 43 pages contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein Franklin County Court, &c., are appellants and The Farmers' Bank of Kentucky is appellee, except the proceedings upon and the petition for rehearing, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Ky, this 13th day of May, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals

[SEAL.]

Exhibit B reads as follows:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 5th day of June, A. D. 1888, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, W. H. Holt, and Caswell Bennett sitting.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal, of said City, Appellants,
vs.
THE FARMERS' BANK OF KENTUCKY, Appellee.

Be it remembered that heretofore, to wit, on the 9th day of August, A. D. 1884, the appellants, by their counsel, filed in the clerk's office of the clerk of the court of appeals, a transcript of a record in words and figures following, to wit:

KENTUCKY:

Franklin Court of Common Pleas.

Proceedings before the Hon. C. S. French, judge of the court aforesaid, at the court-house, in the city of Frankfort, on the 16th day of May, 1884.

Be it remembered that on the 21st day of November the following petition was filed in the clerk's office of the court aforesaid:

Franklin Court of Common Pleas.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort, T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal, of said City, Defendants. } Petition in Equity.

The plaintiff, The Farmers' Bank of Kentucky, states that by an act of the General Assembly of Kentucky, approved February 16, 1850, entitled "An act to incorporate the Farmers' Bank of Kentucky," it was incorporated under the name aforesaid, with power to contract and be contracted with, sue and be sued, etc., and with
"full power to acquire, hold, possess, use, occupy and enjoy,
48 and the same to sell, convey and dispose of all such real estate, goods, effects and chattels as shall be convenient for the transaction of its business, or which may be conveyed to said bank as surety for any debt, or purchased in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which said bank may have a lien," and by the 15th section of said act the cashier of the principal bank was required on the first day of July, 1851, and on the first day of July in each succeeding year during the continuance of said charter, to pay to the treasury of the Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, "which shall be in full of all tax or bonus."

Plaintiff says that by an act approved March 10, 1876, entitled "An act extending the charter of Farmers' Bank of Kentucky," the charter of said bank as amended was extended for the period of twenty-five years from its termination as therein provided, to wit, from the first day of May, eighteen hundred and eighty. Said acts and all amendments thereto are referred to as part hereof. Plain iff says that pursuant to the terms of said acts it has on the first day of July in each year since said bank went into operation, including the 1st of July, 1882, paid to the treasurer of this Commonwealth fifty cents on each hundred dollars of stock held and paid for in said bank, which payments, as plaintiff is advised, were and are in full of all tax or bonus.

Plaintiff states that soon after the adoption of said original act of incorporation, and in conformity with its terms and provisions, it organized and established said bank, which has ever since been and

is still in regular operation, doing the business authorized by its said charter; and for the location of its principal office of discount and deposit in the city of Frankfort, and for the safe and convenient transaction of its business, the plaintiff purchased a lot or lots of ground situated on the north side of Main street in said city, and erected thereon a building suitable for a banking-house, which building includes rooms suitable for and used as a residence of the cashier of said bank, and for one or more of its clerks, said building being of such a character and so arranged as to promote and secure the convenient transaction of the business of said bank and the safety and protection of the property and its control. Plaintiff says that neither said building nor the lot of ground on which it stands nor any part of either is used or was purchased or was intended for any other purpose or object than as stated, and all of said building and ground is convenient and necessary for the transaction of said business and for the safety and security of said property.

Yet, the plaintiff says, that notwithstanding the premises the defendant, The Board of Councilmen of the City of Frankfort, has recently, without authority of law, assumed and undertaken to levy a tax upon a part of the real estate hereinabove described,
49 and the defendant Kirtley, as deputy of defendant Todd, marshal as aforesaid, under the order and by the direction of the defendant, The Board of Councilmen of the City of Frankfort, has advertised in the newspaper published in said city, called the "Daily Yeoman," that he will on the first Monday in December, 1882, sell portions of said property belonging to said bank, which portions, as described by said marshal, are: (1) "Residence on Lewis street, used for cashier, value $5,000," to raise the sum of $75, besides his pretended costs and commissions amounting, as claimed, to $8 more; (2) "lot on Ann street, value $2,000, to raise the sum of $30, besides costs and commissions claimed, amounting to $3.50, making in all the sum of $116.50, *to* which the said defendant Kirtley will, unless prevented, attempt to realize by said sale, under the pretense that said last-named sum is due from plaintiff to said board of councilmen of the city of Frankfort as delinquent taxes on the property so advertised for sale for the year 1882. The part of said property described in said advertisement as "lot in Ann street, is part and parcel of the lot of ground on which said bank building stands, and was bought and is held, used and occupied, like all the rest of said property, for the safe and convenient transaction of the business of said bank, the same being necessary therefor, and is not and never has been held or used for any other purpose.

Plaintiff says that it does not owe said board of councilmen of the city of Frankfort the sum so claimed, or any part of it, for taxes on said property, or any part of it, for the year 1882 or for any other period, and that said Kirtley has no legal right or authority to make said proposed sale for the purpose stated, but unless enjoined and restrained will do so according to said advertisement, to the great and irreparable injury of the plaintiff. Plaintiff is without adequate remedy at law, and says that no injunction has been refused by the court, by any circuit judge or by any one else.

Wherefore plaintiff prays that the defendants, Todd and Kirtley and The Board of Councilmen of the City of Frankfort, and all others, be enjoined and restrained from selling said property or any part thereof for the purpose above stated or for any other purpose or on any other pretext whatever; that said injunction be made perpetual; that plaintiff have judgment for its costs and all other relief, general or special, to which it may be entitled.

A. DUVALL,
For Plaintiff.

Thomas Rodman says he is the president of the plaintiff, The Farmers' Bank of Kentucky, and is its chief officer, and that he believes the statements of the foregoing petition to be true.

THOMAS RODMAN.

Sworn to before me by Thomas Rodman, this — day of November, 1882.

E. S. THEOBALD,
Notary Public.

50 On the 21st day of November, 1882, the following summons issued on the foregoing petition:

Summons.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon the Board of Councilmen of the City of Frankfort, T. J. Todd, marshal, and J. E. Kirtley, deputy marshal, of said city, to answer on the first day of the next May term a petition in equity filed against them in Franklin common pleas court by the Farmers' Bank of Kentucky, and warn them that upon their failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next May term of said court. Witness W. Franklin, clerk of said court this 21st day of November, 1882.

W. FRANKLIN, *C. F. C. C.*,
By ROB'T FRANKLIN, *D. C.*

Sheriff's Return.

Executed on E. H. Taylor, Jr., mayor of the city of Frankfort, on T. J. Todd, marshal of the city of Frankfort, and John E. Kirtley, deputy marshal of the city of Frankfort, by delivering to each of them a copy of the within summons.

J. W. GAINES, *S. F. C.*

November 28, 1882.

Notice Filed and Motion for Injunction.

At a court held on the 23d day of November, 1882—
The plaintiff filed notice and moved the court to grant an in-

junction as prayed in the petition, which motion is laid over for hearing.

Franklin Court of Common Pleas.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal, of said City, Defendants. } Notice.

The defendants are notified that on the 4th day of the present November term, 1882, of the Franklin court of common pleas, the plaintiff will apply to said court to grant an injunction according to the allegations and prayer of the petition now on file in the clerk's office of said court, the style of which is shown by the caption above.

THE FARMERS' BANK OF KENTUCKY,
By A. DUVALL, *Its Attorney.*

51 *Sheriff's Return.*

E. H. Taylor, Jr., mayor of the city of Frankfort, not being found, executed on the Board of Councilmen of the City of Frankfort, by delivering to H. Rodman, attorney for city of Frankfort, by delivering to him a copy of the within notice.

November 23, 1882.

J. W. GAINES, *S. F. C.*

Executed on T. J. Todd, marshal of city of Frankfort, and J. E. Kirtley, deputy marshal of the city of Frankfort, by delivering to each of them a copy of the within notice.

November 22, 1882.

J. W. GAINES, *S. F. C.*,
By FRANK FRENCH, *D. S.*

At a court held on the 25th day of November, 1882, came the parties by their attorneys, and the defendants, The Board of Councilmen of the City of Frankfort, T. J. Todd, marshal, and J. E. Kirtley, deputy marshal, of said city, filed a demurrer to the petition, and the cause being heard on said demurrer, and on the motion of plaintiff for an injunction herein, and the court being advised, it is ordered that the demurrer be overruled, to which defendants except, and the clerk of this court will issue orders of injunction agreeable to the prayer of the petition, enjoining the defendants and each of them from selling the properties described in the petition, or in any part of it, for delinquent taxes claimed to be due, The Board of Councilmen of the City of Frankfort, until the further order of this court, upon the plaintiff executing to the defendants bond with good security, conditioned that the plaintiff will pay to the defendants such damages as they may sustain if it is finally decided that the injunction ought not to have been granted. To all of which the defendants except.

Franklin Common Pleas Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort, &c., Defendants. } General Demurrer.

The defendants and each of them come and demur to the petition herein and say the same is not sufficient in law.

HUGH RODMAN,
Attorney for the Defendants.

Franklin Common Pleas Court.

THE FARMERS' BANK OF KENTUCKY
versus
CITY OF FRANKFORT, &c. } Injunction Bond.

We undertake that the plaintiff, The Farmers' Bank of Kentucky, will pay to The Board of Councilmen of the City of Frankfort, Thos. J. Todd, marshal, and J. E. Kirtley, deputy marshal,
52 of said city, such damages as they or either of them may sustain if it is finally decided that the injunction in this action ought not to have been granted.

November 25, 1882.

THOMAS RODMAN.

At a court held on the 27th day of November, 1882—

The defendants moved the court to dissolve the injunction herein, and the matters of law arising on said motion and the demurrer to petition being heard, the court overruled both motion and demurrer, to which the defendant excepts.

The defendants The Mayor and the Board of Councilmen of the City of Frankfort filed their answer.

Franklin Common Pleas Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal, of said City, Defendants. } Answer.

Par. 1. The defendant, "The Board of Councilmen of the City of Frankfort," for answer herein says it denies that fifty cents on each hundred dollars of stock held and paid for in said bank is in full of all tax or bonus. It denies that the fifty cents alleged to have been paid to the treasurer of this Commonwealth on the 1st day of July in each year, and especially the year 1882, were and are in full of all tax or bonus. It denies that all of the building and ground described in the petition is necessary for the transaction of the business of said bank and for the safety and security of said property. It denies that it, notwithstanding the premises set forth in the

petition, has recently or without authority of law assumed and undertaken to levy a tax upon a part of the real estate described in the petition. It denies that the part of said property described in the advertisement set out in the petition as "lot on Ann street" is part and parcel of the lot of ground on which said bank building stands, was bought or is held, used and occupied like all the rest of said property for the safe and convenient transaction of the business of said bank. It denies that the same is necessary for the safe and convenient transaction of the business of said bank. It denies that the same is not and never has been held or used for any other purpose. It denies that the plaintiff does not owe it the sum so claimed by it and set out in the petition herein, or any part of it, for taxes on said property, or any part of it, for the year 1882, or for any other period. It denies that said Kirtley has no legal right or authority to make said proposed sale for the purposes stated.

Par. 2. Further answering, this defendant says that by virtue of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 10, 1869,
53 it has full power and authority to assess annually, levy and collect a tax not exceeding two dollars and fifty cents on the one hundred dollars worth of property *on all real estate within the limits of the city of Frankfort.* Said act and amendment thereto and all the ordinances of *the* this defendant are referred to and made part of this answer. It alleges that by regular assessment and levy there is due from plaintiff to it the taxes set out in the petition and the percentage due the defendants as marshal and deputy marshal of the city of Frankfort and the costs and penalties therein stated. It says the rate of taxation fixed by its order for the year 1882 was $1.50 on the hundred dollars valuation.

Having fully answered, it prays that the injunction granted herein be dissolved and that the petition be dismissed and for its costs and all proper relief to which it may be entitled.

HUGH RODMAN, *Att'y Def'ts.*

Hugh Rodman says he is the attorney for the board of councilmen of the city of Frankfort, and that its chief officer, to wit, the mayor, is absent from Franklin county, and he believes the foregoing to be true.

HUGH RODMAN,
City Attorney.

Sworn to and subscribed before me this the 27th day of Nov., 1883.

WM. CROMWELL,
Ex. F. C., Ky.

At a court held on the 16th day of May, 1884—

This day came the parties by their attorneys, and this cause being submitted upon the pleadings, exhibits and proof and the argument of counsel, and the court being now sufficiently advised, it is adjudged that the injunction heretofore granted by this court be and

the same is now hereby perpetuated, and the defendants and all others are perpetually enjoined and restrained from selling the property mentioned and described in the petition or any part thereof for delinquent taxes claimed to be due by the plaintiff to the board of councilmen of the city of Frankfort. And it is further adjudged that the plaintiff recover of the defendants its costs herein expended and for which it may have execution. To all of which the defendants except and pray an appeal to the court of appeals, which is granted.

The following are the depositions on file in this case:

The deposition of Grant Green, taken at the Farmers' Bank of Kentucky on the 3d day of May, 1884, by agreement, to be read as evidence in behalf of plaintiffs in case of Farmers' Bank of Kentucky against The Board of Councilmen of the City of Frankfort, and Bank of Kentucky against the same, now pending in the Franklin court of common pleas.

54 The defendant being of lawful age, and first duly sworn says:

Ques. 1. State your age, residence and occupation.

Ans. I am fifty-eight years old. I reside in Frankfort, Ky., and am cashier of the Farmers' Bank of Kentucky. Have been such cashier sixteen years.

2. Please state all you know concerning the purchase of the lot fronting on Ann street in Frankfort, now owned by Farmers' bank, state from whom it was purchased and when and why it was purchased.

Answer. In February, 1869, Mr. Haly proposed to build on the lot joining the Farmers' Bank lot, and fronting on Ann street, a character of building which the officers of the bank thought would be dangerous to the safety of the bank and its property, and they appointed a committee of the directors of the bank to investigate the matter, and that committee being satisfied that the safety of the bank and its property required that the bank should own the property, and they, with the approval of the board, purchased it on the 15th day of February, 1869, and the deed from John Haly and wife is recorded in the clerk's office of the Franklin county court.

3. You have before you a paper purporting to be a copy of the order appointing the committee referred to in your last answer, and also the report of the committee in relation to the purchase of said lot. Please state whether or not said paper contains a true copy of said order and report taken from the records of said bank, and make said copies a part of your answer.

Ans. The said paper is a true copy taken from the records of the bank, and I file the same as a part of my answer and mark it "G. G."

4. State whether any part of said lot has been sold or conveyed by the bank since its purchase, and if so, when and to whom, and the conditions upon which said sale was made.

Ans. In 1870, Oct. 17, the bank conveyed to Mrs. Emily H. Tub-

man thirty-five feet of the lot fronting on Ann street to be used and occupied as a part of church lot, for church building, and for no other purpose whatever. The deed from bank to Mrs. Tubman contains the following stipulation and condition: "It is distinctly understood and agreed that the lot aforesaid is to be used and occupied for a church building and for no other purpose whatever, and should said property ever be offered for sale or sought to be used for any other purpose than a church, the Farmers' bank is to have the option of purchasing twenty-four feet by thirty-five on the back end, at the same per square foot as the bank has received for it."

5. State whether or not, in your opinion, the grounds on which the bank buildings are erected, including the lot fronting on Ann street and also said bank buildings, are convenient and necessary for the transaction of the business of said bank and for the safety and security of the property and effects in its possession or under its control.

55 Ans. I think they are.

6. How long have you been occupying the bank building?

Ans. Sixteen years.

7. State whether the building's rooms suitable for and used as a residence for the cashier of said bank and for one or more of its clerks are of a character and so arranged as to secure the convenient transaction of the business and the safety of the property of the bank.

Ans. They are.

8. State whether or not the said lot on Ann street bought from Haly is held or used or occupied as the rest of said bank property for any other purpose than as you have already stated.

Ans. It is not.

9. Please state whether or not a residence for the cashier is necessary to the safety of the bank in view of the limited number of the police force of said city.

Ans. I believe that is necessary in the town of Frankfort and the greatest safety the bank could have.

Cross-examined:

1. How many feet front on Main street and how many feet deep on Lewis street is the bank property?

Ans. It is about 78 feet front on Main street and running back on Lewis 192 feet, the lot I mean.

2. How many rooms does the bank building contain?

Ans. It contains 14 rooms, including kitchen and servants' room—that is, the whole building.

3. How many of those rooms are used strictly for banking purposes?

Ans. Three rooms for banking purposes.

4. What is the bank building and the lot upon which it is situated worth?

Ans. The whole property, including lot on Ann street, is $16,240, estimated.

5. How many feet front and how many feet deep is the lot on Ann street?

Ans. The lot on Ann street is 53½ feet front and runs back 99 feet to the line of the lot originally owned by the bank.

6. What is the separate value of the lot on Ann street?

Ans. I suppose it is worth $2,000. I have no idea what it is worth.

7. What is the lot used for by the bank?

Ans. For no especial purpose. It is used as a protection and guard to the bank building.

8. What is the value of the residence part of the building?

Ans. It is worth about $14,000.

9. In what way is the lot upon which the bank building stands and the lot on Ann street necessary for the transaction of the business of the bank or its safety or protection?

56 Ans. The lot on Ann street is so close to the bank building that buildings placed upon that lot, if owned by other parties, would endanger the loss of the bank building by fires and the outhouses, etc., necessary which might be erected on the lot would make such nuisances that the cashier or other officers who occupy the building would be greatly annoyed, and if they occupied the bank building would have to do so with great discomfort, and besides robbers would have a safe position from which they could approach the bank for the purpose of robbing and breaking into the bank.

Examined by attorney for Bank of Kentucky:

No. 1. Are you acquainted with the lot of ground on the west side of St. Clair street, in the city of Frankfort, owned by the Bank of Kentucky, fronting on said street and bounded on the north by the court-house lot and on the south by the property of the Catholic church, and on which is erected the banking building of said plaintiffs? If so, state how long you have known the same and for what purpose said property has been used and occupied and is now used and occupied.

Ans. I am acquainted with the lot mentioned and have known it for 33 years, and it has been occupied and used by the bank ever since I have known it.

2. Please state if you know the size of the front of said lot on St. Clair street and how the lot is occupied by the building thereon.

Ans. I don't know the size of the front, but I guess about 70 or 75 feet. The whole of the lot front is occupied by the bank building with the exception of an alley of about 3 feet.

3. Are you acquainted with the arrangement and use of said building?

Ans. I am not well acquainted with it, but I know the front part of the building is occupied by the banking-room, president and directors' room, the vault and the cashier's room back of vault, and above president's room and directors' room is occupied by clerks

of the bank, and the rest of the house is occupied by residence of cashier, and the front of the residence only presents one room and the hall for entrance to residence.

4. State whether or not said building is of such character and so arranged as to promote and secure the convenient transaction of the business of said bank and the safety and protection of its property and that of the deposits and other property under its control.

Ans. I think it is or does.

5. State whether or not in your opinion such a residence for the cashier and arrangements for sleeping-rooms for clerks adjoining and surrounding the banking-rooms and vault of the bank, and their use for such purposes, is a proper and necessary safeguard in the city of Frankfort for the protection of the property and business of said bank.

57 Ans. I think it is necessary to the protection, and the greatest protection it could have.

6. State if the banking-room, president and directors' room and cashier's room, as erected in said building, are suitable for and necessary to the convenient transaction of the business of said bank.

Ans. I think they are.

Cross-examined by attorney for defendants:

1. How many rooms in the bank proper, and how many rooms in the cashier's residence?

Ans. I think there are three or four rooms used for the transaction of the business of the bank, and I do not know how many other rooms there are in the house.

2. What is the value of the property?

Ans. I don't know what it is really worth, but I suppose from $10,000 to $15,000.

GRANT GREEN.

The following is Exhibit "G. G.," filed with deposition of Grant Green:

FARMERS' BANK OF KENTUCKY,
FRANKFORT, *February* 8, 1869.

At a meeting of the board of directors of the bank this day the following order was made, to wit: "A. J. James and G. W. Craddock are appointed a committee to examine and report on the propriety of purchasing Haly's lot, adjoining the bank property.

(Signed) "THOS. N. LINDSEY, *President.*"

And afterwards, on the 16th day of February, 1869, the following order was made (the following members of the board being present: Thos. N. Lindsey, president; A. J. James, G. W. Craddock, J. G. Dudley and S. B. Churchill), viz: "The committee appointed to confer with John Haly in relation to the purchase of the lot adjoining the bank reported that they had examined the lot, and were satisfied that the proximity of the same to the bank buildings was such that the buildings proposed to be placed upon said lot by

Haly would not only endanger the security of the bank buildings from fire, but the privies which it would be necessary for him to make near the bank would create intolerable nuisances to any one who might occupy the bank building. They therefore purchased said lot at the price of $2,500 cash, and received a deed from Haly and wife for the same, which is accepted and ordered to be recorded. And the cashier was ordered to settle with Haly for the same. The cashier is also directed to have the fence replaced on Ann street, upon the most reasonable terms it can be done, by using the old materials and such new materials as will be necessary.

(Signed) "T. H. LINDSEY, *President.*"

58 I hereby certify that the two foregoing orders are true copies from the records of the Farmers' Bank of Kentucky as they appear upon the minutes of the proceedings of the board at the dates named.

Given under my hand as cashier of the Farmers' Bank of Kentucky this 30th day of April, 1884.

GRANT GREEN, *Cashier.*

Also the deposition of E. L. SAMUEL, taken at the same time and place, and on the same behalf, who, being of lawful age and first duly sworn, says:

1. State your age, residence and occupation.

Ans. I am 53 years of age, and am cashier of the Branch Bank of Kentucky at Frankfort, Ky.

2. Are you acquainted with the lot of ground on the west side of St. Clair street owned by the plaintiff, The President, Directors and Company of the Bank of Kentucky? If so, describe the same by boundaries, and also the buildings erected thereon, and state for what purposes the said lot and buildings are used exclusively.

Ans. I am acquainted with ground and have known it for fifty years. I knew it before the banking buildings were erected on it. It is bounded on the east by St. Clair street, on the west by an alley, on the north by the court-house lot, on south by property of the Catholic church. The building is a two-story brick building occupying front of the whole lot except an alleyway running back the depth of the building. The right wing and the main center of the building is occupied for banking purposes, and the left wing for an entrance to the cashier's residence. The vault is as near the center of the building as possible, and is surrounded by rooms used for banking purposes and above by the cashier's family and clerks of the bank in order to afford as much protection to the vault of the bank as possible. The lot and buildings are used for banking purposes, residence of cashier, and sleeping apartments of the clerks.

3. You have stated that you are the cashier of the bank. Do you occupy the residence of such building; if so, how long have you occupied it?

Ans. I do occupy it, and have done so for eleven years.

4. State whether the said lot and building, including the portions thereof which you have stated are used for cashier's residence and

rooms for one or more clerks, are of a character and so arranged as to secure the convenient transaction of the business of said bank and the safety and protection of its property and the property under its control and custody.

Ans. I think they are well arranged for those purposes and are necessary thereto.

5. If you know, state for what purpose the said lot was purchased and the building thereon erected by the plaintiff, and for what purpose they have been solely used by the plaintiff.

59 Ans. It was purchased by the Bank of Kentucky for erecting banking-house to carry on banking business in city of Frankfort, and they did erect thereon a banking-house, and in which they have carried on the banking business since 1840 to the present day. My father, being president of the bank at the time it was built, supervised its erection.

6. State whether or not, in your opinion, the rooms in said building used for banking purposes are more than sufficient for the convenient and proper transaction of the business of the bank, and whether or not in your opinion such a residence for the cashier and rooms for clerks adjoining and surrounding the banking-rooms and vault of the bank, and their use for such purposes, is a proper and necessary safeguard for the protection of the property of said bank and that entrusted to its custody in the city of Frankfort?

Ans. I think the rooms used for banking purposes are not more than sufficient to transact the business. I think the cashier's residence and rooms for clerks are a proper and necessary safeguard for the protection of the property of said bank and that entrusted to its custody.

Cross-examined by attorney for defendants:

1. How many rooms in the whole building?

Ans. Eleven rooms.

2. How many are used strictly for banking purposes?

Ans. Three rooms, occupying two-thirds of the front.

3. How many clerks has the bank, and how many sleep in the building?

Ans. The bank has three clerks, one of whom sleeps in the building.

4. What is the property valued at?

Ans. At $10,000, and is in the city limits.

E. L. SAMUEL.

Also the deposition of THOMAS RODMAN, taken at the same time and place and on the same behalf, who, being of lawful age and first duly sworn, says:

1. State whether or not in your opinion the grounds upon which the bank buildings are erected, including the lot fronting on Ann street, and also said bank buildings are convenient and necessary for the transaction of the business of said bank and for the safety

and security of the property and effects in its possession or under its control.

Ans. I think that they are. The reasons are that the buildings put upon the vacant lot would endanger the bank as to fires, robbers, burglars and nuisances.

2. State whether the buildings include rooms suitable for and used as a residence for the cashier of said bank and for one or more of its clerks are of a character and so arranged as to secure
60 the convenient transaction of the business and the safety of the property of the bank.

Ans. I think so, for the reason that the cashier or its employés ought to sleep in the bank building for its protection.

3. State whether or not the said lot on Ann street, bought from Haly, is held or used or occupied as the rest of said bank property for any other purpose.

Ans. It is not. The bank gets no revenue from it, and the bank does not use it except for purposes of protection.

4. Who was the cashier of this bank prior to and up to the time of Mr. Green's appointment?

Ans. John B. Temple. He was appointed in 1850, and remained until May, 1868.

Cross-examined by attorney for defendant:

1. How many rooms in bank building?

Ans. There are twelve rooms, besides kitchen and servants' room and including bank-rooms. T front rooms on Main street are used for banking purposes.

2. What is the bank proper'_ worth?

Ans. Sixteen thousand dollars.

3. How many feet front is the bank property on Main street and how many on Lewis street?

Ans. About seventy-eight feet on Main street and about one hundred and ninety-two on Lewis street.

4. How many feet is the building proper on Main and Lewis streets?

Ans. Sixty feet on Main and ninety-five on Lewis street.

5. What are the dimensions of the lot on Ann street?

Ans. About fifty-five by ninety-nine feet, and is worth about $2,500, and is used only for the protection of the bank.

Examined by attorney for Bank of Kentucky:

1. Are you acquainted with the property owned and occupied by the Bank of Kentucky on the west side of St. Clair street, in the city of Frankfort?

Ans. I am.

2. I call your attention to a description of said property as given by Mr. Samuel in his deposition, this day taken; please state whether that description of the property is accurate so far as your knowledge is concerned.

Ans. I think that is a very fair description of the property.

3. Please state whether or not the portion of said property used for banking purposes is more than necessary for the convenient dispatch of the business of said bank.

Ans. I think it is not.

4. Please state whether or not the arrangement of said building, as to the cashier's residence and clerk's apartments and their
61 use for such purposes, are proper and necessary to the security of said bank, its property and that of others entrusted to its custody.

Ans. I think they are, as it is necessary that they should live in the bank as a protection from fire and burglars.

5. How long have you lived in Frankfort?

Ans. Twenty years.

Cross-examined by defendant's attorney:

1. How many rooms in the building?

Ans. Ten or twelve I think.

2. How many are used strictly for banking purposes?

Ans. Two, so far as I know, which occupy two-thirds of the front. There may be more. The property is worth $10,000 or $12,000.

THOMAS RODMAN.

GRANT GREEN recalled.

Mr. GRANT GREEN, being recalled, is asked the following by attorney for Farmers' bank:

1. Please state if you know who was president of Farmers' bank at time of its organization up to and including year 1858.

Ans. John H. Hanna was president during the time named and for some time afterwards.

2. Do you know anything concerning the conveyance of the lot fronting on Ann street by John H. Hanna to John B. Temple on 1st of April, 1858?

Ans. I know nothing except what is shown by the records of the county court clerk's office, which shows, as I understand, the record of the conveyance from Hanna to Temple in Deed Book No. 6, dated April 1st, 1858. Being further interrogated, says that said Temple conveyed to John Haly by deed dated June 15, 1867, recorded in Deed Book No. 9, page 230, Franklin county court clerk's office, all of which is shown by the records therein. I will file copies of said deeds, marked Nos. 1 and 2. I will also file copy of the deed from John Haly to the bank as part of this deposition.

GRANT GREEN.

Deed No. 1.

This indenture made this 1st day of April, 1858, between John H. Hanna and Mary L. Hanna, his wife, of the city of Frankfort and State of Kentucky, of the one part, and John B. Temple, of the place aforesaid, of the other part, *witnesseth:* That said John H. Hanna in consideration of the sum of thirteen hundred dollars in

hand paid, *to* the receipt of which is acknowledged, hath granted, bargained and sold, and by these presents doth grant, sell and convey unto the said John B. Temple a certain parcel of land in the city aforesaid and bounded as follows: Beginning at a point eighty feet from the corner of a brick house erected by John H. Hanna on the corner of Ann and Montgomery streets, that is, the corner next to Montgomery street, running at right angles with Ann
62 street ninety-nine feet, or to the line of the lot now owned by Farmers' Bank of Kentucky; thence with the line of the said bank lot about eighty-eight and a half feet to the corner of the lot on which the Christian or Reform church is erected; thence with the line of said church to Ann street; thence with said street to the beginning; together with all and singular the premises and appurtenances thereunto belonging or in anywise appertaining. To have and to hold the land hereby conveyed, with its appurtenances, unto the said John B. Temple, his heirs and assigns forever; and the said John H. Hanna, for himself, his heirs, executors and administrators, the aforesaid tract or parcel of land and premises unto the said John B. Temple, his heirs and assigns, against the claim or claims of all and every person or persons whatsoever, claiming or to claim the same, doth and will forever warrant and defend, by these presents; and, further, that the said John H. Hanna is seized of a sure, lawful and indefeasible title in and to the said parcel of ground and appurtenances, and hath lawful right to sell and convey the same. And the said Mary L. Hanna, wife of said John H. Hanna, doth hereby relinquish her right of dower in and to the tract of land and appurtenances hereinbefore described.

In testimony whereof the parties of the first part have hereunto set their hands and seals the day and date first herein.

The word title interlined before signed.

[L. S.] JOHN H. HANNA.
[L. S.] MARY L. HANNA.

STATE OF KENTUCKY, *sc:*

I, Alexander H. Rennick, clerk of the county court of the county of Franklin, do certify that the foregoing deed from John H. Hanna and Mary L. Hanna, his wife, to John B. Temple was produced to me in my office on the 1st day of April, 1858, and was acknowledged by the said John H. Hanna to be his act and deed, and on the 3d day of April, 1858, was acknowledged by Mary L. Hanna to be her act and deed, and the same, with this certificate, have been truly recorded in my office.

Witness my name as clerk, this 5th day of April, 1858.

A. H. RENNICK, *C. F. C. C.*

A copy.
Attest: —— ——, *Clerk*,
By —— ——, *D. C.*

Deed No. 2.

This indenture, made the 15th day of June, in the year 1867, between John B. Temple, of the county of Franklin, city of Frankfort, and State of Kentucky of the one part, and John Haly, of the same city and State, of the second part, *witnesseth:* That
63 the said John B. Temple, in consideration of twenty-five hundred dollars in hand paid, the receipt of which is acknowledged, hath granted, bargained and sold, and by these presents doth sell and convey unto John Haly, his heirs and assigns, a certain lot or parcel of ground in said city of Frankfort, bounded as follows: Beginning at a point on Ann street, eighty feet from Montgomery street, as fixed by the house erected by John H. Hanna, running thence at right angles with Ann street ninety-nine feet, or to the line of the lot now owned by the Farmers' Bank of Kentucky; thence with the line of said bank lot about eighty-eight and a half feet, to the corner of the lot on which the Christian or Reform church is erected; thence with the line of said church lot to Ann street; thence with Ann street to the beginning, being the same lot conveyed by John H. Hanna and wife to said Temple by deed bearing date 1st day of April, 1858. To have and to hold the land hereby conveyed, with all appurtenances thereto attached, unto the said John Haly, his heirs and assigns, against the claim or claims of all and every person or persons whatever, claiming or to claim the same, doth and will forever warrant and defend, by these presents. In witness whereof the said John B. Temple, together with Blandina H. Temple, his wife, who hereby relinquishes her right of dower in and to the lot or parcel of ground hereby conveyed, have hereunto set their hands and seals the day and date first herein written.

JOHN B. TEMPLE.
BLANDINA H. TEMPLE.

STATE OF KENTUCKY, *sc:*

I, Alexander H. Rennick, clerk of the county court for the county of Franklin, do certify that the foregoing deed was produced to me in my office on the 15th day of June, 1867, with a two-dollar-and-fifty-cent United States revenue stamp attached thereon, and was acknowledged by John B. Temple and Blandina H. Temple, his wife, the grantors, to be their act and deed, and the same with this certificate have been truly recorded in my office.

Witness my name as clerk this 22d June, 1867.

A. H. RENNICK, *C. F. C. C.*

A copy.
Attest: JAMES G. CROCKETT, *Clerk,*
By W. D. GRAVES, *D. C.*

Deed No. 3.

This indenture made this 15th day of February, 1869, between John Haly, of the county of Franklin and city of Frankfort, Ky.,

of the one part, and the Farmers' Bank of Kentucky, of the second part, *witnesseth:* That the said John Haly, for and in consideration of the sum of twenty-five hundred dollars ($2,500) in hand paid, the receipt of which is hereby acknowledged, hath granted, bar-
64 gained and sold, and by these presents doth sell and convey unto the said Farmers' Bank of Kentucky and its assigns a certain lot or parcel of ground in said city of Frankfort, bounded as follows, to wit: Beginning at a point on Ann street, eighty feet from Montgomery street as fixed by the house erected by John H. Hanna, running thence at right angles with Ann street ninety-nine feet or to the line of the lot now owned by the Farmers' Bank of Kentucky; thence with the line of said bank lot about eighty-eight and a half feet to the corner of the lot on which the Christian or Reform church is erected; thence with the line of said church lot to Ann street, and thence with Ann street to the beginning; being the same lot conveyed by John B. Temple and wife to the said John Haly by deed bearing date the 15th day of June, 1867. To have and to hold the land hereby conveyed, with all the appurtenances thereunto attached, unto the said Farmers' Bank of Kentucky and its assigns forever. And the said John Haly for himself, his heirs, executors and administrators, the aforesaid lot or parcel of ground and appurtenances, unto the said Farmers' Bank of Kentucky and its assigns, against the claim or claims of all and every person or persons whomsoever, claiming the same, will forever warrant the title.

In witness whereof the said John Haly, together with Hannah Haly, his wife, who hereby relinquishes her right of dower in the lot or parcel of ground hereby conveyed have hereunto set their hands the day and date first herein written.

JOHN HALY.
HANNAH HALY.

STATE OF KENTUCKY, *sc:*

I, Alexander H. Rennick, clerk of the county court for the county of Franklin, certify that the foregoing deed was produced to me in my office on the 15th day of February, 1869, with $2.50 of United States revenue stamps attached thereon, and was acknowledged by John Haly and Hannah Haly, his wife, to be their act and deed, and the same with this certificate have been truly recorded in my office.

Witness my name as clerk this 16th February, 1869.

A. H. RENNICK, *C. F. C. C.*

A copy.
Attest: JAS. G. CROCKETT, *Clerk*,
By W. D. GRAVES, *D. C.*

Deed No. 4.

This indenture made this 17th day of Oct., one thousand, eight hundred and seventy, between the Farmers' Bank of Kentucky, of the county of Franklin and State of Kentucky, of the first part, and

Emily H. Tubman, of the city of Augusta and the State of Georgia, of the second part, witnesseth: That for and in consideration of the sum of twelve hundred and sixty dollars in hand paid, the receipt of which is hereby acknowledged, the party of the first part doth bargain, sell, convey, release and grant unto the
65 party of the second part and her heirs and assigns all that certain lot of ground in the city of Frankfort and State of Kentucky, on Ann street in said city: Beginning at the south corner of the lot on which the Christian church stands; thence with Ann street southwardly thirty-five feet to a stake; thence at right angles with Ann street in the direction of the bank building to a stake at a point thirty-five feet from the most westwardly corner of the Christian Church lot; thence thirty-five feet to the westwardly corner of said church lot; thence to the beginning; the lot sold fronting thirty-five feet on Ann street and running back at that width to the line of the rear part of said church lot; together with the rights, privileges and appurtenances thereto belonging. To have and to hold the property hereby conveyed to the party of the second part and her heirs and assigns forever. And the said party of the first part covenants that it will warrant and forever defend the property hereby conveyed. But it is distinctly understood and agreed that the lot of *said* is to be used and occupied for a church building and for no other purpose whatever, and should said property ever be offered for sale or sought to be used for any other purpose than a church, the Farmers' bank is to have the option of repurchasing twenty-four feet by thirty-five on the back end at the same per square foot as the bank has received for it.

In testimony whereof the party of the first part hereunto sets its hand and seal the day and year first above written by its president and corporate seal, and said Emily H. Tubman also signs her name hereto.

THE FARMERS' BANK OF KENTUCKY,
[SEAL.] By T. N. LINDSEY, *Pres't.*
E. H. TUBMAN.

Attest as to E. H. Tubman:
L. A. THOMAS.

COMMONWEALTH OF KENTUCKY, }
Franklin County, } *sct:*

I, James G. Crockett, clerk of the county court of the county aforesaid, do certify that this deed from the Farmers' Bank of Kentucky to Emily H. Tubman was on the 20th day of October, 1870, produced to me in my office, duly stamped according to the act of Congress, and with the corporate seal of said bank affixed, and acknowledged by the said Thomas N. Lindsey, president of said Farmers' bank, to be his act and deed, which is ordered to be recorded. Whereupon said deed and this certificate have been truly admitted to record in my office.

Given under my hand this 27th day of October, 1870.

JAS. G. CROCKETT, *C. F. C. C.*

A copy.
Attest:

JAS. G. CROCKETT, *Clerk,*
By W. D. GRAVES, *D. C.*

66 STATE OF KENTUCKY, *Franklin County,* } *sct:*

I, W. H. Posey, examiner for Franklin county, Kentucky, certify that the foregoing depositions by Grant Green, E. L. Samuel and Thomas Rodman, were taken before me at the time and place stated in the caption, that each was duly sworn by me before giving his deposition; that the deposition of each was written by me in the presence of each, respectively, and read to and subscribed by each, respectively, in my presence; that A. Duvall, attorney for Farmers' Bank of Kentucky, D. W. Lindsey, attorney for Bank of Kentucky, and Hugh Rodman, attorney for defendants, were present at the examination.

Given under my hand as examiner of aforesaid this May 10th, 1884.

W. H. POSEY,
Examiner for Franklin County, Ky.

KENTUCKY:

Franklin Common Pleas Court.

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing fifty-eight pages and the above lines contain a full, true and complete transcript of the record and proceedings had in the cause therein mentioned.

Witness my hand this 9th day of August, 1884.

W. FRANKLIN, *C. F. C. C. C.,*
By ROB'T B. FRANKLIN, *D. C.*

Upon which transcript was endorsed the following statement:

THE BOARD OF COUNCELMEN OF CITY OF FRANKFORT, Appellants, *versus* THE FARMERS' BANK OF KENTUCKY, Appellee. } Statement.

The judgment appealed from was rendered on the 16th day of May, 1884, at the May term of the Franklin common pleas court, and can be found on page 19 of this transcript.

No summons desired.

SAME, Appellants, *versus* SAME, Appellee. } Assignment of Errors.

The appellants assign for errors the following: The court below

erred in rendering the judgment appealed from herein, and found on page 19 of the transcript.

HUGH RODMAN,
City Attorney, for Appellants.

67 Afterwards, at a court of appeals, begun and held for the Commonwealth of Kentucky at the capitol in the city of Franklin, on the 11th day of October, A. D. 1884, the following order was entered:

BOARD OF COUNCILMEN OF CITY OF FRANKFORT *vs.* THE FARMERS' BANK OF KENTUCKY. } Franklin.

SAME *vs.* PRESIDENT, DIRECTORS, &C, OF THE BANK OF KENTUCKY. } Franklin.

Ordered that these causes be continued for oral argument.

Afterwards, at a court of appeals held, as aforesaid, on the 4th day of March, A. D. 1886, the following order was entered:

These causes coming on to be heard, were argued by D. W. Lindsey for the Bank of Kentucky, A. Duvall for the Farmers' Bank, and Wm. Lindsay for appellant, and submitted.

Afterwards, at a court of appeals held as aforesaid on the 5th day of June, A. D. 1888, the following order was entered:

CITY OF FRANKFORT, Appellant, *versus* FARMERS' BANK OF KENTUCKY, Appellee. } Appeal from Franklin Common Pleas Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of Kentucky court of appeals, hereby certify that the foregoing 38 pages contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein The Board of Councilmen of the City of Frankfort, &c., are appellants and The Farmers' Bank of Kentucky is appellee, except the opinion of the court, which is copied in the record in case of Franklin County Court, &c., *vs.* Farmers' Bank of Kentucky, and except the proceedings upon, and the petition for, rehearing, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed

the seal of my office. Done at Frankfort, Ky., this 11th day of May, A. D. 1897.

[SEAL.]

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

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Exhibit "C" reads as follows:

Copy of acceptance of the provisions of the Hewitt law by the Farmers' Bank of Kentucky, on file in office of auditor of public accounts.

FARMERS' BANK OF KENTUCKY, *December* 6, 1887.

At an adjourned meeting of the stockholders of the Farmers' Bank of Kentucky, held in their banking-house in the city of Frankfort on Tuesday, the 6th day of December, 1887, a majority in interest of a quorum of said stockholders being present, it was resolved that the consent of said bank be and is hereby given to the levying and payment of the tax as provided in and by article 11, charter 1233, of "An act to amend the revenue laws of the

Commonwealth of Kentucky," approved May 17th, 1886, and said bank hereby waives and releases all right under its charter to a different mode or a smaller rate of taxation.

Which order and consent of the stockholders was ordered to be certified to the governor as required by said act.

69 In testimony whereof the signature of the president, and the corporate seal of the bank are hereto attached the above date written.

[SEAL.] THOMAS RODMAN, *President.*
GRANT GREEN, *Cashier.*

A copy.
Attest: F. H. JOHNSON,
Assistant Auditor.

Exhibit "D" reads as follows:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the first day of June, A. D. 1895, Chief Justice William S. Prior, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, and George B. Eastin and B. L. D. Guffy sitting.

THE FARMERS' BANK OF KENTUCKY, Appellant,
vs.
COUNTY OF FRANKLIN and R. D. ARMSTRONG, Sheriff of Franklin County, Appellees.

Be it remembered that heretofore, to wit, on the 4th day of October, A. D. 1894, the appellant, by its counsel, filed in the clerk's office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

FARMERS' BANK OF KENTUCKY *against* FRANKLIN COUNTY, &C. } Pleas before Hon. James E. Cantrill, Judge.

January Term, 1894.

Be it remembered that on the 22d of December, 1894, the plaintiff filed the following petition herein, to wit:

Franklin Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE COUNTY OF FRANKLIN and R. D. ARMSTRONG, Sheriff of Franklin County, Defendants. } Petition in Equity.

The plaintiff, The Farmers' Bank of Kentucky, states that it is a corporation and as such has the right to sue and be sued, plead and be impleaded, contract and be contracted with. That it was incor-

porated and chartered by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Farmers' Bank of Kentucky," approved February 16, 1850, which act, together with all the amendments thereto are referred
70 to as part hereof, and by reason of said act of incorporation it undertook and agreed to perform certain public duties therein mentioned, such as carrying on the banking business, loaning money, discounting notes and bills of exchange, etc., and it states that in accordance with said provisions of said charter it has fully performed all of its duties to the public and complied with its contract with the State.

That its principal bank and principal place of business is in Frankfort, Kentucky. That one of its branches is in the city of Henderson, Kentucky, and one in Georgetown, Kentucky, all of which are in existance and operation.

The plaintiff states that by the terms of its charter and in consideration of its organization and acceptance of the same, it was authorized and bound by the cashier of its principal bank, on the 1st of July of each year and every year thereafter during the existence of its charter, to pay to the treasurer of Kentucky fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus. Said provision is in section No. 15 of said act of 1850, chartering this plaintiff, and reads as follows: "It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1891, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay into the treasury of the Commonwealth fifty cents on each one hundred dollars of stock held and paid for by said bank, which shall be in full of all tax or bonus, provided that no tax shall be paid until said bank goes into operation, and provided further that the tax or bonus hereby proposed to be imposed on each share is set apart and forever dedicated to the cause of education on the common-school system, and whenever the same or any part thereof shall be directed otherwise by legislative enactment said bank shall be exonerated from the payment of any tax or bonus whatever."

The plaintiff states that said contract and stipulations as contained in said charter fixing the said rate of taxation of plaintiff's property conduced to an acceptance by plaintiff of said charter, and the plaintiff was thereby induced to and did organize under said charter in a short time after its passage by the legislature, and the said contract and the provision in regard to taxation has been relied on by plaintiff and has conduced to the maintenance and operation of plaintiff's bank and its said branches. That by an act entitled "An act extending the charter of the Farmers' Bank of Kentucky," approved March 10th, 1876, the legislature of Kentucky extended the plaintiff's charter for a period of twenty-five years from the time of the expiration of its original charter, to wit, twenty-five years from the 1st day of May, 1880. Said act is referred to as part hereof and reads as follows:

"That the charter of the Farmers' Bank of Kentucky as amended,

be extended for the period of twenty-five (25) years from the
71 termination of its charter as therein fixed: Provided, that said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act; and provided further, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other right previously vested." Acts 1886, volume 2, page 324.

Said acts are referred to as parts hereof.

That in accordance with the provisions of its charter and the contract therein contained between the plaintiff and the Commonwealth of Kentucky, it paid to the treasurer of the Commonwealth of Kentucky on the first day of July in each year ever since its organization, and up to the 6th day of December, 1887, an annual tax of fifty (50) cents on each hundred dollars of stock held and paid for in said bank which payments, as plaintiff is advised, were in full of all tax or bonus, and the same was received and accepted by the Commonwealth of Kentucky in full of all tax or bonus against this plaintiff.

The plaintiff states that soon after the adoption of said original act of incorporation and in conformity with its terms and provisions, it organized and established said bank, which has ever since been and still is, in regular operation, doing the business authorized by its said charter.

Plaintiff states that a general statute passed by the said legislature of Kentucky, approved May 17, 1886, chapter 92 of the General Statutes of Kentucky, commonly called the "Hewitt act," article 2, section 1 of said act, provided and reads as follows:

"Shares of stock in national and State banks and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition pay upon each one hundred dollars of so much of their surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, and the same rate of taxation that is now assessed upon real estate, shall be in full of all tax, State, county and municipal." That section four (4) of said act reads as follows:

"That each of said banks, institutions and corporations by its proper corporate authority, with the consent of a majority in interest of a quorum of stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all rights under the acts of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation which consent or *agreement to and with the State of Kentucky, shall* be evidenced
72 by writing under the seal of such bank and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation what-

soever so long as said tax shall be paid during the corporate existence of such bank."

Under the seventh section of the same article it is also provided, that nothing in said act contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but that the same may be taxed for county and municipal purposes as other real estate is taxed.

That in the fifth section of said act it is also provided that said banks may take the proceedings authorized by said fourth section of said act at any time until the meeting of the next General Assembly, provided they pay the tax aforesaid.

Now, the plaintiff states that previous to the next session of the General Assembly of the Commonwealth of Kentucky, after the passage of said act, and within the time fixed by said act for an acceptance of the proposition of the State of Kentucky, to wit, on the 6th day of December, 1887, the plaintiff, The Farmers' Bank of Kentucky, at an adjourned meeting of a majority in interest of a quorum of the stockholders of said bank, did consent and agree to and with the Commonwealth of Kentucky to the levying and payment of said tax as provided in and by article 2, chapter 1233, of "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and waived and released all rights under its charter to a different mode or smaller rate of taxation, which agreement with the State of Kentucky was evidenced by writing under the seal of plaintiff and delivered to the governor of the Commonwealth of Kentucky as provided by said act. A certified copy of said agreement is filed herewith as part hereof, marked "A," and the plaintiff in all respects complied with all the requirements of said act. The plaintiff further states that in consideration of said agreement to pay said additional tax of twenty-five (25) cents on each one hundred dollars of its capital stock, and to pay the same rate of tax that might be assessed on real estate in Kentucky on so much of its surplus as exceeded an amount equal to ten (10) per cent. of its capital stock, and to permit its real estate and buildings owned or used by it for conducting its business to be taxed for city and county purposes, the said Commonwealth of Kentucky agreed and contracted with this plaintiff that this plaintiff, The Farmers' Bank of Kentucky, and its shares of capital stock should be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of the bank.

It states that ever since its acceptance of said "Hewitt act" as aforesaid, it has paid to the State of Kentucky the above taxes on all the shares of stock and all taxable surplus and profits in the proportions or rates as fixed and contemplated by the said
73 act and contract, and it has paid all the county and municipal taxes assessed against its real estate owned and used by said bank and its branches in conducting its business, until the 1st day of July, 1893, when it filed its report in accordance with the "Hewitt act" and tendered and offered to pay to said State of Kentucky, through its auditor of public accounts, whose duty it was to

receive the same, the sum of $7,747.36, it being the full amount of the tax for which the plaintiff was liable for the year 1893, the same being the only remaining unpaid tax against the plaintiff, and the State of Kentucky, by its auditor of public accounts, whose duty it was to receive the same, refused to accept said sum of $7,747.36 in full payment of all tax against plaintiff, excepting its real estate, which it has paid as required by law. That it is now and always has been ready and willing and able to continue to pay the said tax as provided by said "Hewitt act," and to fully comply with its agreement, in every particular, under said act.

It states that it also tendered to said auditor of public accounts in full of its tax of every character forty-nine hundred and fifty-seven dollars, it being fifty cents on each of its shares of capital stock as provided by its charter, which the said auditor declined to receive, upon the ground that the charter provision of plaintiff with reference to taxation was not in force. The plaintiff now says and submits that under its said contract with the State of Kentucky it is not liable to the payment of any greater, or higher, or with other rate of tax, State, county or municipal, than that fixed under its said contract during the period of its existence as a corporation.

It states that its said contract with the State of Kentucky is in full force, and is irrepealable during the corporate existence of said bank plaintiff, so long as said bank continues to observe the same, and also that under said agreement said bank, and the shares of stock therein, and the property of said bank, excepting its banking-house, are exempt from both county and municipal taxation.

The plaintiff states that the General Assembly of the Commonwealth of Kentucky, by an act entitled "Revenue and taxation," chapter 103, which became a law on November 11, 1892, enacted in article 1, section 2, that all real and personal estate within the State of Kentucky, and all personal estate of persons residing within such State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property which shall be considered and estimated in fixing the value of corporate franchises, shall be subject to taxation, unless the same shall be exempt from taxation by the State constitution, and in the third section thereof, that the State of Kentucky, and each county, incorporated city, town and taxing district shall have a lien on all other property of each person or corporation owing the same for the taxes due by them respectively.

The plaintiff states and submits that, if such act was intended as defendants claim, by the said legislature of Kentucky to
74 apply to and include this plaintiff, or the shares of stock held by its stockholders, or the stock therein, or any of its property, the same is in direct conflict with the said agreement and contract made between this plaintiff and the State of Kentucky, and as to the plaintiff and said stockholders and plaintiff's property, the last act mentioned is inoperative and void, during the corporate existence of the said plaintiff, The Farmers' Bank of Kentucky; and the plaintiff further states and submits that the said act of November 11, 1892, in so far as it conflicts with the aforementioned

agreement or contract, impairs the obligations of said contract, and is unconstitutional and void.

Plaintiff further states and submits, that if it should be held by the court, that the act of Nov. 11, 1892, operated as a repeal of the said "Hewitt" law of 1886, and as a repudiation by the State of Kentucky of its said contract, or a withdrawing from the same; then the original charter of this plaintiff is now in full force and effect and the plaintiff is restored thereby, to all of its vested rights under its original charter, among which is the exemption of plaintiff's property and its stock from any other or greater tax than that specifically designed by its charter, to wit fifty cents on each one hundred dollars of its capital stock in full of all bonus or tax.

The plaintiff states that on the — day of November, 1882, it filed a petition in the Franklin county pleas court against The Franklin County Court and one against The Board of Councilmen of the City of Frankfort, etc., in which it sets forth the provisions of said section 15 of the charter and its amendments and claimed that under its charter and amendments the State of Kentucky agreed that plaintiff should pay to its treasurer fifty cents on each one hundred dollars of stock held and paid for by plaintiff in full of all tax or bonus, and ask for an injunction against the said county of Franklin, enjoining it from collecting any tax whatever from this plaintiff, the said county having attempted to levy a tax on plaintiff's property for county purposes. That on the — of May, 1884, the said Franklin common pleas court upon final trial of said case, after all the issues were made, decided that the said charter of this plaintiff granted by the State of Kentucky and accepted by plaintiff, constituted a binding and inviolable contract by which the plaintiff was to pay into the treasury of Kentucky annually fifty cents on each one hundred dollars of stock held and paid for by plaintiff in full of all tax or bonus and that plaintiff could not be taxed for any county or municipal purposes whatever, and perpetuated said injunction asked for.

Said judgment and the record now on file in this honorable court, is referred to as part hereof. That said case was appealed to the Kentucky court of appeals, together with the case of The President and Directors of Branch Bank of Kentucky *vs.* said Franklin County and The Deposit Bank of Frankfort *vs.* Said County and the
75 said Bank *vs.* The City of Frankfort, and the said judgment was affirmed by the said Kentucky court of appeals by an opinion rendered by said court of appeals on the 5th day of June, 1888, and reported in volume 87, Kentucky Reports, on page 370. Said opinion is referred to as part hereof; and the plaintiff now pleads and relies upon said judgment of the Franklin common pleas court, and the opinions of said appellate court and the records in said suits.

The Farmers' Bank of Kentucky *vs.* Franklin County Court, and Farmers' Bank of Kentucky *vs.* The City of Frankfort, &c., as *res adjudicata* of any claim to tax plaintiff's property for county or municipal purposes, and in bar of any right of defendants or any other person or corporation to tax plaintiff's property or its franchise for any purpose whatever.

The plaintiff states that the defendant, The County of Franklin, is unlawfully and without any right attempting to subject the plaintiff and its capital stock and its other property to the payment of certain county taxes claimed by the defendant, The County of Franklin, as owing to it from this plaintiff, and certain penalties for the non-payment of said tax so claimed by the defendant.

The plaintiff states that the defendant, R. D. Armstrong, is the sheriff of Franklin county, and as such the collector of taxes, and as said collector of taxes, he has demanded of this plaintiff ($2,810.20) twenty-eight hundred and ten dollars and twenty cents for said taxes for 1893, so claimed by the county, and $168 as a penalty for not heretofore paying them to him, which taxes and penalty the plaintiff has refused to pay, and the plaintiff states that the defendant, The County of Franklin, through said sheriff, and the said sheriff, the defendant, R. D. Armstrong, have threatened, and are now threatening, to levy upon and sell the banking-house and other property of the plaintiff, in order to pay and satisfy said taxes and penalty, and unless restrained by law, they will proceed to carry out said threat, and sell plaintiff's property; and if an injunction, as hereinafter asked, is not immediately granted, the plaintiff will suffer and sustain great and irreparable injury. The plaintiff states that it does not owe the county of Franklin the sum so claimed for taxes or any part thereof on any property of plaintiff's for the year 1893, or any other year, and that the defendant, Armstrong, has no legal right to levy on or sell any of plaintiff's property, but unless enjoined and restrained, he will do so, and carry out his said threats, to the great and irreparable injury of the plaintiff. Plaintiff is without adequate remedy at law, and says that no injunction had been refused by the court, by any circuit judge, or by any one else, in regard to the matter herein, wherefore the plaintiff prays that the defendants be enjoined and restrained from collecting from the plaintiff the taxes and penalties above mentioned, or any part thereof, and from levying upon or selling the banking-house or any other property of plaintiff's for said taxes or penalty.

76 That plaintiff's rights under the said contract with the State of Kentucky, and all of its above-vested rights under its charter, be protected and held inviolable by this honorable court, and for all other proper relief, both general and special, as the nature of the case may require.

JOHN W. RODMAN,
Attorney for Farmers' Bank of Kentucky.

Thomas Rodman says that he is the president of the Farmers' Bank of Kentucky, and that he believes the foregoing statements are true.

THOMAS RODMAN.

Sworn to and subscribed before me this 15th day of December, 1893.

HARRY G. RODMAN,
Examiner for Franklin County, Kentucky.

The following is Exhibit "A" referred to, viz:

STATE OF KENTUCKY:

Office auditor of public accounts, Frankfort.

(Copy.)

FARMERS' BANK OF KENTUCKY,
FRANKFORT, *December* 6, 1887.

At an adjourned meeting of the stockholders of the Farmers' Bank of Kentucky held in their banking-house in the city of Frankfort on Tuesday, the 6th day of December, 1887, a majority in interest of a quorum of said stockholders being present, it was resolved that the consent of said bank be and is hereby given to the levying and payment of the tax as provided in and by article II, chapter 1233, of "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and said bank hereby waives and releases all right under its charter to a different mode or a smaller rate of taxation.

Which order and consent of the stockholders was ordered to be certified to the governor as required by said act.

In testimony whereof the signature of the president and the corporate seal of the bank are hereto attached the date above written.

THOMAS RODMAN, *President.*

Attest: GRANT GREEN, *Cashier.*

[SEAL.]

A copy.
Attest: VIRGIL HEWITT,
Assistant and Acting Auditor.

77 Whereupon the following injunction bond was executed, to wit:

Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY
versus
FRANKLIN COUNTY, KENTUCKY, &C. } Bond.

We undertake that the plaintiff, The Farmers' Bank of Kentucky, shall pay to the defendant, Franklin County, Ky., such damages as they may sustain if it be finally decided the injunction ought not to have been granted.

December 22, 1893.

FARMERS' BANK OF KENTUCKY,
By THOMAS RODMAN, *President.*
THOMAS RODMAN.

Attest: THOS. B. FORD, *C. F. C. C.*,
By C. E. JAMES, *D. C.*

Whereupon the following order of injunction was issued, to wit:

Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY
vs.
FRANKLIN COUNTY, &c. } Order of Injunction.

The Commonwealth of Kentucky to Franklin County, Kentucky, and R. D. Armstrong, sheriff of Franklin county, Kentucky:

You and each of you are hereby enjoined and restrained from collecting from the plaintiff the taxes and the penalties above mentioned (viz. $2,810.20 for said taxes for 1893, so claimed by the county, and $168.00 as a penalty for not heretofore paying them) or any part thereof, and from levying upon or selling the banking-house or any other property of plaintiffs for taxes or penalty.

Witness Thomas B. Ford, clerk of said court, this 22d December, 1893.

THOMAS B. FORD, *C. F. C. C.*,
By C. E. JAMES, *D. C.*

Endorsed.

Executed by delivering a true copy of the within injunction to B. G. Williams, presiding judge of Franklin county, and R. D. Armstrong, sheriff of Franklin county, this 22d day of December, 1893.

W. S. DEHONEY, *C. of F. Co.*

78 Thereupon the following summons was issued, to wit:

The Commonwealth of Kentucky to the coroner of Franklin county, Greeting:

You are commanded to summon Franklin County, Kentucky, and R. D. Armstrong, sheriff of Franklin county, Kentucky, to answer on the 1st day of next January term of the Franklin circuit court a petition in equity filed against them in said court by Farmers' Bank of Kentucky, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the 1st day of the next January term of said court.

Witness, Thomas B. Ford, clerk of the said court, this 22d day of December, 1893.

THOMAS B. FORD, *Clerk*,
By C. E. JAMES, *D. C.*

Endorsed.

Executed by delivering a true copy of the within summons to B. G. Williams, presiding judge of Franklin county, and R. D. Armstrong, sheriff of Franklin county, this 22d day of December, 1893.

W. S. DEHONEY, *C. of F. Co.*

Afterwards, at a court held on the 27th day of January, 1894, the following judgment was rendered herein, to wit:

FARMERS' BANK OF KENTUCKY
vs.
R. D. ARMSTRONG, &c.

The plaintiff filed its amended petition herein, to which the defendants demurred; said demurrer to the petition as amended was sustained, to which ruling the plaintiff excepts, and declining to amend further, the court filed an opinion herein, and it is adjudged that the plaintiff's petition be dismissed and that defendants recover of plaintiff their costs herein.

To all of which plaintiff excepts, and prays an appeal to the court of appeals, which is granted.

Said amended petition is as follows, to wit:

Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
FRANKLIN COUNTY, &c., Defendants.
Amended Petition.

The plaintiff amends its petition by adding thereto and saying, that before the institution of this suit, to wit, on the 22nd day
79 of February, 1893, the defendant, R. D. Armstrong, being then and there the duly elected, qualified and acting sheriff of Franklin county, filed in the office of the clerk of the Franklin county court a report stating that plaintiff had been delinquent in failing to list for taxation at the then preceding assessment, that is, the assessment upon which the taxes for the year 1893 were to be paid, its notes, bonds, choses in action and other property, alleged to have amounted to $450,000.00, that thereupon a summons was issued commanding plaintiff to appear at the then ensuing term of the county court of said county and show cause, if any it could, why its property aforesaid should not be listed at the amounts aforesaid; that thereafter, to wit, on the 5th day of May, 1893, plaintiff did appear and file its answer and response, showing that it was not required by law to give in to the assessor its property for taxation, and that it had reported to the auditor as required by law, and said court held and adjudged that plaintiff was not delinquent as to any of its property or assets, and dismissed the said proceeding at the cost of the county; that thereupon the County of Franklin, as relator, made and perfected and appealed to this court from said order, and said appeal came on for hearing on September 28, 1893; at its September term, a judgment was duly rendered dismissing the said proceeding and giving plaintiff a judgment for costs against Franklin County, to which judgment the said county excepted and prayed an appeal to the court of appeals, which was granted, and the plaintiff in said proceeding and the defendant in this action, Franklin County, has filed a transcript of the record of said proceeding in the

clerk's office of the court of appeals, and is in said court prosecuting its said appeal. Wherefore plaintiff prays as in its petition.

JOHN W. RODMAN,
Attorney for Plaintiff.

Said opinion of the court is as follows, to wit:

This is a suit to enjoin the collection of county taxes levied under the provisions of the new revenue act, which became a law November 11, 1892.

The petition sets out at length a charter of the bank, the amendments thereto and the decisions of the court of appeals, wherein it is held that the provisions of the original and amended charter, created and constituted an irrevocable contract, from which the State could not withdraw or recede without the consent of the bank. That the bank had such a contract with the State from the time it was chartered in 1834 to the time it accepted the provisions of the revenue law of 1886, known as the Hewitt bill, can hardly be questioned in the light of the adjudication touching the chartered rights and privileges of this and like institutions.

In 1887 the plaintiff accepted the provisions of the Hewitt law in the manner prescribed therein, and it alleges that this acceptance made a contract with the State of the same binding force
80 and validity, although different in terms, as the contract it had under its charter, and that the effort of the State or any of its subdivisions to collect any other tax than that mentioned in the act of 1886 is in violation of the provisions of the constitution of the State and the United States. To the petition the defendant enters a general demurrer; it therefore devolves on this court to construe article 2 of the act of 1886, and in like manner pass upon the validity of the new revenue act of 1892.

Section 1 of article 2 of the Hewitt bill provides that each share of stock equal to $100 shall be taxed 75 cents, and that all surplus exceeding ten per cent. of the capital stock shall be assessed at the same rate as real estate is assessed, and that the taxes on these shares and surplus shall be in full of all tax, State, county and municipal. Section 4 of the same article provides how the banks "may give consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all rights under the acts of Congress, and under the charters of the State banks, to a different mode or smaller rate of taxation," "and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

The language of these two sections is strong, and seems to embody all the essential qualities necessary to constitute a valid contract between the banks and the State during the corporate existence of the banks accepting its provisions, and it is equally explicit in that only the tax on the shares of stock and the surplus therein defined shall be levied and collected.

It is contended, however, on the part of the defendants, that sec-

tions 6 and 7 of the same article place certain limitations upon the provisions just above recited, and that the State intended to reserve and did reserve to itself the right and power to amend, repeal, modify and enlarge the scope and meaning of the terms and conditions imposed by sections 1 and 4. Section 6 is that the act under consideration shall be subject to the provisions of what is known as the act of 1856, the language of which is "that all charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." Section 7 provides that in case any bank refuses to pay the tax imposed under this act (Hewitt bill), it shall be taxed for State, county and municipal purposes as the taxable property in the hands of individuals; and it also provides "that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned or used by said banks and corporations for conducting their business, but the same may be taxed for county and municipal purposes, as other real estate is taxed."

81 This is indeed a confused and contradictory statute; the language of one section indicates that in case the bank pays the tax it shall be exempt from all other taxation during the corporate existence of the bank, while another section provides that this exemption shall be only during the pleasure and will of the legislature. One section says that if the bank will pay the seventy-five cents tax on each $100 share of its stock and the tax on its surplus, it shall be exempt from all other tax whatsoever, while another section says its real estate "may be taxed for county and municipal purposes," yet its real estate is as much represented by its shares of stock as any other asset of the bank.

Much has been appropriately said about the time and circumstances surrounding the passage of the Hewitt bill; that it was an effort on the part of the State to adopt an uniform system of taxation for this class of property; that the State was sadly in need of the revenue which the increased tax of twenty-five cents per share of stock would yield; that the banks which had contract rights under their charters were willing to surrender them and be placed on the same footing as those which had none, but that in accepting the provisions of the Hewitt bill they believed they were securing another contract of as binding force as the one surrendered, and that the State cannot afford to practice bad faith by making promises she did not intend to keep.

It is further said, with equal force, that if the banks are compelled to pay taxes as required by the present revenue law the equality of taxation among banks will be destroyed; that certain county and municipal taxes will amount almost to the earnings of the capital stock of the banks in those localities; that bank capital receives but little if any benefit from county or municipal governments, while other classes of property receive many other benefits which the banks do not receive. On the other hand, this court cannot

ignore the recent political history of the State which imposed upon the legislature the necessity of enacting a law of which the plaintiff now complains.

When the new constitution was being discussed before the people for the adoption or rejection, none of its provisions were more clearly defined or understood than those relating to taxation, and many bank officers and stockholders were earnest advocates for its adoption. And it is a fact that every banking community voted for the adoption of the new constitution, and those communities having the greatest number of banks gave, therefore, the largest majorities.

In view of these facts it can hardly be contended that the holders of bank stock, especially those who favored the adoption of the new constitution, believed that they held an irrevocable contract under the Hewitt bill.

But it is contended on the part of the plaintiff that section 6 of article 2 of the Hewitt bill was not intended to apply to sections 1 and 4 of the same article—that it has no more significance
82 than if it were placed in article 1 or article 12. If such be the case it ought to go a long ways towards maintaining the position that the terms of article 2 constituted a contract with the banks. In no other article of the bill, however, is reference made to the act of 1856, and in ascertaining the intention of the legislature, the courts will be governed not only by the language of the act, the position which one section thereof bears to the other—the purpose for which the law was adopted—but also by the history of the bill as contained in the journals kept by the two houses of the General Assembly. The journals of the senate and house of representatives show that the Hewitt bill, which contains twelve articles, was considered, more or less, article by article, and that article 2 was considered by each house as if it constituted a separate act in itself. Efforts were made to exempt this article from the act of 1856, and without success. Failing in this, provision was attempted to be made that the act of 1856 should not apply to the provisions of article 2 until after the expiration of ten years, and this amendment was likewise defeated. The position of section 6 in article 2, together with the history of its enactment as shown by the journals of the two houses, clearly indicate the legislative intent.

After the passage of the Hewitt bill the plaintiff had the option to accept or reject its provisions. It elected to surrender its contract under its charter and accept those provisions, and, having so elected, this court is of the opinion that it cannot now be heard to say that the repeal of the Hewitt bill restored it to its original status under its charter.

It is ordered that the demurrer to the plaintiff's petition as amended be sustained, to which ruling of the court the plaintiff excepts, and the plaintiff being given leave, but declining to plead further, it is ordered that the petition be dismissed and that the defendants recover their costs herein expended, and to all of which the plaintiff objects and excepts, and prays an appeal to the court of appeals, which is granted.

STATE OF KENTUCKY, } *sct:*
Franklin County, }

I, Thomas B. Ford, clerk of the Franklin circuit court, do certify that the foregoing 26 pages contain a true, perfect and complete transcript of all the pleadings, orders and proceedings in the case mentioned therein, taken from the records of my said office.

Given under my hand as clerk aforesaid, this, the 23d day of February, 1894.

THOMAS B. FORD, *Clerk.*

83 Upon which transcript was entered the following statement:

Kentucky Court of Appeals.

FARMERS' BANK OF KENTUCKY, Appellant,
vs.
THE COUNTY OF FRANKLIN and R. D. ARMSTRONG, Sheriff of Franklin County, Appellees.

The judgment appealed from was rendered at the January term, 1894, of the Franklin circuit court, and is on page 18 of record. An appeal was granted by the court below.

J. W. RODMAN,
Attorney for Appellant.

Afterwards, at a court of appeals begun and held in and for the Commonwealth of Kentucky at the capitol in the city of Frankfort, on the 4th day of October, A. D. 1894, the following order was entered:

FARMERS' BANK OF KENTUCKY
vs.
COUNTY OF FRANKLIN, &c. } Franklin.

Came the parties by counsel and on their motion and by consent it is ordered that this cause be docketed.

The appellant moved the court to advance this case, together with the case of Farmers' Bank of Kentucky *vs.* City of Frankfort, &c., and the case of Farmers' Bank of Kentucky *vs.* City of Henderson, and hear them with the case of Commonwealth, &c., *vs.* Farmers' Bank of Kentucky, which was continued for oral argument at the last term of this court, and the case is submitted on the motion.

Afterwards, at a court of appeals held as aforesaid on October 23, A. D. 1894, the following order was entered:

FARMERS' BANK OF KENTUCKY *vs.* FRANKLIN COUNTY, &c.	Franklin.
SAME *vs.* CITY OF FRANKFORT, &c.	Franklin.
SAME *vs.* CITY OF HENDERSON.	Henderson.

The court being advised, it is ordered that these causes be advanced and set for hearing with the case of The Commonwealth, &c., *vs.* Farmers' Bank of Kentucky, on the argument docket for the next term of this court.

Afterwards, at a court of appeals held as aforesaid, the following order was entered:

COMMONWEALTH *vs.* FARMERS' BANK OF KENTUCKY.	Franklin.
FARMERS' BANK OF KENTUCKY *vs.* COUNTY OF FRANKLIN.	Franklin.
SAME *vs.* CITY OF FRANKFORT.	Franklin.
SAME *vs.* CITY OF HENDERSON.	Franklin.

By agreement of all the parties, and on their motion, it is ordered that these seventeen cases be heard together, and said causes coming on to be heard, were argued by A. P. Humphrey for
84 the banks and Ira Julian for the Commonwealth, counties and cities and laid over until tomorrow for further hearing.

Afterwards, on the 5th day of March, 1895, the following order was entered herein:

These causes again coming on to be heard, were argued by D. W. Lindsey for the banks, and W. McD. Shaw and Hugh Rodman for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, on March 7, 1895, this order was entered:

These causes again coming on to be heard, were argued by Wm. Goebel for the banks, and H. C. Barker for the counties and cities, and laid over for further hearing on tomorrow.

And afterwards, on March 8, 1895, this order was entered:

These causes again coming on to be heard, were argued by John W. Rodman and T. L. Edelen for the banks and laid over for further hearing on tomorrow.

And afterwards, on March 9, 1895, this order was entered:

These causes again coming on to be heard were argued by James P. Helm for the banks and laid over for further hearing on next Tuesday.

And afterwards, on March 12, 1895, this order was entered:

These causes again coming on to be heard, were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid, on the 1st day of June, 1895, the following judgment was entered:

FARMERS' BANK OF KENTUCKY, Appellant,
versus
FRANKLIN COUNTY, &c., Appellees.
} Appeal from Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and the cause remanded for further proceedings, consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appellant recover of the appellees its costs herein expended.

Judges Lewis, Guffy and Paynter dissenting. Dissenting opinion delivered by Judge Paynter.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing twenty-eight pages and this page contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein The Farmers' Bank of Kentucky is appellant and Franklin County, etc., are appellees,
85 except the opinions of the court, which are copied in the record in case of Farmers' Bank of Kentucky *vs.* City of Frankfort, etc., and except the proceedings upon and the petition for a rehearing, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Ky., this 11th day of May, A. D. 1897.

ABRAM ADDAMS,
Clerk — the Court of Appeals.

[SEAL.]

Exhibit "E" reads as fololws:

Franklin Circuit Court, January 21, 1896.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
FRANKLIN COUNTY COURT, &c., Defendants. } Judgment.

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being sufficiently advised, it is adjudged that article 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886 (General Stats., chapter 92, art. 2), and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and of the act of November 11, 1892 (act 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax *the plaintiff's property, rights of property or franchise, except to assess and tax*, for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now hereby made perpetual, and the defendant be, and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any
86 taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes on its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

STATE OF KENTUCKY,
County of Franklin, } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing is a true copy of the judgment in the above-styled case.

Witness my hand as clerk of said court, this May 7th, 1897.

THOS. B. FORD,
[SEAL.] *Clerk Franklin Circuit Court,*
By J. R. ELLIOT, *D. C.*

Exhibit "F" reads as follows:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol of the city of Frankfort, on the first day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting:

THE FARMERS' BANK OF KENTUCKY, Appellant,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and James Hallnan, Tax Collector for the City of Frankfort, Appellees.

Be it remembered that heretofore, to-wit, on the 4th day of October, A. D. 1894, the appellant by its counsel filed in the clerk's office of the clerk of the court of appeals a transcript of a record in words and figures following, to-wit:

Pleas before the honorable judge of the Franklin circuit court, at the court-house, at Frankfort, Kentucky.

Be it remembered that on the 6th day of September, 1894, the Farmers' Bank of Kentucky, filed in the clerk's office of said court its petition herein, which is in words and figures as follows:

Franklin Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus.
THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort, and James Hallnan, Tax Collector for the City of Frankfort, Defendants. } Petition in Equity.

The plaintiff, The Farmers' Bank of Kentucky, states that it is a corporation and as such has the right to sue and be sued, plead and be impleaded, contract and be contracted with.

87 That it was incorporated and chartered by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Farmers' Bank of Kentucky," approved February 16th, 1850, which act, together with all the amendments thereto, are referred to as part hereof, and by reason of said act of incorporation it undertook and agreed to perform certain public duties therein mentioned, such as carrying on the banking business, loaning money, discounting notes and bills of exchange, &c., and it states that in accordance with said provisions of said charter it has fully performed all of its duties to the public and complied with its contract with the State.

That its principal bank and the principal place of business is in Frankfort, Kentucky. That one of its branches is in the city of Henderson, Kentucky, and one in Georgetown, Kentucky, all of which are in existence and operation.

The plaintiff states that by the terms of its said charter and in consideration of its organization and acceptance of the same, it was authorized and bound by the cashier of its principal bank on the first day of July of each and every year thereafter during the existence of its charter to pay to the treasurer of Kentucky fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus. Said provision -s number 15 of said act of 1850, chartering this plaintiff, and reads as follows: "It shall be the duty of the cashier of the principal bank on the 1st day of July, 1851, and on the 1st day of July in each succeeding year during the continuance of this charter to pay into the treasury of the Commonwealth fifty cents on each one hundred dollars of stock held and paid for by said bank, which shall be in full of all tax or bonus: *Provided*, that no tax shall be paid until said bank goes into operation; and *provided further*, that the tax or bonus hereby proposed to be imposed on each share is set apart and forever dedicated to the cause of education on the common-school system, and whenever the same or any part thereof shall be directed otherwise by legislative enactment said bank shall be exonerated from the payment of any tax or bonus whatever."

The plaintiff states that said contract and stipulation as contained in said charter, fixing the said rate of taxation of plaintiff's property, conduced to an acceptance by plaintiff of said charter, and the plaintiff was thereby induced to and did organize under said charter in a short time after its passage by the legislature, and the said contract and the provision in regard to taxation has been relied on by plaintiff and has conduced to the maintenance and operation of plaintiff's bank and its said branches. That by an act entitled "An act extending the charter of the Farmers' Bank of Kentucky," approved March 10, 1876, the legislature of Kentucky extended the plaintiff's charter for a period of twenty-five years from the
88 time of the expiration of its original charter, to wit, twenty-five years from the first day of May, 1880; said act is referred to as part hereof and reads as follows:

"That the charter of the Farmers' Bank of Kentucky, as amended, be extended for the period of twenty-five (25) years from the termination of its charter as therein fixed: *Provided*, that said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act; and, *provided further*, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." Acts 1886, volume 2, page 324. Said acts are referred to as parts hereof.

That in accordance with the provisions of its charter and the contract therein contained between the plaintiff and the Commonwealth of Kentucky, it paid to the treasurer of the Commonwealth of Kentucky on the first day of July in each year ever since its

organization, and up to the 6th day of December, 1887, an annual tax of fifty (50) cents on each hundred dollars of stock held and paid for in said bank, which payments, as plaintiff is advised, were in full of all tax or bonus, and the same was received and accepted by the Commonwealth of Kentucky in full of all tax or bonus against this plaintiff.

The plaintiff states that soon after the adoption of said original act of incorporation, and in conformity with its terms and provisions, it organized and established said bank, which has ever since been and still is, in regular operation, doing the business authorized by its said charter.

Plaintiff states that a general statute passed by the said legislature of Kentucky, approved May 17, 1886, chapter 92 of the General Statutes of Kentucky, commonly called the Hewitt act, article 2, section 1, of said act, provided and reads as follows: "Shares of stock in national and State banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereon equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition pay upon each one hundred dollars of so much of their surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, and the same rate of taxation that is now assessed upon real estate, which shall be in full of all tax, State, county and municipal."

That section four (4) of said act reads as follows:

"That each of said banks, institutions and corporations by its proper corporate authority, with the consent of a majority in interest of a quorum of stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided and to waive and release all rights under the act of Congress, or under the charters of the State banks, to a different mode or a smaller rate of taxation, which
89 consent or agreement to and with the State of Kentucky, shall be evidence by writing under the seal of such bank and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration therefor, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of said bank."

Under the seventh section of the same article it is provided that nothing in said act contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but that the same may be taxed for county and municipal purposes as other real estate is taxed.

That in the fifth section of said act it is also provided that said banks may take the proceedings authorized by said fourth section of said act at any time until the meeting of the next General Assembly, provided they pay the tax aforesaid.

Now, the plaintiff states that previous to the next session of the General Assembly of the Commonwealth of Kentucky after the passage *to* said act, and within the time fixed by said act for an acceptance of the proposition of the State of Kentucky, to wit, on the 6th day of December, 1887, the plaintiff, The Farmers' Bank of Kentucky, at an adjourned meeting of a majority in interest of a quorum of the stockholders of said bank, did consent and agree to and with the Commonwealth of Kentucky, to the levying and payment of said tax as provided in and by said article II, chapter 1233, of "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and waived and released all rights under its charter to a different mode or smaller rate of taxation, which agreement with the State of Kentucky was evidenced by writing under the seal of plaintiff and delivered to the governor of the Commonwealth of Kentucky, as provided by said act. A certified copy of said agreement is filed herewith as part hereof marked "A," and the plaintiff in all respects complied with all the requirements of said act.

The plaintiff further states that in consideration of said agreement to pay said additional tax of twenty-five (25) cents on each one hundred dollars of its capital stock, and to pay the same rate of tax that might be assessed on real estate in Kentucky, on so much of its surplus as exceeded an amount equal to ten (10) per cent. of its capital stock, and to permit its real estate and buildings owned or used by it for conducting its business, to be taxed for city and county purposes, the said Commonwealth of Kentucky agreed and contracted with this plaintiff that this plaintiff, The Farmers' Bank of Kentucky, and its shares of capital stock, should be exempt from all other taxation whatever so long as said tax shall be paid during the corporate existence of said bank. It states that ever since its acceptance of said "Hewitt act," as aforesaid, it has made re-
90 ports, as required by said act, and paid to the State of Kentucky the above taxes on all the shares of stock and all taxable surplus and profits in the proportion or rates as fixed and contemplated by said act and contract, and it has paid all the county and municipal taxes assessed against its real estate, owned and used by said bank and its branches in conducting its business, until the 1st day of July, 1893. It states that on the 1st day of July in each of the years 1893 and 1894 the plaintiff's cashier made, as he had regularly done for years before, written reports to the auditor of public accounts, verified by his oath, as required by law, of the true amount of the capital stock of its bank and of its surplus, undivided profits and accumulations. It states that on the 1st day of July, 1893, it produced in lawful legal-tender money of the United States the amount necessary to pay the State of Kentucky the taxes due from it under said agreement, to wit, the sum of $7,747.36, the maximum tax for that year under said Hewitt act, and tendered and offered to pay the same into the treasury in full of taxes due from it under said agreement, and demanded of the auditor of public accounts a permit authorizing it to pay said amount into the

treasury in full of said taxes, but said tender and offer was refused by said officer.

It then, in like manner, produced to said officer the amount of $4,947 necessary to pay all the taxes due from it under the terms of its charter extended as aforesaid, it being the maximum tax for that year required by its charter, to wit, 50 cents on each $100 of stock held and paid for in said bank, and offered to pay the same into the treasury in full of all taxes due from it, and demanded of said officer a permit authorizing it to pay said amount into the treasury in full of said taxes, but its said tender and offer was refused by the auditor of public accounts. It then, under protest, and to prevent suits, and prosecutions against it, on demand of the auditor of public accounts, on said July 1, 1893, paid into the treasury the sum of $4,908.40, which was demanded of it by the auditor as the amount claimed by that officer to be due from it under and by virtue of an act of the legislature, entitled "An act relating to revenue and taxation," which became a law November 11, 1892 (chapter 103, Acts 1891, '2, '3).

It further states that on the 1st day of July, 1894, it tendered $7,747.37 to the auditor of public accounts in full of all taxes, under said agreement under the Hewitt act, for 1894, and he refused to receive the same, or to issue his warrant on the treasurer authorizing him to receive it. It also tendered him $4,947.00, in full of all its taxes as provided by its charter, for 1894, it being the maximum tax for that year required by its charter, and he declined to receive the same, or to issue his warrant upon the treasurer authorizing him to receive it, and, under protest, it paid into the treasury of the State of Kentucky, through its auditor and treasurer, $4,851.97, the amount which was demanded of it by said auditor to be due from it under the said act entitled "An act relating to
91 revenue and taxation," which became a law November 11, 1892. The said offers, tenders and demands were on each of said occasions refused and rejected by the said auditor under the claim by him that both the State tax provisions of plaintiff's charter and said act approved May 17, 1886, had been superseded and repealed by the new constitution of the State of Kentucky and the act of November 11, 1892. The plaintiff protesting against the said constitution and said act as illegal in their application to the taxation of the plaintiff acceded to the auditor's demands, and under protest paid said sums. It has paid all the municipal and county tax on its tangible property claimed to — due under said Hewitt act for the years 1893 and 1894. The plaintiff now says and submits that under its said contract with the State of Kentucky, it is not liable to the payment of any greater or higher or other rate of tax, State county or municipal, than that fixed under its said contract during the period of its existence as a corporation. It states that its said contract with the State of Kentucky is in full force, and is irrepealable during the corporate existence of said bank, plaintiff, so long as said bank continues to observe the same, and also that under said agreement said bank, and the shares of stock therein, and the property of said bank, excepting the banking-house, are

exempt from both county and municipal taxation. The General Assembly of the Commonwealth of Kentucky, by an act entitled "revenue and taxation," chapter 103, which became a law on November 11, 1892, enacted in article 1, section 2, that all real and personal estate within the State of Kentucky, and all personal estate of persons residing within such State, and of all corporations organized under the laws of this State, whether the property be in or out of the State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises, shall be subject to taxation, unless the same shall be exempt from taxation by the State constitution, and in the third section thereof that the State of Kentucky and each county, incorporated city, town and taxing district shall have a lien on all other property of each person or corporation owing the same for the taxes due by them respectively.

The plaintiff states and submits that if such act was intended, as defendants claim, by the said legislature of Kentucky to apply to and include this plaintiff, or the shares of stock held by its stockholders, or the stock therein, or any of its property, the same is in direct conflict with the said agreement and contract made between this plantiff and the State of Kentucky, and as to the plaintiff and said stockholders and plaintiff's property, the last act mentioned is inoperative and void during the corporate existence of the said plaintiff, The Farmers' Bank of Kentucky, and the plaintiff states and submits that the said act of November 11, 1892, in so far as it conflicts with the aforementioned agreement of contract, impairs the obligation of said contract, and is unconstitutional and void.

Plaintiff further states and submits that if it should be held by the court that the act of November 11, 1892, operated as a
92 repeal of the "Hewitt act" of 1886 and as a repudiation by the State of Kentucky of its said contract, or a withdrawing from the same, then the original charter of this plaintiff is restored thereby to all its vested rights under its original charter, among which is the exemption of plaintiff's property and its stock from any other or greater tax than that specifically designated by its charter, to wit, fifty cents on each one hundred dollars of its capital stock in full of all bonus or tax.

The plaintiff states that on the — day of November, 1882, it filed a petition in the Franklin common pleas court against the Franklin county court and one against the defendant, The Board of Councilmen of the City of Frankfort, &c., in which it set forth the provisions of section 15 of the charter and its amendments, and claimed that under its charter and amendments the State of Kentucky agreed that the plaintiff should pay to its treasurer fifty cents on each one hundred dollars of stock held and paid for by plaintiff in full of all taxes or bonus, and asked for an injunction against the said city of Frankfort and county of Franklin, enjoining them from collecting any tax whatever from this plaintiff, the said city having attempted to levy a tax on plaintiff's property for city purposes. That on the — day of May, 1884, the said Franklin common pleas court, upon final trial of said cases, after all the issues

were made, decided that the charter granted by the State of Kentucky and accepted by the plaintiff, constituted a binding and inviolable contract by which the plaintiff was to pay into the treasury of Kentucky annually fifty cents on each one hundred dollars of stock held and paid for by the plaintiff in full of all tax or bonus and that plaintiff could not be taxed for any county or municipal purposes whatever, and perpetuated said injunction asked for. Said judgment and the record now on file in this honorable court is referred to as part hereof. That said case was appealed to the Kentucky court of appeals, together with the case of President and Directors of the Branch Bank of Kentucky *vs.* said Franklin County, and The Deposit Bank of Frankfort *vs.* said County, and said Bank *vs.* The City of Frankfort, and the said judgment was affirmed by the said Kentucky court of appeals on the 5th day of June, 1888, and reported in volume 87, Kentucky Reports, on page 370. Said opinion and record in said cases referred to as part hereof, and the plaintiff now pleads and relies upon said judgment of the Franklin common pleas court and the opinion of the said appellate court and the records in said suits, The Farmers' Bank of Kentucky *vs.* Franklin County Court, and Farmers' Bank of Kentucky *vs.* The City of Frankfort, &c., *res adjudicata* of any claim to tax plaintiff's property for county or municipal purposes, and in bar of any right of defendants, or any other person or corporation, to tax plaintiff's property or its franchise for any purpose whatever.

And plaintiff alleges that the said act of the legislature entitled "An act relating to revenue and taxation," which became a
93 law November 11, 1892 (chapter 103, acts 1891-'2-'3) and under the provisions of which the said board of valuation and assessment has attempted to assess the plaintiff; and the defendant, The Board of Councilmen of the City of Frankfort, has attempted to tax plaintiff for city purposes, and the defendant, James Hallnan, as tax collector is attemping to collect said tax, was and is in violation of and repugnant to the constitution of the State of Kentucky and the Constitution of these United States, and that by said act it is sought to impair the obligation of the contract between the plaintiff and the State of Kentucky created by and continued in force by its said charter of 1850 and the amendments thereto, and said acts of 1876 extending and continuing in force the same, and created and arising out of the said act of May 17, 1886 (commonly known as the Hewitt act), and the acts of the plaintiff in relation thereto hereinbefore fully set out.

By the terms of the act which went into effect November 11, 1892, entitled "An act relating to revenue and taxation," it is provided that all banks and other corporations, besides the taxes to the State treasury therein provided for, should also pay to the counties in which they may be located or doing business, taxes not only on all its tangible property located in such counties and cities, but also on the "franchise" of said corporation, which is a term used to describe all the other property and assets of said corporation; that said county and municipal taxation shall be at the same rate that other property is assessed or taxed. That when a corporation has officers or conducts

its business in more than one county of the State it is the duty of the State board of valuation and assessment, created by said act, to apportion to the several counties and cities in which the bank or corporation is located or conducting its business the part of the "franchise" of the bank or corporation which may be taxed in each of said counties and cities. By an act of the General Assembly, approved June 14, 1893, entitled "An act for the government of cities of the third class" (to which class the city of Frankfort, whose corporate name is the board of councilmen of the City of Frankfort, belongs) the cities of that class are authorized, so far as the legislature can confer such power, to assess annually, levy and collect taxes on all the property of said banks and corporations located in said cities, and also on such portions of the "franchise" of such banks or corporations as may, by the board of valuation and assessment, be assigned to such cities for local taxation.

By said act the common councils of said cities are authorized at their first meeting in April in each year to elect a collector of taxes, who, among other duties, is required "to list for taxation any property he may find has been omitted, and he shall report such lists to the city clerk, who shall indorse same on the tax book, and charge the collector therewith, and the collector shall have the same power to collect said lists as if they had been originally listed by the assessor."

94 And in pursuance of the power so granted the common council of the city of Frankfort did, at its first regular meeting in April, 1894, elect the defendant, James M. Hallnan, to the office of tax collector for the year 1894, and he has been since then and is now such collector.

Prior and up to the enactment of the said act of June 14, 1893, the city of Frankfort was a municipal corporation under the name aforesaid, having for its city charter an act of the General Assembly, approved March 6, 1869, entitled "An act to amend and reduce into one the several acts relating to the city of Frankfort," by the provisions of which the said city was authorized so far as the legislature could confer such powers, to assess annually, levy and collect taxes "on real estate within the limits of said city, and all bank stock, bridge stock, manufacturing stock or any other kind of stock, money, notes, or bonds of cities, towns, corporations, or State, choses in action, and all personal estate of every kind not exempt by law from execution, belonging to the citizens of the city of Frankfort, and any capital or other property belonging to any other corporation or citizen of any other place employed in said city." Under each of the acts of March 16, 1869, and June 14, 1893, it is required that the assessment of property for taxation shall be made as of the 10th day of January in each year. Each of the said acts of the General Assembly are referred to and made part of this petition.

The plaintiff states that said city of Frankfort did, in accordance with its charter, respectively, order in due form and at the proper time assessments for taxation for the years 1892-'3 and 1894 upon all the property provided by said charter respectively to be assessed; but it alleges that neither it, nor any part or portion of its property,

rights or franchises, is or was assessable or taxable in either of the years 1892–'3 or 1894 for city or any other purpose under the said act of November 11, 1892 (chapter 103 of the acts of 1891–'2–'3), nor for city purposes under either of said city charters or any law. But no assessment was made or attempted to be made against it for said city in either of said years nor at any time except as hereinafter stated.

But notwithstanding its non-liability for assessment for taxation, and especially for municipal or county purposes, the said board of valuation and appraisement provided for in section 1, article 3, chapter 103 of the acts of 1891–'2–'3 aforesaid, have, without warrant or authority, assumed to assess and value, and has assessed and valued plaintiff's franchise, which is, as before stated, a term used to describe all of the corporation property and assets other than its tangible property, for the tax years of 1893 and 1894, and to make apportionment thereof as aforesaid, the part thereof apportioned by reason of its said principal bank in Frankfort in the county of Franklin as taxable by said city and county, being for the year 1893 fixed and valued at $495,919.00 and for the year 1894 at $503,400.00 and the auditor, with like want of authority in law,
95 has certified the said valuation and apportionment for each of said years to the county clerk of Franklin county as liable for county and city taxation, and said clerk has delivered attested copies of the auditor's said certificate to the officers respectively charged with the collection of taxes for that county and city. And the defendant, James M. Hallnan, collector of taxes for said city for the year 1894, has, without warrant of authority in law and without notice to or the knowledge of this plaintiff, assumed to list, and has listed against plaintiff for taxation by said city as omitted property, and has reported such lists to the city clerk, who has endorsed same on the tax book as of and for the year 1892, property described as "notes, money, choses in action and other property of the value of $500,000.00" and as of and for the year 1893 property described as "notes, money, choses in action and other property of the value of $495,919.00" and as of and for the year 1894 property described as "notes, money, choses in action and other property of the value of $503,400.00." The plaintiff alleges that the property so attempted to be listed for taxation by the defendant, Hallnan, collector of taxes as aforesaid, was the intangible property in the hands of its said principal bank at Frankfort and was reported by plaintiff to the said "board of assessment and valuation," and was by said board fully estimated and covered in said board's assessment and valuation aforesaid of plaintiff's franchise for the years 1893 and 1894.

The plaintiff states that it was compelled, by the contract between it and the State, made by the said act of May 17, 1886, known as the "Hewitt bill," and its agreement to pay the tax as prescribed by the first section of the second article of the said act, in full of all tax, State, county and municipal, to pay, and it did pay into the State treasury on the 1st day July, 1892, the taxes prescribed by the said section, to wit, the sum of $7,760.30, in full of all tax or bonus

against plaintiff and its branches for the year 1892, which was so accepted by the State of Kentucky.

Yet the defendant, The City of Frankfort, is claiming and demanding for it under the pretended assessment of the defendant, Hallnan, collector as aforesaid for the said year 1892, as taxes due it, the sum of $6,250.00. And said city is claiming under said alleged assessment against it of $495,919.00 for 1893, as city taxes, the sum of $6,446.94, and under said assessment of $503,400.00 for 1894 the sum of $7,047.60, and $1,349.45 for penalties, and 10 per cent. interest on said alleged taxes for 1893 and 1894. And in addition, on the said alleged assessment and valuation of its "franchise," the county of Franklin and city of Henderson, and the city of Georgetown and counties of Henderson and Scott, are each claiming against plaintiff sums for county and city taxes, respectively, for the said years 1893 and 1894, which said several sums claimed each year for local taxes by said cities and counties, when added to the amount paid by plaintiff into the treasury as aforesaid for
96 each of those years, will aggregate an amount largely in excess of the amount that could be claimed of the plaintiff either under its charter or under the said act of May 17, 1886. It avers that it does not owe to the city of Frankfort, or the city of Henderson or Georgetown, or the county of Franklin, or Henderson, or Scott, or either of them, the said sums, respectively, or any part of either of said sums; that the defendant, James M. Hallnan, collector as aforesaid, had no power or authority under the charter of the city of Frankfort, or otherwise, to make the said alleged assessments or either of them; that the said "board of assessment and valuation" had no power or authority to make the said assessments and valuations of plaintiff's franchise or either of them; that the said charter of the city of Frankfort, and the said act entitled "An act relating to revenue and taxation," which became a law November 11, 1892, and each of them, in so far as they, or either of them, prescribe additional or different taxation of plaintiff or its property for the benefit of cities or counties, are repugnant to and in violation of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts, and were, and are, wholly void.

It alleges that the granting and acceptance of its charter and the acts extending and continuing the same, which were accepted and acted upon by it, constituted a contract between the State on the one part and this plaintiff and its stockholders on the other part, continuing during the legal existence of plaintiff's corporation, and that the State of Kentucky never had, and now has not, the right to *appeal*, alter or annul said agreement, or the rights conferred by said charter limiting the right of the State to impose a tax on plaintiff or its property without its consent.

The plaintiff further states that it did, in the manner and form hereinbefore stated, and upon the consideration recited in the first and fourth sections of the second article of the said act, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, give its consent to the levying of the tax

prescribed by the said first section of the second article of said act, and agreed to pay the same, and to waive and release its rights under its charter to a different mode or smaller rate of taxation than is in said first section provided. Such consent and waiver was made in good faith by it, and under the belief that the agreement so made would endure during its corporate existence. And it now submits that such is the true construction of said act, and that the proposition from the State contained in said act, and its acceptance by plaintiff in the manner and form stated, constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments and subdivisions. The judgment of the court is asked upon this submission; and if on final hearing it is adjudged that the said act of May 17, 1886, is still operative as the law regarding plaintiff's taxation, the plaintiff, having tendered full compliance with said law, is still ready and willing to pay to the State
97 treasury any balance due thereunder, and to still be bound by its assent to its terms. But if the said act and agreement be not binding on the State, and if it be held to be abrogated by the State, then the plaintiff insists that it is entitled to all its rights under its charter, extending as aforesaid, and that it cannot be taxed at a higher rate or in a different method than therein provided. Nevertheless, the plaintiff says that the defendants, The City of Frankfort and its tax collector, James M. Hallnan, are claiming that plaintiff is indebted to the said city in the sum of $6,250.00 as city taxes for said city, as aforesaid for the year 1892, and $6,446.94 as city taxes for said city, as aforesaid, for the year 1893, and $7,047.10 as city taxes for said city, as aforesaid, and $1,349.45 as penalty and interest on said taxes for 1893 and 1894, and the defendant, Hallnan, collector of taxes for said city, is threatening to, and is about to levy on and sell the plaintiff's property and real estate in the city of Frankfort; that he has already attempted to levy upon personal property belonging to the plaintiff, and it says that he will forthwith make said levy and proceed to sell said property to make the sums aforesaid claimed as taxes due said city, unless restrained by the order of this court, and that such levy and sale would result in putting a stain and cloud upon the plaintiff's title to its said property, and would produce great and irreparable injury and hardship to the plaintiff, and stop the business of its principal bank in Frankfort. That it is without adequate remedy at law. The said collector of taxes, unless restrained and enjoined, will proceed forthwith to make said levy, and advertise and sell such property. The injunction herein prayed for has never been applied for, or refused by any court, judge, or any one else.

Wherefore the plaintiff prays that the defendants and each of them be enjoined from making any levy or distraint on or selling any property of plaintiff for the said sums, or any of them, or any part of either of them, alleged to be due from the plaintiff as taxes to the city of Frankfort, or taking any other proceedings or means to collect or recover the same, and that the city of Frankfort be enjoined from assessing or attempting to assess, or from collecting or attempting to collect hereafter any tax upon the plaintiff, its

property or franchise, except upon its real estate used in conducting its business, for the purposes of said city. It prays that the said tax and said charters of said city, and the said act of November 11, 1892, be in their application to plaintiff adjudged illegal, unconstitutional and void. It prays for a temporary injunction to restrain the commission of said wrongs during the pendency of this action; that on final hearing said injunction be made perpetual, and that plaintiff be adjudged its costs and all relief, general or special, to which in law or equity it may be entitled.

JOHN W. RODMAN,
Attorney for Plaintiff.

98 Thomas Rodman says that he is the president of the Farmers' Bank of Kentucky, and that the foregoing statements are true, as he verily believes.

THOMAS RODMAN.

Sworn to and subscribed before me this 6th day of September, 1894.

JOHN A. BRISLAN,
[SEAL.] *Notary Public for Franklin County, Kentucky.*

EXHIBIT WITH PETITION.

FARMERS' BANK OF KENTUCKY, FRANKFORT, *Dec.* 6, 1887.

At an adjourned meeting of the stockholders of the Farmers' Bank of Kentucky held in their banking-house in the city of Frankfort on Tuesday, the 6th day of December, 1887, a majority in interest of a quorum of said stockholders being present, it was resolved that the consent of said bank be and is hereby given to the levying and payment of the tax as provided in and by article II, chapter 1233, of "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and said bank hereby waives and releases all right under its charter to a different mode or smaller rate of taxation.

Which order and consent of the stockholders was ordered to be certified to the governor as required by said act.

In testimony whereof the signature of the president and the corporate seal of the bank are hereto attached the date above written.

THOMAS RODMAN, *President.*

Attest:
[SEAL.] GRANT GREEN, *Cashier.*

A copy.
Attest: L. C. NORMAN,
Auditor of Public Accounts.

Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and James M. Hallnan, Collector of Taxes for the City of Frankfort, Defendants.
} Injunction Bond.

I undertake and am bound to the defendants, Board of Councilmen of the City of Frankfort, and James M. Hallnan, tax collector for the city of Frankfort, to pay to said defendants the damages they may sustain not exceeding the sum of twenty thousand dollars ($20,000), if it be finally decided that the order of injunction herein ought not to have been granted.

This September 6, 1894.

THOMAS RODMAN.

Attest: THOS. B. FORD,
Clerk Franklin Circuit Court,
By C. E. JAMES, *D. C.*

99 Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and James M. Hallnan, Collector of Taxes for the City of Frankfort, Defendants.
} Order of Injunction.

The defendants, Board of Councilmen of the City of Frankfort and James M. Hallnan, collector of taxes for the city of Frankfort, and each of them, are hereby enjoined and restrained from making any levy or distraints, or selling any property of the plaintiff for the sums, or any part of them, or any part of either of them, alleged to be claimed by the defendant Board of Councilmen of the City of Frankfort to be due it from the plaintiff for taxes for the years 1892, 1893 and 1894, or taking any other proceedings or means to collect or recover the same, during the pendency of this action, and the Board of Councilmen of the City of Frankfort is enjoined from assessing or attempting to assess, or from collecting or attempting to collect, any tax for the purpose of said city upon the plaintiff, its property or franchise, except upon its real estate in said city used in conducting its business, during the pendency of this action and until this case shall have been heard by the chancellor of this court.

This September 6, 1894.

THOS. B. FORD,
Clerk Franklin Circuit Court,
By C. E. JAMES, *D. C.*

Franklin Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and James M. Hallnan, Tax Collector of the City of Frankfort, Defendants. } Order of Injunction.

Upon the application and motion of the plaintiff for an injunction, as prayed for in the petition, this day came the plaintiff and the defendants by their respective attorneys, and the defendants entered their appearance to this application and motion, and waived any and all notice that might be required, and gave consent that the said application and motion may now be acted upon; and it being made to appear to my satisfaction that the judge of the Franklin circuit court is now absent from Franklin county, and that great and irreparable injury will result to the plaintiff if an injunction be not immediately granted, upon consideration of the petition herein the clerk of the Franklin circuit court is directed to issue an order of injunction agreeable to the prayer of the
100 petition, enjoining and restraining the defendant-, The Board of Councilmen of the City of Frankfort, and James M. Hallnan, tax collector of the city of Frankfort, and each of them, from making any levy or distraint, or selling any property of the plaintiff for the sums, or any part of them, or any part of either of them, alleged to be claimed by the defendant, The Board of Councilmen of the City of Frankfort, to be due it from the plaintiff for taxes for the years 1892, 1893 and 1894, during the pendency of this action, and enjoining said Board of Councilmen of the City of Frankfort from assessing or attempting to assess, or from collecting or attempting to collect any tax, for the purposes of said city, upon the plaintiff, its property or franchise, except upon its real estate in said city used in conducting its business, during the pendency of this action. But said clerk shall not issue such order of injunction until bond shall have been executed by one or more sufficient sureties of plaintiff, to the effect that plaintiff shall pay to the defendants such damages as they may sustain, not exceeding $20,000, if it be finally decided that the order of injunction herein ought not to have been granted.

September 6, 1894.

B. G. WILLIAMS,
Presiding Judge of the Franklin County Court.

On September 7, 1894, the sheriff made his return, viz:

Executed on the Board of Councilmen of the City of Frankfort by delivering to Ira Julian, mayor of said city, a true copy of the within, and by delivering a true copy of the within to James Hallnan.

September 7, 1894.

R. D. ARMSTRONG, *S. F. C.*,
By N. SULLIVAN, *D. C.*

On September 10, 1894, the following order was entered:

Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT. } Order.

The defendants, The Board of Councilmen of the City of Frankfort, and James Hallnan, tax collector for the city of Frankfort, hereby enter their appearance to the petition filed in this case on the — day of September, 1894, and consent*ed* that this cause be now placed upon the docket of this court for proceedings, the same as if process had been served 10 days before the 1st day of this term, and defendants filed a general demurrer to the petition.

101 Said demurrer is in words and figures as follows:

Franklin Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Defendants. } Demurrer.

The defendants, The Board of Councilmen of the City of Frankfort, and James Hallnan, tax collector for the city of Frankfort, say that the plaintiff's petition herein does not state facts sufficient to constitute a cause of action, and demur to said petition.

HUGH RODMAN,
City Attorney,
W. H. JULIAN,
For Defendants.

On September 25th a judgment was entered, viz:

Franklin Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Defendants. } Judgment.

This day came the parties by their attorneys, and this cause having been submitted upon the defendants' demurrer to the plaintiff's petition, and the court, being now sufficiently advised, is of the opinion and adjudges that the defendant city had and has no authority or right to levy, assess or collect any taxes against the plaintiff for the year 1892, and that for that year the plaintiff properly made its report to the auditor, and paid its taxes into the treasury under the provisions of the Hewitt revenue statute; that for the years 1893 and 1894 the defendant Hallnan, tax collector for the city of Frankfort, or said city had no power or authority to assess for taxation the intangible property of the plaintiff described in the

petition, but that the same was properly assessed for taxation by the State board of assessment and valuation in assessing the franchise of plaintiff, as provided for in the act of November 11th, 1892; and that for the delinquency of plaintiff in the payment of the city of Frankfort on so much of the assessments of its franchise for the years 1893 and 1894 as has been apportioned for taxation by said city defendants have no power or authority to collect any penalty or interest.

It is therefore adjudged that the defendants' demurrer to the petition be overruled, and they declining to answer, but electing to stand by their demurrer, it is further adjudged that the preliminary injunction heretofore granted herein in so far as the same enjoins the defendants from collecting from the plaintiff any sum for taxes against it for the year 1892, and any sums as penalty or in-
102 terest for delinquency in payment of taxes on its franchise for the years 1893 and 1894, be and the same is hereby made perpetual, and that so much of said injunction as enjoins the defendant- from collecting from the plaintiff the sums set out in the petition as taxes on franchise for the years 1893 and 1894, be and the same is hereby dissolved.

The defendants except to so much of the foregoing judgment as overrules their demurrer to the plaintiff's petition and perpetuates the injunction herein for any purpose. And the plaintiff excepts to so much of the foregoing judgment as dissolves in part its injunction herein and as adjudges that plaintiff's intangible property or franchise was assessable by the board of assessment or otherwise than as contended for in the petition, and prays an appeal to the court of appeals which is granted; and on motion of the plaintiff so much of the injunction herein as is dissolved by this judgment is hereby continued in force during the pendency of the appeal herein granted upon the plaintiff executing, before the clerk of this court, by one or more good sureties, bond conditioned that the plaintiff will, if this judgment dissolving the injunction is affirmed, pay to the defendants all damages they or either of them may sustain by reason of the continuance of such injunction pending the appeal.

On September 26, 1894, the following bond was filed in this office, viz:

Franklin Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and J. M. Hallnan, Tax Collector for the City of Frankfort, Defendants. } Bond.

Whereas by judgment rendered in the above-styled cause in the Franklin circuit court on the 25th day of September, 1894, the temporary injunction previously granted the plaintiff against the defendant- was in part dissolved and from so much of said judgment as dissolved in part the said injunction, an appeal was asked of and

granted by said court; and in order granting said appeal it was ordered that the injunction dissolved should continue in force pending the appeal upon the plaintiff's executing bond as in the judgment provided. Now I, Thomas Rodman, surety, hereby covenant to and with the defendants, Board of Councilmen of the City of Frankfort, and J. M. Hallnan, tax collector for said city, that the plaintiff will, if said judgment dissolving the injunction is affirmed, pay to the defendants all damages they or either of them may sustain by reason of the continuance of such injunction pending the appeal.

THOMAS RODMAN.

Attest: THOS. B. FORD, *C. F. C. C.*

103 STATE OF KENTUCKY, } *sct:*
Franklin County, }

I, Thomas B. Ford, clerk of the Franklin circuit court, do hereby certify that the foregoing thirty-one pages of typewritten matter contains a true and complete copy of all the pleadings, exhibits, &c., in the case of The Farmers' Bank of Kentucky *vs.* The Board of Councilmen of the City of Frankfort, &c., as appears from the records of my office.

Given under my hand this 2nd day of October, 1894.

THOS. B. FORD,
Clerk of Franklin Circuit Court,
By C. E. JAMES, *D. C.*

Upon which transcript was endorsed the following statement:

FARMERS' BANK OF KENTUCKY, Appellant,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and JAMES H. HALLNAN, Tax Collector for the City of Frankfort, Appellees. } Statement.

The judgment sought to be reversed is on page twenty-eight of record, and was rendered at the September term, 1894, of the Franklin circuit court. The appeal was granted by the court below. Both parties good for costs.

JOHN W. RODMAN,
Attorney for Appellant.

Afterwards, at a court of appeals, begun and held for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 4th day of October, A. D. 1894, the following order was entered:

THE FARMERS' BANK OF KENTUCKY
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c. } Franklin.

Came the parties by counsel, and on their motion and by consent it is ordered that this cause be docketed.

The appellant moved the court to advance this case, together

with the case of Farmers' Bank of Kentucky against Franklin County and the case of Farmers' Bank of Kentucky against City of Henderson, and hear them with the case of Commonwealth, &c., *vs.* Farmers' Bank of Kentucky, which was continued for oral argument at the last term of this court, and the cause be submitted on the motion.

104 Afterwards, at a court of appeals held as aforesaid, on October 23, 1894, the following order was entered:

FARMERS' BANK OF KENTUCKY *vs.* CITY OF FRANKFORT.	Franklin.
SAME *vs.* FRANKLIN COUNTY, &C.	Franklin.
SAME *vs.* CITY OF HENDERSON.	Henderson.

The court being advised, it is ordered that these causes be advanced, and set for hearing with the case of The Commonwealth, &c., *vs.* Farmers' Bank of Kentucky, on the argument docket for the next term of this court.

Afterward, at a court of appeals held as aforesaid, the following order was entered:

COMMONWEALTH, &C., *vs.* FARMERS' BANK OF KENTUCKY.	Franklin.
FARMERS' BANK OF KENTUCKY *vs.* CITY OF FRANKFORT, &C.	Franklin.
SAME *vs.* FRANKLIN COUNTY, &C.	Franklin.
SAME *vs.* CITY OF HENDERSON.	Henderson.

By agreement of all the parties, and on their motion it is ordered that these seventeen cases be heard together, and said causes coming on to be heard, were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties and cities, and laid over until tomorrow for further hearing.

Afterward, on the 5th day of March, 1895, the following order was entered herein:

These causes, again coming on to be heard, were argued by D. W. Lindsey for the banks and W. McD. Shaw and Hugh Rodman for the counties and cities, and laid over for further hearing on tomorrow.

Afterward, on March 7, 1895, this order was made:
These causes, again coming on to be heard, were argued by Wm. Goebel for the banks and H. C. Barker for the cities and counties and laid over for further hearing on tomorrow.

And afterward, on March 8, 1895, this order was made:
These causes, again coming on to be heard, were argued by Jno. W. Rodman and T. L. Edelen for the banks, and laid over for further hearing on tomorrow.

And afterward, on March 9, 1895, this order was made:
These causes, again coming on to be heard, were argued by Jas. P. Helm for the banks, and laid over for further hearing on next Tuesday.

Afterward, on March 12, 1895, this order was made:
These causes, again coming on to be heard, were argued by Wm. J. Hendrick for the Commonwealth, and submitted.

105 Afterward, at a court of appeals held as aforesaid, on the first day of June, 1895, the following judgment was entered:

FARMERS' BANK OF KENTUCKY, Appellant, *versus* BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellee.	Appeal from the Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appellant recover of the appellees its costs herein expended.

Judges Lewis, Paynter and Guffy dissenting.

Dissenting opinion by Judge Paynter.

At the same time, to wit, June 1, 1895, the court, through Chief Justice Pryor, delivered the following opinion, to wit:

The Bank of Kentucky, the Northern Bank, the Farmers' Bank and other State banks; the National Bank of Covington and other national banks, are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxation for county and municipal purposes, and others standing as appellees in cases relieving them from such local burdens. The legislation imposing such burdens is found in the Kentucky Statutes under the title of *revenue and taxation*, and is based on sections 174 and 175 of the present constitution. Section 174 pro-

vides: "All property whatever, owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation, based on incomes, licenses, or franchises."

Section 175 provides: "The power to tax property shall not be surrendered, or suspended, by any contract or grant to which the Commonwealth shall be a party."

It is manifest by reason of section 175, the right of the legislature no longer exists, of surrendering the power to tax property, or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging to corporations or individuals, must pay the same rate of taxation. The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State, by which, in consideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger
106 State tax than individuals paid, or their charters required, the State agreed not to impose upon them any local burdens, and the important inquiry in these cases is, "Was such a contract entered into between the banks and the State based on a consideration binding the State on the one side, and the banks on the other?"

The statute under which this contract is claimed to have been made is found in the General Statutes under the title of revenue and taxation, sections 1 and 4 of article 2, and known as the Hewitt bill.

Counsel for the banks in the discussion of these cases classified the banks as follows: 1st, the banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law; 2d, banks chartered after that date, when by a general law the right to annul or repeal the charters was expressly reserved; 3d, the national banks.

We shall treat all the cases as one, in considering the application of the Hewitt act, to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation, and requiring them to pay a larger tax to the State upon its property, than that paid by the individual tax-payer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation, and made all taxation alike upon property, whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is imposed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed, and like institutions in more favored localities, where lighter or no local

burden exists, and while the fact that the banks in the commercial centres of the State are taxed two and a quarter dollars on the hundred under the present system (local and State) and those in an adjoining town or county only one per cent. may work a hardship, and prevent competition or drive the bank thus heavily taxed to locate elsewhere, yet this, under the old system was a question of policy only, and the framers of the present constitution in adopting the *ad valorem* system, left no room for classifying property, so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act, and that of the banks in accepting it.

It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856), with reference to taxation, and the circumstances attending the legislation resulting in the passage of the Hewitt bill, in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation, and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The bank- in existence prior to the act of 1856
107 were claiming their charter contracts, by which only a tax of fifty cents on each share of one hundred dollars of stock could be imposed.

The national banks claimed that they were entitled to be taxed like the State banks and were not liable for local burdens, and, besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government.

The State claimed the old banks were taxed for too small an amount, and the banks chartered since the year 1856 were resisting any discrimination between such institutions and the old banks. Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all the banks, State and national, "We will impose a tax of seventy-five cents on each share of your capital stock equal to one hundred dollars, and in addition a tax on your surplus, and this shall be in full of all tax, State, county, and municipal, provided you will accept the act imposing the tax with the condition annexed." This act reads:

"Shares of stock, in State and national banks and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars of stock therein, owned by individuals, corporations or societies, and said banks, institutions, and corporations shall, in addition, pay on each one hundred dollars, of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal." The 7th section of the act further providing that "nothing herein contained shall be construed as

exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of this act provided: "That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular meeting thereof, may give its consent to the levying of said tax, *and agree* to pay the same as herein provided, *and to waive and release all right under the act of Congress*, or under the charters of the State banks, to a different mode, *or smaller rate of taxation, which consent or agreement with the State of Kentucky* shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth, *and upon such agreement and consent being delivered, and in consideration thereof*, such bank and
108 its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid, during the corporate existence of such bank."

Section 5 of the act provided: "The said banks may take the proceeding authorized by section 4 of this act, at any time until the meeting of the next General Assembly, provided they pay the tax provided in section 1 from the passage of this act." Section 6 provides: "This act shall be subject to the provisions of section 8, chapter 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptance with the governor under corporate seals. The banks incorporated before the act of 1856 surrendered what they claimed to be their charter contracts, by which they were taxed only fifty cents on their shares of stock of one hundred dollars. The national banks yielded their right to deduct from the value of their stock their surplus consisting of nontaxable securities and their claim to be taxed as the old banks, and most of the State banks uniting to prevent any discrimination, all accepting the proposition made by the State and agreeing to pay seventy-five cents on each share of stock of one hundred dollars in value, and the additional tax mentioned in the article.

It is conceded (and we think it clear) by counsel for the city of Louisville that prior to the passage of the Hewitt bill, in the year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of one hundred dollars, and the same may be said of all the banks chartered prior to the act of 1856, but it is further contended that the act, as well as the contract under it, were both subject to repeal by reason of the reserved power contained in section 6 of article 2. Again, it is contended by counsel for the city of Frankfort that the grant to the banks was without any consideration and the renewals of the charters of the old banks, as they are designated, placed them within the provisions of the act of 1856, and by the Attorney General that the State had no power to surrender this right of taxation; and the contract, if made, is not binding.

This court, in the case of The Franklin County Court against The

Bank of Kentucky, reported in 87 Kentucky, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contracts made with the State under the original grant, and if disposed to reconsider the decision rendered in that case, it could not affect the issue involved on the present appeals.

At the date of the passage of the Hewitt bill the Franklin circuit court had decided that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill this court affirmed that judgment. It is apparent that article 2 in the Hewitt bill was adopted by the legislature with a view of equalizing the burdens of taxation as between the banks, and to relieve them from the burden of local taxation during their
109 corporate existence; but it is insisted there was no consideration for this partial exemption.

If there was a binding contract between the *old banks* and the State to pay a tax of only fifty cents on each share of stock, and the banks surrendered their contract or their rights under it, and agreed to pay seventy-five cents to the State instead of forty-two and a half cents, it seems to us this would be a consideration sufficient to uphold any such contract with the State, if the power existed with the State to make it, and the fact that such a power existed has been too often decided by this court, as well as the Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights, not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in commercial centers of the State and those outside of such localities, where no heavy burden for local taxes were being levied, and therefore, the consideration moving from the old banks, was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discrimination between these moneyed institutions, and therefore its exactions from the old banks and the national banks being acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856 as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute imposing the tax of seventy-five cents, and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks and with such a consideration as will uphold it. No reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into, the provisions of the present constitution, and subsequent legislation under it, operated to repeal not only the statute, but the contract made by virtue of its provisions, and this power existed by reason of the 6th section of the article making it subject to the provisions of section 8 of chapter 68 General Statutes, declaring that "this shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be plainly expressed;" provided, that "whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, as we think was the legislative intent, the word *act* in section 2 of the Hewitt bill, was used as synonymous with the word *article*, and therefore the reservation of the power on the part of the legislature, was the right to amend or repeal the article in which is contained the proposition by the State to the banks in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act and the right to annul, by repeal or otherwise, a contract made under it, is manifest—and while under the present constitution the State can make no contract by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous decisions of the Supreme Court.

The general rule in regard to legislation is, that one legislative body cannot bind a subsequent legislature to its action in purely legislative matters, but when it comes to matters of contract, if the State has the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens, and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution providing that "no State shall pass any law impairing the obligation of contracts." Sec. 10 of art. 1, U. S. Constitution.

That the State may enter into such contract was held by this court as early as the year 1839, in the case of Johnson *vs.* The Commonwealth, reported in 7 Dana, 442, where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract, and this court held that the contract placed a limitation on the power. In the case of The Farmers' Bank against The Commonwealth, reported in 6th Bush. it was held the bank could not be taxed beyond its charter rate, as fixed by the contract, and in the late case of The City of Frankfort *vs.* The Bank of Kentucky and others, reported in 87 Kentucky, the same doctrine was announced. The question then arises, Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature or the framers of the constitution to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties.

The legislature, at the time this contract was made, recognized the right of the Bank of Kentucky and the banks chartered prior to 1856, to stand upon their charter rights, or if not, the right of the banks as against the State on this subject of taxation had found

its way to the courts, and had been decided adversely to the State. The legislature thought the tax of fifty cents too small. The old banks claimed an irrevocable contract. The national banks could only be taxed as authorized by the Federal Congress. The new State banks were subject to such taxation as the State might see proper to place upon them, and to make them liable for
111 these local burdens would be to end their existence or cause them to seek shelter under the Federal banking act, and with a view of placing the entire matter at rest and placing the banks on an equal footing, the legislature said to all the banks: "If you will agree to pay seventy five cents on each share of stock equal to one hundred dollars, &c., it shall be in full of all tax, State, county and municipal." It said to the old banks: You must relinquish your right to a smaller rate of tax, and this must be done not by your president and directors, but by the consent of the stockholders in writing, and delivered to the governor, as evidence of your good faith." The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution the contract was adhered to by both the State and the banks. It is now argued the banks, and particularly those with charter contracts for a smaller rate of taxation, surrender those charter rights and agree to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business men at the head of those institutions would relinquish every right they had acquired under their charters that an increased burden might be placed upon the banks they represented.

In the contention that the 6th section of the article reserves this power of repeal, counsel overlook the fact that, by the express terms of the section by which this reserved power is retained it is provided that "*no amendment* or repeal shall impair other rights previously vested." The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself, connected with its acceptance by the banks, vested in the latter rights of which they could not be divested without their consent, the chief of which was the payment of a specified tax to the State during their corporate existence.

The State waived its right to tax these banks for local purposes (except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way, the State granting the franchise derived the benefit, instead of the municipal government, while under the present system the difference between 42½ cents and 75 cents, with tax on surplus amounting to $125,000, is taken from the revenue proper and applied to the municipalities where the banks are located.

In the case of the State against the Green & Barren River Navigation Company reported in 79th Ky., this court held, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and that the repeal of the charter to the extent it deprived the com-

pany of its contract rights acquired under it was in violation of the constitution. In that case the court said: We cannot assent
112 to a doctrine that will allow the State to alter or abolish such contracts, whenever, in the opinion of the legislature, the necessities of the public or the interest of the State require it." The case of The Commonwealth *vs.* Owensboro, &c., R. R. Co., 95 Ky., 60, determines in effect the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroads, and in doing so, relieved them from taxation for a limited period. The act provided "That all railroads which may hereafter be built within this Commonwealth under existing charters, or under charters which may hereaftor be granted, shall be exempt from all taxation under the laws of this Commonwealth for the period of five years from the date of the beginning of the construction of the new roads." The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes, when the five years from the beginning of the construction of these roads had not expired. The court, in response to the argument to exact the tax and the application of the act of 1856 to its provisions, said: "It is sufficient to say of this proposition, which, even at first blush, strikes us as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State, and expended their money on its exemption pledge, that the act of 1856 reserving the right to repeal or amend charter privileges has no application to the law of 1884, which, as said before, was a general law, and affected all alike who accepted its provisions, or acted on the strength of them."

Counsel for the local governments argue the questions involved as if there was a perpetual grant to those corporations, and therefore the power of appeal must of necessity have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 these charters expire in ten or twelve years, and hence the policy of the State, if viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

The framers of the constitution, in adopting that instrument, were not looking to past legislation on this particular subject, but were creating an organic law for the future welfare of the State, leaving the rights of those protected by either the State or Federal Constitution undisturbed, and if the attempt to repeal vested rights has been made, the framers of the present constitution would have been as powerless to accomplish such a purpose as the legislature in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the court of appeals of New Jersey, in the case of New Jersey *vs.* Yard, reported in 95 U. S., 110. By an act of the legislature passed in March, 1865, the legislature of New Jersey enacted that the Morris and Essex Railroad Company should pay a

tax of one-half of one per cent., to be paid by the company
113 to the State whenever the net earnings of the company amount to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open and in use to Phillipsburg, and annually thereafter, *which tax shall be in lieu and satisfaction of all other taxation and imposition whatever by or under the authority of this State.*

The 20th section of the original act of incorporation, reserved to the legislature the right to alter, amend or repeal the act whenever it should think proper. The act of 1865 was an amendment to the original grant and in regulating the amount of taxation contained this proviso: "*Provided*, That this section shall not go into effect or be binding on the company until the said company, by an instrument duly executed under its corporate seal and filed in the office of secretary of state, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller in delivering the opinion in that case, said: "The main question here is, 'Did the legislature intend to make such a contract?' *and held* that its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States," and in like manner will the contract in question be upheld, and as said by Mr. Justice Miller in New Jersey *vs.* Yard, "The legislature was not willing to rest this contract in the usual statutory power alone, depending on its validity as a contract upon some action of the corporation under it, to bind it to its terms, but they required of the company a formal written acceptance within sixty days, else it became wholly inoperative." And it may be said in the New Jersey case there was no consideration other than is found in ordinary railroad charters. It is said, however, in that case the repealing clause, or what is known in this State as the act of 1856, was appended to the original charter, and when amended it formed no part of the amendment, as is found in this case, and therefore the court concluded the amendment was not subject to repeal.

The question is asked, "Why the necessity of making the act of 1856 apply to article 5, if the legislature did not intend to reserve the right of annulling the contract?" In response to this it might be asked, if such was the legislative intent, why the necessity of having a formal written acceptance from the banks surrendering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the hundred dollars, so long as their charters continued, if the power was reserved of abrogating the contract at any moment? If such was the legislative purpose there could have been no necessity for any consideration moving from the banks, or any formality attending the execution of the contract. The act of 1856 was enacted to avoid the effect of the
114 decision of the Supreme Court in the Dartmouth College case, reported in 4th Wheaton, to enable the sovereign power to amend and repeal charter provisions, that had theretofore been regarded as beyond the power of the legislature without such a reser-

vation, but under this act of 1856 it has been held by this court, as well as every other court having the question before it, that property rights or contract rights, acquired by virtue of the charter in exercising the privileges conferred, could not be interfered with by legislation, and in fact the act expressly provides, "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." The old banks had contract rights sustained by the adjudication of the courts of the State that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill. City National Bank of Paducah *vs.* The City of Paducah, 10th Kentucky Law Reporter; Covington City National Bank *vs.* The City of Covington, 21st Federal Reporter.

The legislature saw the obstacle in the way of increasing the taxation on these banks, and the national banks standing on the same footing with State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks, that equality as between them might exist, and at the same time increase the taxation. The banks had not asked for any amendments to their charters, nor was the effort made by the legislature to repeal, or amend the charters. The State was attempting to enact a general law entitled *revenue and taxation*, applying to all subjects of taxation and to all kinds of property. The tax in regard to banks under this general title was fixed at seventy-five cents as to all banks, and *to all corporations* required by law to be taxed on their capital stock, and as to the old banks and the national banks, the surrender of their rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the Hewitt bill and be released from other taxation so long as their charters continue.

Why, then, did the legislature annex to *article 2* of the revenue bill the provisions of the act of 1856. No contract had been made when the bill passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consummated. It was provided in article 2, that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized a reservation of power, to repeal or withdraw this proposition, if within the period fixed there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privilege granted was not involved in the legislation, but the banks with their
115 charters in full force, were asked by the legislature to make an agreement as to a rate of taxation that could not have otherwise been imposed against either the old banks or the national banks. The corporations had the right to contract by reason of their charters, and dealing at arm's length with the State accepted the terms and conditions offered in good faith, and the question here is, not the right of the State to repeal or amend these charters, but the right of the State to cancel this contract without the consent of the banks. The right of the State to repeal the franchise or

amend the charter is not here questioned when subject to the act of 1856, but the repudiation of a contract will not be sanctioned.

There was, in fact, necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks, organized since 1856, were liable to this tax whether they accepted the provisions of the Hewitt bill or not, and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side and the State on the other, by which the taxation on these banks might be increased, and at the same time placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced, as against those corporations coming within the act of 1856; but neither the banks or the State ever intended to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed, and no meaning given a statute that will lead to an absurdity.

The case before us is much stronger for the banks than that of Yard *vs.* the State of New Jersey. Here the old banks had contract rights sustained by the adjudications of the courts of the State to the effect that they were not liable to local taxation, and the same adjudication followed with reference to national banks. The contract was not only executed, but based on a valuable consideration. If there was any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article the intention of the Legislature, it seems to us, is manifest. This increased tax under the former constitution, as before stated, went to the State and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms so as to withdraw from the State treasury this additional tax the banks have been paying annuity to $125,000 annually, and transfer it to the cities to aid in discharging local burdens.

It requires no judicial utterance to show that under the national banking act, where the rate of interest is fixed at six per cent. (or as the State law provides) and a forfeiture of the entire interest if more is charged, that these banks by the imposition of local burdens, cannot be taxed as much as as two and one-half per cent. in
116 any locality when the average taxation of State banks will not exceed half that sum.

In the case of Lionberger *vs.* Rouse, reported in 105 U. S., after the national banking system went into effect, the legislature of Missouri passed a law asking the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks, and two of them declined to do so. The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent. and the State was powerless to increase this tax. The assessment of the plaintiff's share of stock in the national

bank was at the rate of nearly two per cent. It was contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said as this national bank or its shares was not taxed for a greater sum than other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere. While there are exceeding *sixty* State banks, the Bank of Kentucky and its branches, the Northern bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches, were at the time of the passage of the Hewitt bill, and are now, regarded as the prominent banking institutions of the State, and if with their capital and business rank placed before the Supreme Court with a tax of only one per cent. and the tax on the national banks placed at two per cent. the judgment of the Supreme Court upon such a state of fact doubtless would have been similar to the decision of this court in the case of The National Bank against The City of Paducah.

The case of Lionberger *vs.* Rouse has no bearing on this question of contract. Here, the State was not powerless to remedy the evil or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however great, or even insignificant the difference in taxation might have been. The national banks recognizing the fact they could be taxed as other moneyed capital, and desiring uniformity of taxation, and not one rate for one bank and a different rate for another, surrendered their right or claim to be taxed as the old banks, were taxed, and entered into this agreement by which a uniform system of taxation was adopted for all banks, such as the State desired.

The claim of the old banks and the national banks as to the mode of taxing them was certainly not without foundation, for the reasons already given; and the proposition by the legislature to settle these differences, and its acceptance, was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank case. In the one case there was no legislation making the discrimination, while in the case
117 before us, the State, after placing the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the contract, is now insisting upon a legislative rescission of the contract, and placing the old banks at least in a position where they are to pay only fifty cents on the shares of one hundred dollars, and leaving the national banks subject to a greater rate of taxation.

This repeal, if sustained, is in effect the creation of three or more new banks with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks with a capital of five millions, at the time the Hewitt bill passed, will be relegated to the condition they were in

when the contract was made, as was held by the Supreme Court in the case of Clark *vs.* The Water Company, reported in 143 U. S, and that is *an exemption* from local burdens with a tax of one-half of one per cent. to the State. The national banks with a capital of ten millions when the Hewitt bill was enacted, and now increased to twenty millions will also be exempt from local burdens, because the State in the exercise of power it now claims has abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination, when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities (or the legislature for them) without power to impose on national banks local burdens.

The banks have all practically accepted the provisions of the Hewitt bill, and the legislature repealing or canceling the contract being in violation of both the State and Federal Constitutions, leaves the Hewitt bill as to the banks in full force and they must be taxed under its provisions until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and realty, eighty cents, or about that sum, on each share of stock of one hundred dollars, while the citizen tax-payer is paying only 42½ cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury as under the old constitution, or to the municipalities under the new constitution. In the absence of this contract it would go to discharge local burdens, but with this contract in full force it must be paid as to the amount and manner as provided by the Hewitt bill of 1886 into the treasury of the State.

It results, therefore, that the judgments in the case- of The Louisville Railway Company *vs.* City of Louisville; Third National Bank *vs.* City of Louisville; Northern Bank of Kentucky *vs.* Bourbon County; Deposit Bank *vs.* Franklin County; Bank of Kentucky *vs.* Armstrong; Bank of Kentucky *vs.* City of Frankfort; Farmers' Bank *vs.* City of Frankfort; Same *vs.* Franklin County; Same *vs.* City of Henderson are reversed. And the judgments in the
118 cases of The City of Louisville *vs.* Bank of Kentucky; Commonwealth *vs.* State National Bank; Same *vs.* Frankfort National Bank; Same *vs.* Deposit Bank; Commonwealth *vs.* Bank of Kentucky; City of Covington *vs.* German National Bank; Same *vs.* First National Bank; Commonwealth *vs.* Farmers' Bank are each and all affirmed.

The following dissenting opinion was delivered at the same time through Judge Paynter, to wit:

Were this a case simply affecting the rights of two citizens of the State, I might content myself with dissenting without expressing my reason therefor, but involving as it does the sovereignty of the people, and denying to them, as I conceive it does, the right to have their will to assume the form of law on such a vital question as that of taxation and their right to demand and enforce equal and just taxation, I feel constrained to give my reasons for dissenting from the views expressed by the court.

The effect of the opinion of the court is to destroy a principle engrafted in the laws of this State nearly forty years ago—one so important that it was declared by the General Assembly to be in effect written in every act of incorporation granted by it. So important was the reservation of the right to amend or repeal all acts of incorporation that the General Assembly was unwilling to run the risk of inserting it in each act, but declared by general law that it should be understood to be written in all of them.

The opinion in effect denies the power of the people, through their organic law, to declare what are just principles of taxation, that the same rate of taxation shall be imposed on the property of corporations as on an individual, and the authority of the General Assembly to execute that constitutional mandate. I believe that corporate rights should be held as inviolate as those of the citizen; that each citizen should bear his full share of the common burden of taxation; all freemen, when they form a social compact, are equal and no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community "but in consideration of public services." I do not believe in the State passing laws impairing the obligation of its contracts with corporations or individuals when the contracts are made by virtue of the provisions of the constitution; nor do I believe in denying the right to the State to withdraw from a contract when in express terms the right to do so is reserved, as in such case it cannot be said to impair the obligation of the contract.

While I regard there is a vast difference between granting a corporate franchise authorizing the acquisition of property by donation or otherwise for the purpose of educating and spreading the gospel among the Indians and affording an opportunity to the youth of the land in the days of the early settlement of the country, to obtain an education, as was the purpose of the charter to Dartmouth college, and granting immunity from taxation to institutions operated solely for private gain, yet as the courts of the country
119 taking the principle enacted in the Dartmouth College case as authority therefor, have held that immunity from taxation granted in the act of incorporation, is a contract with the State, and is irrevocable, unless the right to do so is reserved in the act of incorporation or in a general act, which must be treated as part of the act of incorporation, in considering those cases, I shall accept that as the rule to govern in the determination of the questions involved. Indeed it is unnecessary to take any other view of the law in order to reach the conclusion which I have done in these cases.

However, I cannot forbear quoting what Justice Miller said in delivering the opinion of the court in New Jersey *vs.* Yard, 95 U. S., 114, to wit: "The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a measure as the constitution will permit. But, so long as the majority of this court adheres to the contrary doctrine he must,

when the question arises, join with the other judges in considering whether such a contract has been made."

I agree with Justice Miller that in the matter of taxation, one legislature of a State has no power to bargain — the right of a succeeding legislature to levy taxes in as full a measure as the constitution will permit.

Such a power could be exercised to such an extent as to almost destroy the Government, or to grievously burden one class of its citizens.

Instead of having the Dartmouth College case under consideration had Chief Justice Marshall a case coming from Kentucky wherein it was claimed the legislature had sought to impair the obligation of a contract it had made with one of the old banks, by passing a statute providing it should pay an amount of tax in addition to that specified in its charter, I cannot believe, in view of the constitutional provision prohibiting the granting of exclusive privileges except "in consideration of public services," he would have held that the bank had an irrevocable contract with the State.

From the Dartmouth College case to the present time (and the right was in that case recognized) the Supreme Court of the United States has uniformly held that whenever the legislature granting the charter reserved the right to amend or repeal it, either by so providing in the charter or by a general law, the right to amend or repeal such charter exists, and to do so is not impairing the obligation of a contract.

The charter being accepted with the full understanding that the right of repeal is part of the contract, and to the exercise of which right the grantee has consented.

Many of the States, after the Dartmouth College case, began to realize the importance of reserving the right to control corporate organizations which from time to time were being created, and to make sure that such power was being reserved, they passed general laws expressly reserving such power, which statutes became a part of every act of incorporation as fully as if written therein unless a different purpose was therein plainly expressed.

The legislature of this State, being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as the statute of 1856, which is section 8, chapter 68, General Statutes.

It reads as follows: "All charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, *and all other statutes*, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It seems so plain that charters and grants since the 14th day of February, 1856, are subject to amendment or repeal at the will of the legislature unless a contrary intent is plainly expressed therein that it is needless to discuss it.

The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it. Acts of the character of the act of 1856 have uniformly been held to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made, and that they were as much a part of the charter as if incorporated into them. Any other interpretation would render the statute inoperative and wholly deprive it of its power to accomplish the purpose of its enactment. In 1841 South Carolina passed a statute substantially the same as the statute of 1856. The Northeastern Railroad Company was incorporated in 1851. In 1855 an act was passed to amend its charter, the amendment exempting the railroad company from taxation. In 1868 the State adopted a new constitution, in which it was declared that the property of the corporations then existing or thereafter created should be taxed.

The legislature of the State passed an act to enforce that provision of the constitution.

The question involved in Tomlinson *vs.* Jessup, 15 Wallace, 454, was as to the enforcement of such legislation. Justice Field, in delivering the opinion of the court in the case, said: "It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the
121 validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the probability of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contracts with corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made.

The reservation effects the entire relation between the State and

the corporations and places under legislative control all rights, privileges and immunities derived by its charter directly from the State.

The same doctrine is enunciated in Railroad *v.* Maine, 96 U. S., 499.

Railroad Co. *vs.* Georgia, 98 U. S., 359.
Hoge *vs.* Railroad Co., 99 U. S., 348.
Greenwood *vs.* Freight Co., 105 U. S., 13, 21.
Spring Valley Water Works Co. *vs.* Schottler, 110 U. S., 347, 352.
Clore *vs.* Greenwood Cemetery Co., 107 U. S., 466, 476.
Louisville Gas Co. *vs* Citizens' Gas Co., 115 U. S., 683, 696.
Gibbs *vs.* Consolidated Gas Co., 130 U. S., 369, 408.
Sioux City Street Railway *vs.* Sioux City, 138 U. S., 98, 108.

It must be conceded from the authorities cited the Supreme Court of the United States has repeatedly held that the legislatures of the States have the power when reserved in the charters or by general law to change or repeal acts granting corporate privileges or franchises. The decisions of this court are in accord with these opinions.

The case of Griffin *vs.* Kentucky Insurance Company, 3 Bush, 592, has been quoted with approval in the case of Louisville Water Co. *vs.* Clark, 143 U. S., 14, and in that case the court held that in all cases of charters or grants of corporate franchises where the intention of legislature was not "plainly expressed" not to exercise the power, reserved by the statute of 1856 to amend or repeal
122 at the will of the legislature such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them.

Judge Robertson in delivering the opinion in Griffin *vs.* Kentucky Insurance Co., 3 Bush, 595, said: "Then was the general reservation of power like a special reservation in the charter itself, a part of the contract: or was the contract made subject to it and the obligations defined or modified by it? We think so. And whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute, over which the judiciary has no jurisdiction, our conclusion, as to the mere power of repeal is as we think, sustained by reason and abundant authority. All contracts, except such as are municipal, are made subject to law, and their obligation is defined by the *lex loci contractus*. Why should the contract in this case be excepted? Such exception would be unreasonable; and the authorities fortify the reason."

In the case of Cumberland and Ohio Railroad Co. *vs.* Barren County Court, 10 Bush, 604, in reference to the act of 1856, the court said: "The act was intended to preserve to the State control over all acts of nicer peroration thereafter passed." Experience had demonstrated the propriety of, if not the absolute necessity, for such a reservation of power, and it would be a manifest disregard of the clearly expressed will of the legislature for the courts to resort to technical rules of construction, or finely drawn legal implications, to escape the effect of the plain declaration that all charters of and

grants to corporations shall be subject to amendment and repeal "unless a contrary intent be plainly expressed."

I conclude that the legislature in 1886, when it passed the revenue bill, had the right to amend or repeal at will all charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, "unless a contrary intent was plainly expressed."

In view of decisions of the courts I also concede that as to the charter of banks granted prior to the 14th of February, 1856, unless the acts extending them reserved the right to amend or repeal their charter, any act of the legislature increasing their tax would be invalid as to such banks, unless in acts extending them the right to amend or repeal was reserved.

The national banks were subject to have the same tax imposed on their shares of stock as are imposed on State banks, doing business under charters granted since the 14th of February, 1856.

Their real estate is subject to taxation. Their shares of stock may be taxed at their *actual* value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the State.

In the case of The Covington City National Bank *vs.* City of Covington, &c., 21 Federal Reporter, 491, Justice Matthews,
123 discussing this subject, said: "When, therefore, a statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value, as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits. The interest which Congress has left subject to taxation by the States under the limitations prescribed, and which is a distinct, independent interest in property held by the shareholder, like any other property that may belong to him, is that interest as defined in Van Allen *vs.* The Assessors, 3 Wall., 573, which "entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter in proportion to the number of its shares, and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts." And (page 587) "it includes for taxation the whole interest of shareholder, such as would pass to the purchaser of the share on a transfer of his certificate. So, when a State law taxes shares of national bank stock, it taxes the same interest of the shareholder that he would transfer on a sale. The State may tax them at their actual or at their market value, or at any other rate of appraisement which does not violate the act of Congress."

To the same effect are the cases of People *vs.* Commissioners of Taxes, 94 U. S., 415.

Mercantile Bank *vs.* New York, 121 U. S., 138. In the latter case the court said (p. 155): "The main purpose, therefore, of Congress in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals, carrying on a similar business

and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for *county, school, municipal and local purposes.* The supreme court in Hepburn *vs.* The School Directors, 23 Wallace, 480, held the statute valid. It has been decided that it is competent for the States to tax the shares of national bank stock, notwithstanding the capital of the bank was invested in bonds of the United States which were not subject to taxation. It is no discrimination against them, because they are required to pay a greater tax on their shares of stock, than is paid by banks, enjoying special privileges under their charters. Lionberger *vs.* Rouse, 9 Wallace, 468.

The court should endeavor to ascertain the legislative intent in the act of 1886, with reference to the taxation of banks, as all depends in this controversy upon what was that intent.

To aid in reaching a conclusion as to what the intent was it is well to recall some official facts within the knowledge of the members of the legislature.

124 The first of July, 1885, was the date of the last report of the capital stock of the banks in the State before the enactment of the revenue law of 1886.

From that it is learned that the capital stock of the 59 national banks amounted to	$9,708,900.00
The capital stock of the 65 State banks, doing business under charters granted subsequent to 1856, amounted to...	6,224,891.00
The capital stock of the four State banks, Farmers' Bank of Kentucky, Bank of Kentucky, Northern bank and the Bank of Louisville, incorporated prior to 1856, was.....	5,144,500.00
It will be seen from this statement that the capital stock of the national banks and of the State banks chartered since 1856, amounted in round numbers to.....	16,000,000.00
While the capital stock of banks whose charters antedate 1856, amounted to about.....	5,000,000.00

being less than one-third of that of the other banks named. It must be presumed that the legislature knew that the banks claiming irrevocable contracts to pay only 50 cents on each share of the capital stock, equal to one hundred dollars, paid less than one-third of the revenue coming from the banks under the then existing law.

It can hardly be said that the Farmers' Bank of Kentucky was in a condition to claim an irrevocable contract, because the act extending its charter, which became a law on March 10, 1876, expressly reserved the right to amend or repeal its charter and amendments thereto. It reads as follows: "That the charter of the Farmers' Bank of Kentucky, as amended, be extended for a period of twenty-five years from the termination of its charter as therein fixed: *Pro-*

vided, that said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act, and *Provided further*, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract.

This left but three banks in the State which could claim an irrevocable contract, and one hundred and twenty-five without any claim whatever to immunity against increased taxation.

The revenue act repealed several acts by particularly naming them and excluded certain other acts from the repealing clause, and declared all other acts general and special, and parts of acts inconsistent or not in conformity therewith were thereby repealed. The revenue law is now chapter 92, General Statutes. The only part of the act relating to the taxation of banks and other institutions of loan or discount is article 2, chapter 92, General Statutes.

125 Section 1 of the article relates to the amount of tax which the banks shall pay and designates the method of levying the tax.

Sec. 2 imposes certain duties on the cashier of the bank with reference to making a report to the auditor of public accounts.

Sec. 3 exempts banks having certain money invested in bonds or funds of the United States from taxation named in the section.

Sections 4, 5 and 6 of article 2 are as follows:

SEC. 4. "That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax; and agree to pay the same as herein provided, and waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatever, so long as said tax shall be paid during the corporate existence of such bank."

SEC. 5. "The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; *Provided*, they pay the tax provided in section 1 from the passage of this act."

SEC. 6. "*This act shall be subject to the provisions of section eight* (8) *chapter sixty eight* (68) *of the General Statutes.*"

Section 7 provides that if the banks fail or refuse to make the consent and agreement as provided in section 4, then they are to be assessed, and the same tax, State, county and municipal, shall be imposed, levied and collected, &c., as is imposed on the assessed taxable property in the hands of individuals.

Without section 4 the remaining sections of the article would

have been a complete system for levying and collecting taxes on the banks chartered after 1856. The article *treats of nothing except the taxation of banks.*

It seems there can be no further question of the power of the legislature at that time to impose a tax on such banks for State, county and municipal purposes. It was wholly useless for the legislature to ask the consent of the banks chartered since 1856 to make any consent to the imposition of tax on them for that purpose. The national banks were subject to the payment of taxes for State, county and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose.

It was needless to ask this class of banks to enter into the agreement.

The legislature may have entertained some doubt not as to the right to tax national banks for State, county and municipal
126 purposes, but as to the method prescribed and desired to remove all doubt by obtaining the consent of such banks to that method.

It was greatly to the interest of the national banks and the State banks chartered subsequent to 1856 to enter into the agreement because they were thus released from the payment of county and municipal taxes. In agreeing to pay the amount provided in the article for State purposes they were released from local burdens which in some instances were two or three times as great as that which they agreed to pay the State.

It was greatly to their interest to accept the proposition of the State.

As a matter of fact these banks were relinquishing no rights. They were apparently yielding a right which the State, in its sovereignty, already possessed. The right had never been relinquished, but had been expressly reserved. So vigilant had been the State to retain the control of corporations, and retain its power to tax them, its purpose to do so was declared in the form of a legislative enactment which was understood to be written in every act of incorporation.

It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned, as shown by the revenue act, as their charters were declared repealed so far as they were inconsistent therewith.

It was the evident purpose of the legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired that all banks should be placed upon the same footing in the matter of taxation with the other banks of the State. The legislature had been renewing their charters, and if they were again renewed an appeal must be made to the same power. These banks may have realized that the act of 1856 should have by a proper interpretation been made applicable to the acts renewing their charters. However, it is needless to speculate further as to the reasons which induced them to enter into the contract with the State by which they released any irrevocable contract which they had under

their charter against increased taxation. These banks had the right to give their consent to the increased taxation.

The courts have always recognized the right of a corporation to consent to legislation or accept its provisions, and be bound thereby, though it may have the effect of depriving such corporation of a vested right.

This brings me to the question as to what were the terms and conditions of the contract into which all these banks entered.

The banks must be presumed to know the law and the effect of the contract to which they agreed.

Those who represent banks are among the brightest and most sagacious business men of the country.

The contract is brief, simple and without ambiguity.

127 In short, the State agreed to accept and the banks agreed to pay seventy-five cents annually on each share of their stock equal to one hundred dollars, and in consideration thereof, to be exempt from all other taxation whatsoever so long as the tax shall be paid during the corporate existence of such bank. If these were all the terms of the contract then it might be contended with some reason that it was irrevocable during their corporate existence.

Being mindful of the policy which had been pursued for thirty years, it said in effect to the banks, it is desired that the contract be signed in the formal way prescribed, but it must be understood that the right to alter, change or abandon the contract is reserved to the State. That its purpose might be fully understood the legislature placed in the article section 6, which in terms makes the statute of 1856 a part of the contract. It is expressly provided that the article shall be subject to the provisions of section 8, chapter 68, General Statutes.

The legislature was determined that the provisions of the act of 1856 should not depend on rules of construction to be read into the contract by implication, but in terms said that it should be a part thereof. It is admitted that when the word "act" appears in article 2 it has reference to the article (2).

Article 2 was an independent measure, offered as a substitute to article 2 of the original bill. The substitute was adopted and became a part of the revenue bill. It now appears as a part of the bill in the exact language as offered.

Section 6 has no reference to any part of the revenue bill *except the article of which it is a part.* It has been suggested that it had reference to new banks that might be organized.

This could not be so, because article 2 is dealing with banks in existence, and asks them to give their consent, &c., thereto, and says, if at all, they must do so before meeting of the next General Assembly. When it was admitted that the word "act," as used, is synonymous with "article," then it must be admitted that the provisions of section 6 of article 2 are applicable alone to the article (2), of which it is a part.

If there could be any doubt from the language used as to the

meaning of the legislature, then that must be removed by an examination of the house and senate journals.

An amendment (p. 1241, House Journal, 1886) was offered to article 2 of the original revenue bill and section 7 of that amendment reads as follows: "This act shall *not* be subject to the provisions of section 8, chapter 68 of the General Statutes."

The amendment (p. 1243, House Journal, 1886) was defeated.

While the revenue bill was pending in the Senate it was proposed to amend section 6 of article 2 by inserting after the word "shall" in the first line the words "*not for ten years*," (p. 1315, Senate Journal, 1886). This amendment was defeated. Had it been adopted, then the section would have read: "This act shall *not for ten years* be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes."

128 The proceedings of the house and senate show the members of the legislature fully understood the purpose for which this section was made part of article 2. It was the purpose of the legislature not to be restricted for any period of time in its right to repeal the article and withdraw from the contract.

In view of the plain provisions of the statute, about the meaning of which there should be no doubt, and the intent of the legislature being fully explained by its records, it seems to me there should be no hesitation in concluding the act of 1856 should be read as a part of the contracts, hence they are not irrevocable.

The fact that a written consent was asked and received does not alter the application of the act of 1856.

To this effect is New Jersey *vs.* Yard, 95 U. S., 104.

The facts of that case were as follows: The Morris & Essex Railroad Company was created a corporation by an act of the legislature of New Jersey passed January 29, 1835. The act provided that as soon as the net proceeds of the railroad amounted to seven per cent. on its costs, it should pay a State tax of one-half of one per cent. on the cost of the road, and no other tax should be levied upon it.

The twentieth section reserved to the legislature the right to amend or repeal the act, whenever it should think proper. A supplemental act was passed on March 2, 1836, in which the right to repeal or amend was reserved.

On the 14th of February, 1846, the legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856.

Another supplemental act to the charter of the railroad was approved March 23, 1865, authorizing a branch road to be built, and by which the company was vested with all the powers and franchises given by original and supplemental acts, &c.

The third section of the last-named act reads as follows: "Be it enacted, that the tax of one-half of one per cent. provided by their said original act of incorporation, to be paid by the said company to the State whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburg, and annu-

ally thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatever, by or under the authority of this State, or any law thereof: *Provided*, That this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal and filed in the office of the secretary of state, shall have signified its assent thereto, and which amount shall be signified within sixty days after the passage of the act, or this act is void." The instrument required by the section was duly executed by the company.

In the act of 1865 there was no reservation of the right to repeal or amend it.

129 Acts of the legislature imposed a more burdensome tax on the railroad company than that provided for in section three, *supra.*

The sole question in New Jersey *vs.* Yard was whether the act of 1865 and its acceptance by the railroad company constituted a contract which could not be impaired by any subsequent legislation of the State.

The court held that it was an irrevocable contract *because the legislature had not reserved the right to amend or change it.*

It is plain from the opinion that had the legislature reserved the right to alter or change the contract or act by which it was made, the court would have held the act of the legislature doing so did not impair the obligation of the contract. Justice Miller, in delivering the opinion, said: "But as we have already said, since the legislature which passed the act of 1865 had the power to make a contract which *should not be subject to repeal* or *modification* by one of the parties to it without the consent of the other, the main question here is, *Did they intend to make such a contract?*"

* * * * * * *

"In the case now under consideration, it is conceded on all hands that the act of 1865 was a contract for a tax of one-half of one per cent. per annum on the cost of the Morris & Essex railroad, and no more. But counsel for defendant says the contract was repealable; that the legislature of its own volition could impose other and more burdensome taxes at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it, and no longer.

"It is conceded, also, that this construction of it cannot be sustained, unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this, on general principles of construction. We think it still clear that it cannot be done, because it is inconsistent with the legislative intent in passing the act of 1865."

* * * * * * *

"The implication is of a right to revoke it, and comes from the other quarter, and is one which *we do not think exists by fair con-*

struction, and which we do not feel at liberty to import into the contract, to defeat its manifest purpose."

From the language of this opinion and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, &c.

In order to hold that the right to alter, &c., the contract made under article 2 does not exist, it is absolutely necessary to eliminate section 6 from the article. No such a rule for the interpretation of statutes can be found, as the meaning of the section is manifest and clear.

130 Besides, by the very terms of the act of 1856 a rule of interpretation is given that "all charters and grants of or to corporations or amendments thereof *and all other statutes,*" shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein "plainly expressed."

It is proposed now by those representing the banks to disregard this statutory rule of construction. It is now in effect insisted that in order to reserve the right claimed it must be "plainly expressed" in the act that it is reserved. This being done it is still disregarded.

The legislature doubtless anticipating such contention and versatility, "plainly expressed" in the article, that whatever was done thereunder or in pursuance thereof could only continue during its will. If section 6 was not for this purpose, I should like to have had the court to suggest some reason as to why it was placed in the article.

The doctrine is that when it is asserted that a State has bargained away her right of taxation in a given cause, the contract must be clear and cannot be made out by dubious implication.

New Jersey *vs.* Yard, *supra.*

The taxing power of the State is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms.

Bradley *vs.* McAtee, 7 Bush, 667.

It is a familiar rule of construction of statutes that effect must be given to every provision except in cases of absolute and irreconcilable incongruity.

Dazley *vs.* Killan, 2 Duvall, 407.

If one statute refers to another for the power given by the former, the statute referred to is to be considered incorporated in the one making the reference.

Nunes *vs.* Wellisch, 12 Bush, 365.

Mr. Cooley in his work on taxation (p. 204) says: "As taxation is the rule, and exemption the exception, the intention to make an exception ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the

language of the statute on which it depends is doubtful or uncertain."

For the interpretation of statutes this court in Nichols *vs.* Wells, Sneed, 259, said "that the most natural and genuine way of construing a statute is to construe one part by another part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another; and if it can be prevented no *clause* or *sentence* or *word* shall be superfluous, void or insignificant."

As there is a clear expression of the legislative intent in the statute, no rules are really necessary to aid in its interpretation.

If A should rent B his farm for a term of 99 years in consideration of a certain annual rental, but it was written in the
131 contract that it was "subject" to be annulled at the will of A, in the interpretation of this contract would not a court hold that the entire instrument was to be considered in determining its effect? Would not A's right to annul the contract be just as enforceable as B's right was to enter upon the farm under the contract? Whilst it might be said it was an unwise contract on the part of B, yet being capable of contracting he would be bound thereby, and a court would certainly not hold, because it appeared to be an unwise contract for B to have entered into, that therefore A did not reserve the right to annul the contract. This is the character of interpretation which must be employed to sustain the contention of counsel for the old banks. It can hardly be said it was an unwise contract on the part of one hundred and twenty-five of the one hundred and twenty-eight in the State, as by the very terms of the act under which the contract was entered into they were required to pay State, county and municipal taxes, with the power in the legislature to increase it at will.

It certainly was a very advantageous contract for them to enter into. When these banks paid more than two-thirds of the taxes paid by all banks, with the power in the legislature to increase the amount if they should so desire, what reason can be suggested as to why the legislature would desire to reverse the policy which had been steadfastly adhered to for so long, and enter into an irrevocable contract with such banks?

Why should it want to surrender a power which it had been so jealous to preserve?

The contract was made subject to the right of the legislature to withdraw from it whenever it regarded the public interests demanded it should do so.

Whenever the banks accepted the provisions of the act of 1886 they surrendered any rights to immunity from increased taxation which their charters gave them.

The acceptance of the act of 1886 was a consent to the repeal of so much of their charters as *were* inconsistent therewith, hence they stood in such relation to the State as to future taxation as the legislature saw proper to impose. If the provisions of their charters relating to taxation were repealed, as it must be admitted they were by the act of 1886, then such powers were no longer in force. It is

unreasonable to say that the provisions of the charters fixing the rate of taxation in banks at fifty cents on each share of the capital stock of the banks equal to one hundred dollars can be in force if the act of 1886 fixing such tax at seventy-five cents instead of fifty on shares is in force. The court admits the latter is in force. In doing this it must be admitted the charter privilege has been repealed.

If repealed, then, by the act of 1886, surely the only way in which the provisions of their charters could be restored would be by the legislature so providing in some act.

132 There is no pretence this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of their charters. Section 464, Kentucky Statutes, provides, "When a law which may have repealed another, shall be repealed, the previous law shall not be *revived*, unless the law repealing it be passed during the same session of the General Assembly."

It is a most groundless contention to say that if the present law is sustained that the old banks will be restored to the former privileges under their charters.

It has been suggested that the provisions of their charters with reference to taxation were vested rights, and although they "consented to the legislation of 1886, and because subject to the provisions of the act of 1856, still, as the charter privilege as to taxation was a vested right, therefore it was saved to them by the proviso which preserves other rights previously vested."

The purpose of the act of 1856 was to reserve in the legislature the power to destroy the privileges and franchises granted in the charters.

If it does not have this effect, it would be entirely inoperative, and the effort to retain control of corporations would be a bother. The claim that the privileges granted by article 2 can be repealed, but without the right to terminate the contract with the banks, is not founded in reason.

The only privilege which the banks enjoyed was to pay the 75 cents on each share of stock in lieu of all other taxes.

To say that the law granting the privilege can be upheld because the right to do so was reserved, as is admitted by the court, and still leave the banks in its enjoyment (*as is the effect of the opinion of the court*) is to employ logic that has never been in common use by this or any other court. This logic gives the banks the substance and the State the shadow. The preserved rights, then, are not privileges and franchises granted by the repealed charter, but "other rights" which had vested previous to the act amending or repealing the charter.

The other rights are such as the beneficiaries under the charter may have acquired in property, choses in action, real and personal property or interests of every character which they could acquire in operating under the charter, and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment, or otherwise in the property belonging to the corporation.

My contention has been recognized as correct in all the decisions

of this court in passing upon the act of 1856. The Supreme Court of the United States has so construed the act. It was said in Griffin *vs.* Kentucky Insurance Company, 3 Bush, 594, "The proviso was intended to secure the rights of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise."

133 To same effect is Cumberland & Ohio Railroad Company *vs.* Barren County Court, 10 Bush, 609. Section 174 of the constitution recognizes a just principle when it declared that all property, whether owned by persons or corporations, should be taxed in proportion to its value unless exempted thereby, and that all corporate property should pay the same rate of taxation paid by individual property.

The legislature, in obedience to that provision of the constitution, enacted the law for levying and collecting tax from the banks of the State, the validity of which is in question in these cases.

For the reason already given, I conclude that the obligation of no contracts *were* impaired by the action of the constitutional convention or the succeeding legislature. Some of the best lawyers in the State were members of the convention which framed our constitution, who gave an earnest consideration to the questions involved in these cases, and the conclusions which they reached were crystal-ized into section 174 of the constitution.

I believe that their conclusions are correct.

The opinion of the court denies the power is in the legislature to say what taxes the banks of the State shall pay for State purposes during the existence of their several charters. It denies the right of the legislature to compel them to bear any of the burdens of county and municipal governments.

I cannot believe the legislature did or intended by article 2 of the act of 1886 to reverse its policy so earnestly pursued for a generation and surrender to sixty-odd banks of the State its right previously reserved to control them in the matter of taxation, and to give up its power to increase or diminish the taxes imposed on one hundred and twenty-five banks, this including the national banks.

Exigencies may arise requiring the levying and collecting of vast sums to meet the public demand; yet, however great the emergency may be, or imperative its demand for money to meet such wants, the legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporate existence.

The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the State are compelled to incur large expense to support the county governments, to pay for bridges and public highways, and to support their unfortunate citizens. The municipalities must incur great expense in making all necessary improvements for the comfort, safety and health of their citizens, to supply water and lights and to give police protection to their citizens and to the banks; yet, the court concludes that the legislature has no power to compel the banks to

contribute their fair share of such expenses. In this view I cannot concur.

Judges Lewis and Guffy concur in this dissenting opinion.

134 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 93 pages contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein The Farmers' Bank of Kentucky is appellant and The Board of Councilmen of the City of Frankfort, &c., are appellees, except the opinions of the court which are copied in the record in case of Farmers' Bank of Kentucky *vs.* The Board of Councilmen of the City of Frankfort, and except the proceedings upon and the petition for rehearing as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 11th day of May, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

[SEAL.]

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Exhibit "G" reads as follows:

Franklin Court Circuit, January 21, 1896.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, etc., Defendants. } Judgment.

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed reversing the former judgment of this court, and the court being sufficiently advised, it is adjudged that article 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, (General Stat's, chapter 92, article 2,) and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provision of the present constitution of this State and of the act of November 11, 1892, (act 3, chapter 103, Acts 1891-'2-'3,) in so far as they were intended to provide for any assessment or taxation of, for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now hereby made perpetual, and the defendant be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise or property of the plaintiff, except taxes on its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

135

STATE OF KENTUCKY,
County of Franklin, } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing is a true copy of the judgment in the above-styled action.

Witness my hand as clerk of said court this May 7, 1897.

THOS. B. FORD,
Clerk Franklin Circuit Court.
[SEAL] By J. R. ELLIOT, *D. C.*

Exhibit H reads as follows:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the first day of June,
136 1895, Chief Justice W. S. Pryor, judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting:

THE FARMERS' BANK OF KENTUCKY, Appellant,
versus
THE CITY OF HENDERSON and P. R. YEANEY, Collector of Taxes, Appellees.

Be it remembered that heretofore, to wit: on the 4th day of October, A. D. 1894, the appellant, by its counsel, filed in the clerk's office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

STATE OF KENTUCKY:

Henderson Circuit Court.

Pleas before Hon. M. C. Givens, judge of the Henderson circuit court, at the court-house, in the city of Henderson, Ky., on Friday, Nov. 3, 1893.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE CITY OF HENDERSON and P. R. YEANEY, Collector of Taxes, Defendants. } Petition in Equity.

Be it remembered that on Nov. 4th, 1893, the plaintiff filed its schedule in the clerk's office of the Henderson circuit court, which is in words and figures as follows:

Henderson Circuit Court.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
versus
THE CITY OF HENDERSON ET AL., Defendants. } Schedule.

For the purposes of an appeal to the court of appeals of Kentucky, from the judgment of the Henderson circuit court in the above action the clerk of the Henderson circuit court is directed to copy the entire record, including the pleadings and all orders in said action.

MONTGOMERY MERITT,
A. T. DUDLEY,
Attorneys for Plaintiff.

The defendants hereby accept service of the notice of the filing of the above schedule in the office of the clerk of the Henderson circuit court on this 4th day of November, 1893.

J. L. DORSEY,
Attorney for Defendants.

137 At a September term, 1893, of the Henderson circuit court, to wit: Monday, October 9, 1893, the following order was entered herein:

"The plaintiff filed its petition and on its motion the same is now ordered docketed, and moved the court to grant the injunction prayed for in the petition. The defendants by attorney entered their appearance and waived notice. Said motion was for the time continued."

The petition referred to in the foregoing order is here copied as follows:

"The plaintiff, The Farmers' Bank of Kentucky, states that it is a banking corporation, duly chartered by an act of the General Assembly of the Commonwealth of Kentucky by an act, entitled An act, to incorporate the Farmers' Bank of Kentucky, approved February 16, 1850, and under its charter, which would have expired in 1880, by the terms thereof, but for the act extending it hereinafter mentioned, is possessed of general banking powers among them those of having and conducting offices of loan and discount, to loan money, discount promissory notes and bills of exchange, and deal in exchange, and soon after the granting of its said charter it organized thereunder, and has conducted its banking business ever since such organization under said charter and under the act hereinafter mentioned, by which the term of such charter was extended. At this time the principal officer is located at the city of Frankfort, Ky., and its branches respectively in the city of Georgetown, Ky., and in the city of Henderson, Ky. That section fifteen (15) of the act first mentioned prescribes that "it shall be the duty of the cashier of the principal bank on the first day of July, 1851, and on the first day of July in each succeeding year during the continuance of this charter to pay into the treasury of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for by said bank, which shall be in full of all tax or bonus, provided that no tax shall be paid until said bank goes into operation, and provided further that the tax or bonus hereby proposed to be imposed upon such shares of stock in this bank, or such as shall hereafter be imposed on each share is set apart, and forever dedicated to the cause of education on the common-school system, and whenever the same or any part thereof shall be directed otherwise by legislative enactment said bank shall be exonerated from the payment of any tax or bonus whatever."

Plaintiff says that said contract and stipulation as contained in the said charter, fixing the said rate of taxation conduced to the acceptance of the said charter, and to an organization under it by said bank, and to the maintenance of said bank and its branch banks, that by an act entitled An act extending the charter of the

Farmers' Bank of Kentucky, approved March 10, 1876, the said legislature extended the aforesaid charter for the period of
138 twenty-five years from the time of the expiration of its said original charter in language as follows:

SECTION 1. That the charter of the Farmers' Bank of Kentucky as amended by extended for the period of twenty-five years from the termination of its charter as therein fixed—*Provided*, that said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act, and provided further, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair the rights previously vested. Said act is contained in the Acts of 1876, volume 1, page 324.

Plaintiff states that in pursuance *to* said provision relating to tax, the plaintiff, from the time of its first organization, and ever since then to the date hereinafter mentioned, has always paid and continued to pay to the State of Kentucky said tax on each hundred dollars of the stock issued and paid for in the said bank. That by a general statute passed by the said legislature, and approved on May 17, 1886, chapter 92 of the General Statutes of Kentucky, article 2, section 4, commonly called the "Hewitt law," it was provided that each of said banks, (viz: State and national banks) by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof: may give its consent to the levying of a tax of seventy-five (75) cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and that such corporations shall pay, in addition, upon each one hundred dollars, or so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax. State, county and municipal, and agree to pay the same and to waive and release all right under the acts of Congress or, under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement shall be evidenced by writing under the seal of said bank and delivered to the governor of the Commonwealth of Kentucky, and said section further provides that upon such agreement and consent being delivered, and in consideration thereof, such bank, and its shares of stock, shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of said bank. Under the 7th section of the same article it is also provided that nothing in said act contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations, for conducting their business, but that the same may be taxed for county and municipal purposes as other real estate is taxed.

That in the 5th section thereof it is also provided that said banks may take the proceeding authorized by said 4th section of
139 such act, at any time until the meeting of the next General Assembly, provided they pay the tax aforemended.

Now, the plaintiff states that within the aforesaid time so fixed by said act for an acceptance of the proposition of the State of Kentucky, to wit: on the 6th day of December, in the year 1887, the said Farmers' Bank of Kentucky, by a majority in interest of a quorum of the stockholders of said bank, did consent and agree to and with the Commonwealth of Kentucky to the payment of the taxes proposed and provided for in aforesaid article 2, and in all other respects did comply with all the requirements of said act; and said bank thereupon did complete its acceptance of the proposed contract with the Commonwealth of Kentucky, and delivered its said written consent and agreement to the governor of the Commonwealth of Kentucky, as prescribed by the act, and have always complied with the provisions of said contract from the inception of plaintiff's liability thereunder, by paying to the said State of Kentucky the above taxes on all the shares of stock and all taxable surplus and profits in the ratio fixed by the act and contemplated by the said act and contract, and by paying all the county and municipal taxes assessed against its real estate owned and used by said bank and its branches in conducting its business until the — day of ——, 1893, when it tendered and offered to pay to said State all the taxes for which it was liable for the year (the same being the only remaining unpaid tax), and the State of Kentucky, by its auditor of public accounts, whose duty it was to receive same, refused to accept such payment. Plaintiff says and submits that under its said contract with said State of Kentucky it is not liable for the payment of any greater, or higher, or other rate of tax or taxes, State, county or municipal, than that fixed under its said contract, during the period of its existence as a corporation; and that its said contract with the State of Kentucky is in full force and is irrepealable during the said corporate existence of plaintiff, so long as said bank continues to observe the same; and also that under said agreement said bank and the shares of stock therein, and the property of the said bank, save and except its banking homes, are exempt from both county and municipal taxes.

It states the legislature of the State of Kentucky, by a late act which became a law on November 11, 1892, entitled "Revenue and taxation," chapter 103, enacted in article 1, section 2, that all real and personal estate within the State of Kentucky, and all personal estate of persons residing within such State, and all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises, shall be subject to taxation, unless the same shall be exempt from taxation by the State constitution; and in the 3d section thereof, that the State of Kentucky, and each county, incorporated
140 city, town, and taxing district, shall have a lien on all other property of each person or corporation owing the same for the taxes due by them respectively. Plaintiff submits that if such act was intended by the said legislature of this State to apply to and include this plaintiff, or the shares of stock held therein, or its property, the same is in conflict with the aforesaid agreement made

between this plaintiff and the State of Kentucky, and as to the said plaintiff and said stock, the last-mentioned act is inoperative and void during the corporate existence of said bank; and it further submits that the said act of November 11, 1892, in so far as it conflicts with the aforementioned agreement, impairs the obligation of the said contract and is unconstitutional and void.

Plaintiff further alleges and submits that if it should be held by the court that the act of November 11, 1892, operated as a repeal or abrogation of the said "Hewitt" law of 1886, and as a repudiation by the said State of Kentucky of its said contract; then the original charter of the plaintiff is now in full force and effect; and that the plaintiff is restored to all its vested rights under its original charter, among which is its exemption from any greater or other tax than that specifically designated by its said charter. Plaintiff states that the defendant, City of Henderson (an incorporated city, within the State of Kentucky), without right and due legal authority, is seeking to subject the plaintiff to the payment of certain municipal taxes claimed by it as owing to said city from this plaintiff, and certain penalties sought to be by it imposed upon said bank for the non-payment of said tax; and that the defendant, P. R. Yeaney, is the collector of taxes for said city, and has demanded from plaintiff, by the direction of said city, or municipality, the sum of three thousand, nine hundred and forty-nine dollars ($3,949.00) for said taxes, and eighty dollars and seventy-four cents ($80.74) as a penalty or penalties for the non-payment of said taxes, which demands plaintiff has refused to comply with, and that said City of Henderson, through its collector of tax-, and said tax collector, have threatened, and do now threaten, to levy upon and sell the banking-house of said plaintiff for the satisfaction of said alleged taxes and penalties, and unless restrained by law they will proceed to carry out said threat; and if the injunction hereinafter prayed for be not immediately granted, great and irreparable injury will result to the plaintiff, and no injunction about the matters herein has been refused by the court or any circuit judge.

Wherefore plaintiff prays that the defendants be enjoined from collecting from the plaintiff the taxes and penalties above mentioned, and from levying upon and selling the banking-house and any other property of plaintiff for said taxes or penalties, and for all the relief to which it may be found entitled.

MONTGOMERY MERRITT,
A. T. DUDLEY,
Attorneys for Plaintiff.

141 A. T. Dudley, one of the attorneys for the plaintiff, says that the president and principal officer of the plaintiff, The Farmers' Bank of Kentucky, is Thomas Rodman, who is absent from Henderson county, Kentucky, and affiant says he believes the statements in the foregoing petition are true.

A. T. DUDLEY.

Sworn to before me by A. T. Dudley, — day of October, 1893.
MONTGOMERY MERRITT, W. *P., H. C.*

At a special November term of the Henderson circuit court, to wit: Friday, November 3rd, 1893, the following order was entered herein:

The defendants filed this demurrer to plaintiff's petition. This cause coming on to be heard upon defendants' demurrer to the plaintiff's petition, and the court being sufficiently advised, it is adjudged that the demurrer be sustained, and the plaintiff declining to plead further, it is adjudged that the injunction prayed for — and is now refused, and that the plaintiff's petition be dismissed absolutely, to which the plaintiff objects and excepts, and prays an appeal to the court of appeals, which is granted.

The demurrer referred to in the foregoing order is here copied as follows:

"The defendants demurrer to the petition of the plaintiff, and say that said petition does not state facts sufficient to constitute a cause of action."

CITY OF HENDERSON,
By J. L. DORSEY, *Attorney.*

STATE OF KENTUCKY, }
Henderson County, } *sct:*

I, S. A. Young, clerk of the Henderson circuit court, same being a court of record in and for the county and State aforesaid, do certify that the foregoing 13 pages, this included, contains a full and complete transcript of all the record and proceedings in suit Farmers' Bank of Kentucky, plaintiff, *vs.* The City of Henderson, &c., defendants, as found of record in my office and directed to be copied per plaintiff's schedule incorporated herein, and made part of this transcript.

Given under my hand as clerk of said court this 10th day of November, 1893.

S. A. YOUNG, *C. H. C. C.*

Clerk's fee, $3.90.

142 Upon which transcript was endorsed the following statement:

Kentucky Court of Appeals.

FARMERS' BANK OF KENTUCKY, Appellant,
versus
THE CITY OF HENDERSON and P. R. YEANEY, Collector of Taxes, Appellees.

The judgment appealed from was rendered by the Henderson circuit court on November 3rd, 1893, and is on page 12 of the record. An appeal was granted by the court below.

MONTGOMERY MERRITT,
A. T. DUDLEY,
JNO. W. RODMAN,
Attorneys for Appellant.

Afterwards, at a court of appeals, begun and held for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 4th day of October, A. D. 1894, the following order was entered:

FARMERS' BANK OF KENTUCKY
vs.
THE CITY OF HENDERSON, &c. } Henderson.

Came the parties by counsel, and on their motion and by their consent, it is ordered that this cause be docketed.

The appellant moved the court to advance this case, together with the case of Farmers' Bank of Kentucky against Franklin County, and the case of Farmers' Bank of Kentucky against Board of Councilmen of the City of Frankfort, &c., and hear them with the case of Commonwealth, &c., *vs.* Farmers' Bank of Kentucky, which was continued for oral argument at the last term of this court, and the cause is submitted on the motion.

Afterwards, at a court of appeals, held as aforesaid, on October 23, 1894, the following order was entered:

FARMERS' BANK OF KENTUCKY
vs.
CITY OF FRANKFORT, &c. } Franklin.

SAME
vs.
FRANKLIN COUNTY, &c. } Franklin.

SAME
vs.
CITY OF HENDERSON. } Henderson.

The court being advised, it is ordered that these causes be advanced and set for hearing with the case of The Commonwealth, &c., *vs.* Farmers' Bank of Kentucky on the argument docket for the next term of this court.

Afterwards, at a court of appeals held as aforesaid, the following order was entered:

COMMONWEALTH, &c.,
vs.
FARMERS' BANK OF KENTUCKY. } Franklin.

FARMERS' BANK OF KENTUCKY
vs.
CITY OF FRANKFORT, &c. } Franklin.

SAME
vs.
FRANKLIN COUNTY, &c. } Franklin.

SAME
vs.
CITY OF HENDERSON. } Henderson.

143 By agreement of all the parties, and on their motion, it is ordered that these seventeen cases be heard together, and said

causes coming on to be heard were argued by A. P. Humphrey for *for* the banks, and Ira Julian for the Commonwealth, counties and cities, and laid over until tomorrow for further hearing.

Afterwards, on the 5th day of March, 1895, the following order was entered herein:

These causes again coming on to be heard, were argued by D. W. Lindsey for the banks and W. McD. Shaw and Hugh Rodman for the counties and cities, and laid over for further hearing until tomorrow.

Afterwards, on March 7, 1895, this order was made:

These causes again coming on to be heard, were argued by Wm. Goebel for the banks and H. C. Barker for the cities and counties, and laid over for further hearing on tomorrow.

And afterwards, on March 8, 1895, this order was made:

These causes again coming on to be heard, were argued by John W. Rodman and T. L. Edelen for the banks, and laid over for further hearing on tomorrow.

And afterwards, on March 9, 1895, this order was made:

These causes again coming on to be heard, were argued by James P. Helm for the banks, and laid over for further hearing on next Tuesday.

Afterwards, on March 12th, 1895, this order was made:

These causes again coming on to be heard, were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid on the 1st day of June, 1895, the following judgment was entered:

FARMERS' BANK OF KENTUCKY, Appellant,
versus
THE CITY OF HENDERSON, &c., Appellees,
} Appeal from Henderson Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erronous.

It is therefore considered that said judgment be reversed, and cause remanded for further proceedings consistent with the opinion herein; which is ordered to be certified to said court.

It is further considered that the appellant recover of the appellees its costs herein expended.

Judges Lewis, Paynter and Guffy dissenting.

Dissenting opinion by Judge Paynter.

COMMONWEALTH OF KENTUCKY:

I, A. Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 14 pages contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein The Farmers' Bank of Kentucky is appellant,
144 and The City of Henderson, &c., are appellees, except the opinions of the court, which are copied in the record in case

of Farmers' Bank of Kentucky *vs.* Board of Councilmen of City of Frankfort, &c., and except the proceedings upon and the petition for rehearing, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Ky., this 13th day of May, A. D. 1897.

ABRAM ADDAMS,
[SEAL.] *Clerk Kentucky Court of Appeals.*

Exhibit "K" reads as follows:

STATE OF KENTUCKY:

Henderson Circuit Court, September Term, 1895.

OCTOBER 29, 1895.

THE FARMERS' BANK OF KENTUCKY Plaintiff,
vs.
THE CITY OF HENDERSON ET AL., Defendants. } No. 860. In Equity.

This cause coming on to be further heard and the mandate of the court of appeals of Kentucky having been heretofore filed herein, whereby said court reversed the decision of the Henderson circuit court, and the plaintiff now filing herein the opinion of said court of appeals in which, in substance, it is decided that neither the capital stock, surplus fund, or undivided profits of the plaintiff bank, nor any of its property (save and except such real estate as is specifically mentioned in chapter 92, article 2, section 7, of the General Statutes of Kentucky, commonly called the Hewitt law) shall be or is subject to municipal taxation, or taxation by any county of this Commonwealth, during the corporate existence of the bank; and defendant- declining to plead further, it is therefore adjudged that the injunction prayed for by the plaintiff herein is granted, and that defendants be, and they are, enjoined and restrained from collecting from the plaintiff, the said bank, the amount set forth in the petition as taxes and penalty claimed by said city as assessed against said bank for the year 1893, or any other tax or taxes, and from levying upon or selling the real estate or any other property of the plaintiff, and that said injunction be, and is hereby, made perpetual, also that the aforesaid tax or penalty in the petition mentioned is illegal and void, and that the plaintiff recover from the defendant, The City of Henderson, the costs of this action, for which execution may be issued.

A copy.
Attest:

S. A. YOUNG, *C. H. C. C.*,
By J. R. LAMBERT, *D. C.*

And on the same day, to wit, on May 8th, 1897, the following subpœna in chancery was issued by the clerk of this court upon the filing of said bill of complaint, viz:

The United States of America to the marshal of the Kentucky district, Greeting:

You are hereby commanded to summon Samuel H. Stone, Charles Finley, George W. Long, the Board of Councilmen of the City
145 of Frankfort, the County of Franklin, the City of Henderson, the County of Henderson, the City of Georgetown and the County of Scott to appear before our circuit court of the United States of America of the district of Kentucky, at the Federal court hall, in the city of Frankfort, on the first Monday in June next, to answer a bill in equity, exhibited against them in our said court, by the Farmers' Bank of Kentucky, and this they shall in nowise omit, under the penalty of four hundred dollars, and have then there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court in Frankfort, this 8th day of May, A. D. 1897, and in the 121st year of our Independence.

Attest: W. G. CHAPMAN, *C. C. C., K. D.*,
By CHAS. N. WIARD, *Deputy.*

MEMORANDUM.—The said defendants are required to enter their appearance in the clerk's office of said court, on or before the first Monday in June, 1897, otherwise the said bill will be taken *pro confesso.*

W. G. CHAPMAN, *Clerk*,
By CHAS. N. WIARD, *D. C.*

And on the day following, to wit, on the 28th day of May, 1897, said subpœna in chancery was returned and filed with the following return endorsed thereon, viz:

Executed May 10, 1897, on the County of Franklin by delivering a copy of within spa. in chy. to B. G. Williams, judge of said county; on the Board of Councilmen of the City of Frankfort, by delivering a copy of within to Ira Julian, mayor of said city; executed May 11th, on the County of Scott by delivering a copy of within to W. E. Bates, judge of said county; executed on the City of Georgetown, by delivering a copy of within to J. E. Pack, mayo[illegible]f said city; executed May 14th, on Geo. W. Long; May 15t[illegible] Chas. Finley and Samuel H. Stone, by delivering to each of t[illegible] a copy of the within. City of Henderson and County of Henderson not served.

JAMES BLACKBURN,
United States Marshal,
By P. D. TUCKER, *D. M.*

Fees	14.00
77 miles....	4.62
	$18.62

Executed May 25, 1897, on the County of Henderson, by delivering a copy of within spa. in chy. to E. C. Ward, judge of
146 said county; on the City of Henderson, by delivering a copy of within spa. to A. J. Washam, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By M. BULLINGTON, *D. M.*

Fees	4.00
Expense	2.00
	$6.00

And on the same day, to wit, on May 28th, 1897, the following notice of motion for interlocutory injunction was filed herein, viz:

Circuit Court of the United States, Sixth Circuit.

FARMERS' BANK OF KENTUCKY, Complainants,
versus
SAMUEL H. STONE, ETC., Defendants.
} Notice.

The defendants, Samuel H. Stone, Charles Finley, G. W. Long, The Board of Councilmen of the City of Frankfort, County of Franklin, City of Henderson, County of Henderson, The City of Georgetown and The County of Scott will take notice that on Friday, May 28th, 1897, at the Federal court-room in Nashville, Tennessee, *on* or about the hour of 10 a. m., or when the court shall convene, the complainant will move the court to grant to it an interlocutory injunction herein, restraining the board of valuation and assessment from making any return of assessment of the complainant's property to any of the municipalities named in the bill, and restraining each and every of said municipalities from endeavoring to collect any taxes for any of the years set out in the bill of complaint; the said motion to be made upon the bill of complaint and accompanying exhibits.

W. S. PRYOR AND
JNO. W. RODMAN,
Counselors for Complainant.

The affiant, W. H. Negley, states that he served the within notice on the County of Henderson by delivering a copy thereof to E. C. Ward, the county judge of Henderson county, on the 18th day of May, 1897, and upon the City of Henderson by delivering a copy thereof to A. J. Worsham, the mayor of the city of Henderson on the 18th day of May, 1897. Affiant states that he is over twenty-one years of age, that he is not a party to, or interested in this action.

W. H. NEGLEY.

Sworn to before me by W. H. Negley, this 18th day of May, 1897.

S. A. YOUNG, *C. H. C. C.*

147 And on same day, to wit, on the 28th day of May, 1897, the following notice of motion for interlocutory injunction was filed herein, viz:

Circuit Court of the United States, Sixth Circuit.

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } Notice.

The defendants, Samuel H. Stone, Charles Finley, G. W. Long, The Board of Councilmen of the City of Frankfort, County of Franklin, City of Henderson, County of Henderson, The City of Georgetown and The County of Scott, will take notice that on Friday, May 28th, 1897, at the Federal court-room in Nashville, Tennessee, *on* or about the hour of 10 a. m., or when the court shall convene, the complainant will move the court to grant to it an interlocutory injunction herein, restraining the board of valuation and assessment from making any return of assessment of the complainant's property to any of the municipalities named in the bill, and restraining each and every of said municipalities from endeavoring to collect any taxes for any of the years set out in the bill of complaint; the said motion to be made upon the bill of complaint and the accompanying exhibits.

W. S. PRYOR,
JNO. W. RODMAN,
Counselors for Complainant.

Accepted service of within notice this May 17, 1897.
S. H. STONE, *Auditor.*
G. W. LONG, *Treasurer.*

I hereby accept service of within notice, May 17, 1897.
CHAS. FINLEY.

I accept service of this notice, May 17, 1897.
B. G. WILLIAMS,
P. J., F. C. C.

I hereby accept service of the within notice, May 17, 1897.
IRA JULIAN,
Mayor of Frankfort.

Executed the within notice upon Samuel H. Stone, Chas. Finley, G. W. Long, by delivering to each of them a copy of the within notice, this May 17, 1897. Also executed the within notice upon the Board of Councilmen of the City of Frankfort, by delivering a copy thereof to Ira Julian, mayor of the city of Frankfort, this May 17, 1897. Also executed the within notice upon the County of Franklin, by delivering a copy thereof to B. G. Williams, county judge of said Franklin county, this May 17, 1897. I am over twenty-one years of age, and am not an attorney in, nor have any interest in this suit.

D. W. LINDSEY, JR.

Subscribed and sworn to by D. W. Lindsey, Jr., before me, this May 17, 1897.

T. N. LINDSEY,
Notary Public, Franklin Co., Ky.

Commission expires January 14, 1898.

148 And on the same day, to wit, on the 28th day of May, 1897, the following notice of motion for interlocutory injunction was filed herein, viz:

Circuit Court of the United States, Sixth Circuit.

FARMERS' BANK OF KENTUCKY, Complainants,
versus
SAMUEL H. STONE, ETC., Defendants. } Notice.

The defendants, Samuel H. Stone, Charles Finley, G. W. Long, The Board of Councilmen of the City of Frankfort, County of Franklin, City of Henderson, County of Henderson, The City of Georgetown and The County of Scott, will take notice that on Friday, May 28, 1897, at the Federal court-room in Nashville, Tennessee, *on* or about the hour of 10 a. m., or when the court shall convene, the complainant will move the court to grant to it an interlocutory injunction herein, restraining the board of valuation and assessment from making any return of assessment of the complainant's property to any of the municipalities named in the bill, and restraining each and every of said municipalities from endeavoring to collect any taxes for any of the years set out in the bill of complaint; the said motion to be made upon the bill of complaint and upon the accompanying exhibits.

W. S. PRYOR,
JNO. W. RODMAN,
Counselors for Complainant.

The affiant, Jno. R. Downing, states that he served the within notice on the County of Scott by delivering a copy thereof to W. E. Bates, the county judge of Scott county, on the 18th day of May, 1897, and upon the City of Georgetown, by delivering a copy thereof to Jno. E. Pack, the mayor of the city of Georgetown, on the 18th day of May, 1897. Affiant states that he is over twenty-one years of age, that he is not a party to or interested in this action.

JNO. R. DOWNING.

Subscribed and sworn to before me this 18th day of May, 1897.
[SEAL.] JNO. W. CHAPMAN, *N. P., S. C.*

My commission expires January 8, 1898.

And on the same day, to wit, on the 28th day of May, 1897, the following plea of the Board of Councilmen of the City of Frankfort and the County of Franklin to the bill of complaint was filed herein, viz:

Circuit Court of the United States for Sixth Circuit and District of Kentucky.

FARMERS' BANK OF KENTUCKY
against
SAMUEL H. STONE, THE BOARD OF COUNCILMEN OF THE City of Frankfort, The County of Franklin, and Others. } In Equity.

The plea of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Farmers' Bank of Kentucky, complainant.

149 These defendants (Board of Councilmen of the City of Frankfort and Franklin County), by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say: that this court has no jurisdiction of the matters and things set forth and alleged in the said bill, and humbly crave the judgment of this honorable court whether or not they ought to be compelled to make any further or other answer to said bill.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
IRA & W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

And on the same day, to wit, on the 28th day of May, 1897, the following demurrer was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FARMERS' BANK OF KENTUCKY
versus
SAMUEL H. STONE, BOARD OF COUNCILMEN OF THE City of Frankfort, The County of Frankfort, and Others. } In Equity.

The demurrer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Farmers' Bank of Kentucky, complain-t.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demurr to the said bill, and for cause of demurrer showeth:

That it appeareth by the complainant's own showing by the said

bill, that it is not entitled to the relief prayed for by the bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants doth demur thereto and pray the judgment of this honorable court, whether or not they shall be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAS. H. POLSGROVE,
County Attorney, Franklin Co.
IRA & W. H. JULIAN,
For the Board of Councilmen of the City of Frankfort and Franklin County.

150 And on the same day, to wit, on the 28th day of May, 1897, the following demurrer was filed herein by defendants Stone, Finley, and Long, viz:

In the Circuit Court of the United States, for the Sixth Circuit and District of Kentucky.

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants.
} No. 274.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the State of Kentucky, to the bill of complaint — Farmers' Bank of Kentucky, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained, to be true, in such manner and form as the same is therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants Samuel H. Stone, auditor, Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that,

in my opinion the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on the same day, to wit, on the 28th day of May, 1897, the following answer was filed herein by the defendants The Board of Councilmen of the City of Frankfort and The County of Franklin, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE FARMERS' BANK OF KENTUCKY *against* SAMUEL H. STONE, CHARLES FINLEY, GEORGE W. LONG, Board of Councilmen of the City of Frankfort, County of Franklin, City of Henderson, County of Henderson, City of Georgetown, and County of Scott.	In Equity.

Answer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Farmers' Bank of Kentucky.

151 In answer to the said bill, without waiving demurrer to the jurisdiction, or the general demurrer to the bill, but reiterating and relying upon the same, the board of councilmen of the city of Frankfort, and county of Franklin, say as follows:

(Responding to each of the XX paragraphs or sections of the bill separately.)

I.

'Tis true that complainant is a corporation duly incorporated, etc. as stated in the first paragraph of the bill.

II.

The allegations of the second paragraph of the bill are true.

III.

The allegations of the third paragraph of the bill are true.

IV.

The allegations of the fourth paragraph of the bill are true.

V.

The allegations of the fifth paragraph of the bill are true, except the statement following: "Complainant states that said tax of fifty (50) cents on each share of its stock was a tax then largely in excess of the ordinary rate of taxation paid by other moneyed capital or property in the State of Kentucky, including municipal and county

taxes." This (the said) allegation, these defendants deny; and allege that, in 1850, the *ad valorem* levy of the city of Frankfort, alone, was fifty (50) cents per hundred dollars, to which were added the State and county levies. Ever since 1850, said taxes, especially the local taxes, have steadily increased, until now (1897), in the city of Frankfort, they aggregate sum of $2.56\frac{3}{4}$, per $100.00.

VI.

These defendants deny that, by the settled course of decisions of the highest court of this State, the meaning of complainant's charter has been fixed and determined to be an irrevocable contract. The original charter of the Farmers' bank merely fixed the rate of taxation, and was not an irrevocable contract. As set forth in the bill, the present charter of that bank expressly provides, that same shall be subject to alteration, amendment or repeal, either by general or special act. In the case of Farmers' Bank *vs.* Commonwealth and Greenup County, 6 Bush, page 127, no question of contract was made or decided. Besides, same was in 1869, under the original charter of said bank.

152 The decision of the Kentucky court of appeals rendered on June 5, 1888, and reported in Kentucky Law Reporter, page 513, was under the present charter of said bank, and held, notwithstanding the charter itself expressly subjected the bank to legislative control in the matter of taxation, that same constituted an irrevocable contract of exemption from taxation.

VII.

The allegations of the seventh paragraph of the bill are true, except the following statement: "In both of these causes, the contract between this complainant and the State of Kentucky, as herein set up, was fully pleaded and alleged, and relief was asked for upon the basis thereof." Every part of this (the said) statement, these defendants deny. As to same, these defendants allege: That the Farmers' bank did not in either of said causes plead, allege, or rely upon any contract between it and the State, and did not in either of said causes ask relief upon the basis of any contract.

The said causes are those cited in the next preceeding paragraph of this answer, in which the court of appeals (speaking through Judge Bennett) held that the charter of the Farmers' bank, after the renewal thereof, with the express provision therein that same should thereafter be subject to alteration, amendment or repeal either by general or special act, constituted an irrevocable contract of exemption from taxation.

VIII.

The allegations of the eighth paragraph of the bill are true.

IX.

The allegations of the ninth paragraph of the bill are true.

X.

The allegations of the tenth paragraph of the bill are true, except the last eleven (11) lines thereof. Every allegation of those eleven lines these defendants deny. These defendants deny that it has ever been the policy of the State to lessen the rate of taxation on the full amount of the capitel stock of the bank for any reason or upon any ground, and allege, that the stock of the Farmers' bank is, and has been for years last past, worth about twenty-five per cent. above par; and that said bank now habitually loans its money, and has for years last past habitually loaned its money, at a rate of interest exceeding eight per cent. per annum.

XI.

These defendants deny that the present system of taxation in Kentucky violates any contract, and deny that same violates the Constitution of the United States.

153 XII.

These defendants deny that the present system of taxation in Kentucky violates the constitution of Kentucky.

XIII.

The allegations of the thirteenth paragraph of the bill are true.

XIV.

These defendants deny that the judgment of the Franklin circuit court in the case of complainant against Franklin county, set forth in the fourteenth paragraph of the bill, is now in full force and effect.

XV.

The allegations of the fifteenth paragraph of the bill are true.

XVI.

The allegations of the sixteenth paragraph of the bill are true.

XVII.

As to the seventeenth paragraph of the said bill, these defendants deny that it has been fully or finally or at all adjudicated that that complainant is protected by contract from local taxation. These defendants deny that it has been fully or finally or at all adjudicated that complainant may, in any event, be restored to taxation as provided in its charter. These defendants deny that the legislature ever granted to complainant or entered into with complainant any irrevocable contract of exemption from taxation; as fully appears from the language of article two (2) of the Hewitt act itself, and the house and senate journals of 1886, which journals are here referred to as part hereof. House Journal, pages 1241 and 1295, and Senate Journal, page 1315.

These defendants deny every allegation of the said seventeenth paragraph. There has never been but one decission of the Kentucky court of appeals to the effect, that article two (2) of the Hewitt act constituted an irrevocable contract. That was rendered on June the 1st, 1895, by a divided court, in the consolidated cases referred to and exhibited in the bill herein. The three cases of complainant against these defendants and the City of Henderson, which arose under the Hewitt act, and which are set forth in the bill as separate adjudications, were included in the said consolidated cases and were all decided by the court of appeals, at the same time, in one opinion, the said opinion rendered on June the 1st, 1895. In those cases Judge Pryor delivered the opinion. Three (3) of the seven appellate judges concurred with him therein and three (3) of the said judges dissented therefrom in an elaborate dissenting opinion.

154 The petition for rehearing in those cases was overruled on October the 8th, 1895. The time for an appeal therefrom has not yet expired, and may yet be prosecuted. In the trial of same, these defendants relied upon the Constitution of the United States. The matter of said appeal has heretofore been in abeyance, awaiting decision in other cases. When said petition for rehearing was overruled on October the 8th, 1895, there were left pending in the said court of appeals, other cases, from the city of Owensboro and elsewhere, which involved the same questions as the said consolidated decided, as above stated, by the divided court. The said remaining cases having been heard and maturely considered, on March the 24th, 1897, in the case of Deposit Bank of Owensboro *vs.* Davies County, and other cases consolidated therewith, the said opinion rendered on June the 1st, 1895, (upon which alone the complainant herein relies), was entirely overruled and abrogated by the court of appeals of Kentucky. The said opinion rendered on March the 24th, 1897, *holds:* That complainant is not, and was never, under its present charter, protected by contract from local taxation—that neither its charter, nor article (2) of the Hewitt act constitutes an irrevocable contract between the bank and the State—that article two (2) of the Hewitt act, having expressly provided in the sixth section thereof, that it should be subject to alteration, amendment or repeal, the same was so subject, and was repealed by the State constitution of 1891 and the revenue law of 1892; and that said repeal does not impair the obligation of any contract, nor restore complainant to any contract right of exemption under its charter. A certified copy of said opinion rendered on March the 24th, 1897, is filed herewith as part hereof. Certified copies of the records of the cases in which this (the said) opinion was rendered will be filed herewith as part hereof, if required. A petition for rehearing in the said last-named cases is now pending, but same will probably be passed upon before June the 20th next. When that petition has been passed upon, these defendants will ask permission of this court to file herein a supplement to this answer, setting forth the ruling of the court of appeals upon said petition. Further answering, these defendants say that the judgments (set forth in the bill) entered in the Franklin circuit court, under said overruled

opinion, in the cases of complainant against these defendants, are erroneous and not in accordance with the mandate of the court of appeals therein, and void in so far as the same may apply to the taxes in controversy herein. None of the taxes now in controversy were involved in those two cases.

XVIII.

If complainant was, by repeal of the Hewitt act, "restored to its former position under its charter," the Farmers' bank was and is, nevertheless, subject to legislative control, by virtue of its charter.

155 XIX.

These defendants deny, that Samuel H. Stone, Charles Finley, and George W. Long are threatening to or will value the franchise of complainant, or are threatening to or will certify the valuation of said franchise to any county clerk, otherwise than in accordance with the revenue act of November the 11th, 1892 (cited in the bill herein), as construed by the court of last resort of the State.

These defendants deny, that such valuation and certification would be illegal or violative of any contract between complainant and the State, or would cast a cloud over complainant's franchise, or would cause a multiplicity of suits to be brought against complainant, or would damage complainant in a way that could not be repaired or estimated at common law.

These defendants deny that complainant has no remedy at law for the wrongs complained of. Under the laws of Kentucky complainant may pay the taxes in controversy under protest, and afterward in a single suit at law have its right adjudicated and enforced. These defendants allege that each of these defendants is solvent and amply able to reimburse complainant for any loss it may in any event sustain by reason of the wrongs alleged in the bill. These defendants deny that they or either of them will collect or attempt to collect of complainant any tax otherwise than in accordance with the said revenue law of 1892 as construed by the court of last resort of the State, or will subject complainant to the harassment of many suits, or will cast a cloud upon its franchise or property, or will attempt to enforce any penalties against complainant otherwise than as provided by law.

XX.

These defendants allege that to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers, from executing the State constitution and the present revenue law of the State as construed by the court of last resort of the State. These defendants allege that to grant the injunction prayed for would be (in effect and in fact) to enjoin proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and

county courts of the State. There is now pending in the Franklin circuit court at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to ocmpel the State board of assessment to value and apportion complainant's franchise, and the auditor (Samuel H. Stone) to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to collection of the taxes, now in controversy herein between these defendants and complainant.

These defendants submit that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that
156 this court will not exercise jurisdiction of the cause, and pray that the said bill be dismissed with costs.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
W. H. SNEED,
City Attorney for the City of Frankfort.
IRA & W. H. JULIAN,
Assistant Counsel.

Personally appeared before me, H. M. Doak, clerk of the circuit court of the United States in and for the middle district of Tennessee, Ira Julian, mayor city of Frankfort, with whom I am personally acquainted, and made oath that the matters and things stated in the foregoing answer are true, where they are stated as of his own knowledge, and where they are stated on information or belief he verily believes them to be true.

IRA JULIAN,
Mayor of the City of Frankfort, Ky.

Sworn to and subscribed before me this the 28th day of May, A. D. 1897.

H. M. DOAK, *Clerk.*

And on a day following, to wit, on June 7th, 1897, the following entry was made herein at rules, viz:

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAM'L H. STONE ET AL., Defendants.

This day came the City of Henderson, by its attorneys, Clay & Clay and filed its answer to the bill of complaint herein.

Came also the County of Henderson, by its attorney, W. J. Peter, and filed its answer to the bill of complaint herein.

Said answer of the County of Henderson, Kentucky, filed herein at rules on June 7th, 1897, was and is in words and figures as follows, viz:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendant-. } In Equity.

Answer of the County of Henderson, Ky., to the Bill of Complaint of The Farmers' Bank of Kentucky, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefits and advantage of exception which can or may be had, or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make, answering:

The defendant admits the truth of the allegations contained in the first, second, third and fourth paragraphs of complainant's bill. For answer to the fifth paragraph of complainant's bill, the defendant denies that the tax of fifty cents on each share of complainant's stock was a tax then largely in excess of the ordinary rate of taxation paid by other moneyed capital in the State of Kentucky, including municipal and county taxes, or that it continued to be so in excess until a long time thereafter.

For answer to the sixth paragraph of the bill, defendant denies that by the settled course of decisions of the highest courts in this State the meaning of those provisions mentioned in the bill of complainant, of its charter, has been fixed or determined.

157 Answering the eleventh paragraph of the bill of complainant, the defendant denies that this scheme of taxation (as set forth in bill of complaint) violates the contract made between it and the State in its charter and the amendments thereto; it denies there was a contract, or that it violates the contract made between the State under the Hewitt law; it denies there was a contract under said law, or that it is very largely in excess of the taxation provided for by its charter or by said Hewitt law, and it denies that the act of the legislature instituting such a method of taxation is violative of the United States Constitution, or of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract is void.

For answer to so much of the tenth paragraph as it is advised requires answering, defendant denies that it has been the policy of the State by legislation sustained by judicial decisions to lessen the rate of taxation on the full amount of the capital stock of the bank because the banks pay tax on the full par value of its capital stock, or because of their being prevented by law from loaning their money at a greater rate of interest than six per cent., whereas the citizens and other tax-payers under our system of valuation are by giving them their property for taxation at not exceeding one-half of the value of the property assessed, thereby making the banks even under the 75c. rate pay much more than other tax-payers. It denies that

the property of individuals is assessed for taxation at not exceeding one-half of the value of the property.

For answer to the twelfth paragraph of the bill, defendant denies that the method of taxation is also violative of the constitution of the State of Kentucky.

For answer to the seventeenth paragraph, defendant denies that it has been fully and finally adjudicated in a proceeding between it and the defendant, The Board of Councilmen of the City of Frankfort, The County of Frankfort, or The City of Henderson, that complainant's contract is valid and enforceable, or that the complainant can be subjected to no greater rate of taxation than that agreed to by it under the Hewitt law; it denies that if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, it denies there was a contract, then to no greater rate of taxation than is provided for under complainant's charter and amendments.

Answering the eighteenth paragraph, defendant denies that if it should be determined that the State of Kentucky has the right to retire from that contract that the complainant is entitled to be restored to its former position.

Answering the nineteenth paragraph, defendant denies that the defendants, Samuel H. Stone, Charles Finley or Geo. W. Long, are threatening, or unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896 or 1897, or to certify such values to the county clerk of Henderson county, or to be by said clerk certified to the collecting
158 officers thereof, it denies that such assessments will be illegal, or in violation of complainant's alleged contract, or that it will be unlawful or violative of complainant's alleged contract, or will cast a cloud over complainant's franchise, or cause a multiplicity of suits to be brought against complainant, or damage it in a way that cannot be repaired or estimated at common law, or that for these threatened wrongs, it denies there are any threatened wrongs, the complainant has no remedy at common law, or that its only remedy is by a bill in equity, or unless restrained by this honorable court the defendant will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, or will subject complainant to the harassment of many suits or cast a cloud upon its franchise or property, or that any e[illegible] will be made to enforce penalties against the complainant.

This defendant, [illegible]r further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *vs.* Daviess County, and other bank-tax cases wherein the same legal questions were involved, and issues were made, as in the cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said cases delivered, were expressly overruled; and the said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had, or was entitled to, an irrepealable contract with the State under the

provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all of said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation, provided for in said article of said act, which expressed reservation of power to amend or repeal, formed a part of the contract, if any, between the State and the banks and other similar institutions which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such bank, but that said repeal was only a legitimate exercise of the said reserved power of the legislature to amend or repeal, and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charter of said bank, was a grant to said corporation and extension of the period of its charter existence,
159 within the purview of the statutes of February 14, 1856, referred to in complainant's bill, and were subject to amendment or repeal by the legislature. The defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks which were parties in said cases so decided, to wit, sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, nor have the petitions for rehearing been passed upon, nor the decision of the court become final.

This defendant, while disavowing any intention or purpose on its part, to collect or attempt to collect municipal taxes from the complainant, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

The defendant states that the complainant, has not filed its

annual report for the years 1895, 1896 and 1897, with the auditor, or the State board of valuation and assessment, as required by the revenue laws of November 11, 1892.

Further answering, defendant submits that all the questions involved in this case are, as herein set forth, now pending in the court of appeals of Kentucky upon petition for rehearing which have not as yet been disposed of, and it would be a conflict of authorities, such as should be avoided, for this court to assume jurisdiction in this case.

Defendant submits that complainant is entitled to no injunction, nor to any equitable relief in this court.

Wherefore, having answered, this defendant prays that the bill of complainant be dismissed, with judgment for its costs, and for all other relief, to which it in equity may appear to be entitled.

W. J. PETER,
Attorney and Solicitor for County of Henderson.

160 Said answer of the City of Henderson, Kentucky, filed herein at rules on June 7th, 1897, was and is in words and figures as follows, viz:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FARMERS' BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, ETC., Defendant-. } In Equity.

Answer of the City of Henderson, Ky., to the Bill of Complaint of The Farmers' Bank of Kentucky, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefits and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make, answering:

The defendant admits the truth of the allegations contained in the first, second, third and fourth paragraphs of complainant's bill. For answer to the fifth paragraph of complainant's bill, the defendant denies that the tax of fifty cents on each share of complainant's stock was a tax then largely in excess of the ordinary rate of taxation paid by other moneyed capital in the State of Kentucky, including municipal and county taxes, or that it continued to be so in excess until a long time thereafter.

For answer to the sixth paragraph of the bill, defendant denies that by the settled course of decisions of the highest courts in this State, the meaning of those provisions mentioned in the bill of complainant, of its charter has been fixed or determined.

Answering the eleventh paragraph of the bill of complainant, the defendant denies that this scheme of taxation (as set forth in bill of complaint) violates the contract made between it and the State

in its charter and the amendments thereto; it denies there was a contract, or that it violates the contract made between the State under the Hewitt law, it denies there was a contract under said law, or that it is very largely in excess of the taxation provided for by its charter or by said Hewitt law; and it denies that the act of the legislature instituting such a method of taxation is violative of the United States Constitution, or of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract is void.

For answer to so much of the tenth paragraph as it is advised requires answering, defendant denies that it has been the policy of the State by legislation sustained by judicial decisions to lessen the rate of taxation on the full amount of the capital stock of the bank, because the banks pay tax on the full par value of its capital stock, or because of their being prevented by law from loaning their money at a greater rate of interest than six per cent, whereas the citizens and other tax-payers under our system of valua-
161 tion are, by giving them their property for taxation at not exceeding one-half of the value of the property assessed, thereby making the banks, even under the seventy-five-cent rate, pay much more than other tax-payers. It denies that the property of individuals is assessed for taxation at not exceeding one-half of the value of the property.

For answer to the twelfth paragraph of the bill, defendant denies that the method of taxation is also violative of the constitution of the State of Kentucky.

For answer to the seventeenth paragraph defendant denies that it has been fully and finally adjudicated in a proceeding between it and the defendant, The Board of Councilmen of the City of Frankfort, The County of Franklin, or The City of Henderson, that complainant's contract is valid and enforceable, or that the complainant can be subjected to no greater rate of taxation than that agreed to by it under the Hewitt law; it denies that if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, it denies there was a contract then to no greater rate of taxation than is provided for under complainant's charter and amendments.

Answering the eighteenth paragraph defendant denies that if it should be determined that the State of Kentucky has the right to retire from that contract that the complainant is entitled to be restored to its former position.

Answering the nineteenth paragraph, defendant denies that the defendant Samuel H. Stone, Charles Finley or Geo. W. Long are threatening, or unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11th, 1892, for the years 1895, 1896 or 1897, or to certify such values to the county clerk of Henderson county or to be by said clerk certified to the collecting officers thereof; it denies that such assessments will be illegal, or in violation of complainant's alleged contract, or that it will be unlawful or violative of complainant's alleged contract, or will cast a cloud

over complainant's franchise, or cause a multiplicity of suits to be brought against complainant; or damage it in a way that cannot be repaired or estimated at common law, or that for these threatened wrongs, it denies there are any threatened wrongs, the complainant has no remedy at common law, or that its only remedy is by a bill in equity; or unless restrained by this honorable court the defendant will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, or will subject complainant to the harassment of many suits or cast a cloud upon its franchise or property, or that any effort will be made to enforce penalties against the complainant.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24th,
1897, in the case of Deposit Bank of Owensboro *vs.* Daviess
162 County, and other bank-tax cases, wherein the same legal questions were involved, and issues were made, as in the cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said cases delivered, were expressly overruled; and the said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all of said banks and similar institutions in the State, were repealed by the State constitution of September 28th, 1891, and the general revenue law of November 11th, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17th, 1886, the power at will to amend, or repeal the scheme of bank taxation provided for in said article of said act, which expressed reservation of power to amend or repeal formed a part of the contract, if any between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11th, 1892, did not impair the obligation of any contract with such bank, but that said repeal was only a legitimate exercise of the said reserved power of the legislature to amend or repeal, and that the acts of the legislature, adopted subsequent to February 14th, 1856, amending the original charter of said bank was a grant to said corporation and extension of the period of its charter existence, within the purview of the statutes of February 14th, 1856, referred to in complainant's bill, and were subject to amendment or repeal by the legislature. The defendant states that by the concluding section of said revenue law of November 11th, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the

rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks which were parties in said cases so decided, to wit, sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, nor have the petitions for rehearing been passed upon, nor the decision of the court become final.

163 This defendant, while disavowing any intention or purpose, on its part, to collect, or attempt to collect municipal taxes from the complainant, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

The defendant states that the complainant has not filed its annual report for the years 1895, 1896 and 1897, with the auditor, or the State board of valuation and assessment, as required by the revenue laws of November 11, 1892.

Further answering, defendant submits that all the questions involved in this case are, as herein set forth now pending in the court of appeals of Kentucky upon petition for rehearing which have not as yet been disposed of, and it would be a conflict of authorities, such as should be avoided, for this court to assume jurisdiction in this case.

Defendant submits that complainant is entitled to no injunction, nor to any equitable relief in this court.

Wherefore, having answered, this defendant prays that the bill of complainant be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

CLAY & CLAY,
Attorneys and Solicitors for City of Henderson.

Heretofore, to wit, on May 28th, 1897, the following order was made and entered herein, viz:

United States Circuit Court for the Sixth Circuit, District of Kentucky, at Frankfort.

FARMERS' BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, ETC., Defendant.

This day came the Farmers' Bank of Kentucky, by John W. Rodman, counsel, and filed herein notices duly served upon all the

defendants, and moved the court to grant to it an interlocutory injunction during the pendency of this cause against the defendants, Samuel H. Stone, Geo. W. Long and Chas. Finley, enjoining and restraining them from making any assessment or valuation of the franchises or intangible property of the complainant under the act of November 11th. 1892. And against the defendants, The Board of Councilmen of the City of Frankfort, and County of Franklin, and City of Georgetown and County of Scott, and City of Henderson and County of Henderson, from attempting to collect any taxes thereon.

Thereupon, came said Board of Councilmen of the City of Frankfort and Franklin County, by Ira Julian and J. H. Polgroves,
164 counsel, and the City of Henderson by Jas. F. Clay and the County of Henderson by E. C. Ward, and W. J. Peter, and objected to the said motion, and filed special and general demurrers to the bill of complaint. And the same having come on to be heard, and argued by counsel, was submitted, and the court not being advised, takes time.

And thereupon, at the same time, came the defendants, Samuel H. Stone, Geo. W. Long and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their demurrers to the bill of complaint; and also came the Board of Councilmen of the City of Frankfort, and the County of Franklin, by Ira Julian and J. H. Polgroves, and filed herein their demurrers to the said bill of complaint, and by stipulation, without waiving the same, their answers.

And the said cause having come on to be heard upon the said demurrers, and argued by counsel, was submitted, and the court not being advised, takes time.

WM. H. TAFT,
Circuit Judge.

May 28, 1897.

165 And on day following, to wit, on the 5th day of July, 1897, the following entry was made herein at rules, viz:

FARMERS' BANK OF KENTUCKY
vs.
SAM'L H. STONE ET AL.

This day came the complainant herein, by its attorneys, W. S. Pryor and John W. Rodman, and filed its replications to the answers of the County of Henderson, the City of Henderson, and of the City of Frankfort and County of Franklin.

Said replication to the answer of the County of Henderson is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendant-.

Replication of the Complainant to the Answer of the County of Henderson.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter of thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

W. S. PRYOR &
J. W. RODMAN,
Solicitors for Complainant.

166 Said replication to the answer of the City of Henderson is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendant-.

Replication of the Complainant to the Answer of the City of Henderson.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied to, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

W. S. PRYOR AND
J. W. RODMAN,
Solicitors for Complainant.

Said replication to the joint answer of the City of Frankfort and County of Franklin is in the following words and figures, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants.

Replication of the Complainant to the Joint Answer of the Board of Councilmen of the City of Frankfort and Franklin County.

167 This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereto saith that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

W. S. PRYOR AND
J. W. RODMAN,
Solicitors for Complainant.

And on a day following, to wit, on the 9th day of May, 1898, the following entry was made herein, viz:

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &C., Defendants.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE, &C., Defendants.

Came this day the complainants in the above-styled causes, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainants in said several cases also filed herein notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions, and also came the City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties, and, the court being advised, it is now ordered, adjudged, and decreed that the several defendants in the above-styled cases are enjoined and restrained as follows:

The defendants Stone, Finley, and Long are enjoined and
168 restrained from making or certifying any assessment against the complainants or any of them for the years 1895, 1896, 1897, and 1898 or any of them.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

(Signed) WM. H. TAFT,
Circuit Judge.

Said notice of motion filed herein on May 9th, 1898, is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } Notice.

The defendants to the above-entitled bill of complaint will take notice that on Monday, May 9th, 1898, the complainant will move, before the Honorable W. H. Taft, circuit judge, at his chambers or court-room, in the Federal building, at Cincinnati, Ohio, about the hour of two p. m., to file herein an amended and supplemental bill of complaint and for an order of injunction or restraint against the defendants in accordance therewith.

Respectfully,

FARMERS' BANK OF KENTUCKY,
By W. S. PRYOR &
J. W. RODMAN, *Att'ys.*

Said notice is endorsed as follows, viz:

Executed by delivering to W. S. Dehoney, mayor of the city of Frankfort, Ky., and J. D. Moore, county judge of Franklin county, Ky., to each of them a true copy of the within notice. May the 6, 1898.

B. F. SUTER, *S. F. C.*,
By P. C. TOWLES, *D. S.*

Said amended and supplemental bill of complaint filed herein on May 9th, 1898, is in words and figures as follows, viz:

169 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } Amended and Supplemental Bill of Complaint.

The complainant, by way of amended and supplemental bill of complaint, would respectfully represent that the defendants Stone, Finley, and Long are now proposing to value the intangible prop-

erty and franchises of the complainant and to certify the same for the year 1898, exactly in the same way as they are alleged in the original bill of complaint to be about to value and certify for the years 1895, 1896, and 1897, and unless restrained by the court will make such valuation and certification, and the other defendants will endeavor to collect the tax thereon, just as is alleged in reference to the years specified in the original bill of complaint.

Your complainant makes the same allegations in reference to this vaouation and certification, to wit, for the year 1898, *and* it makes in its original bill of complaint in regard to the valuation and certification for the other years, and makes the same allegation in reference to the illegality thereof and of any effort on the part of the other defendants to collect taxes thereon as is made in reference to the said other years.

Wherefore the complain-t now amends its prayer in the original bill of complaint so as to include the year 1898, and prays as before and will ever pray.

Thomas Rodman says he is the president of the complainant; that the facts stated in the foregoing amended and supplemental bill of complaint are true so far as stated upon his personal knowledge, and are believed to be true so far as stated upon information.

THOMAS RODMAN.

Subscribed and sworn to before me this 6th day of May, 1898.

JAMES H. DORMAN, JR.,
Examiner for Franklin Co.

170 And on a day following, to wit, on the 25th day of June, 1898, the following entry was made herein, viz:

FARMERS' BANK OF KENTUCKY
vs.
SAMUEL H. STONE, Auditor, &c.

This day came the complainant, by its attorney, and filed a notice, duly executed, upon the defendant The County of Henderson, and by leave of court complainant is permitted to file its amended bill herein; which notice and amended bill are now filed.

(Signed) WM. H. TAFT,
Circuit Judge.

Said notice is in words and figures as follows, viz:

Circuit Court of the United States for the Sixth District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
versus
SAM'L H. STONE, &c., Defendants. } Notice.

The defendant The County of Henderson will take notice that on Saturday, the 25th day of June, 1898, at the Federal court-room in Cincinnati, Ohio, on or about the hour of 10 o'clock a. m. or when the court shall convene, the complainant will file in the above-

styled case an amended bill, in which it will set up and rely upon two judgments rendered by the Henderson circuit court on the 22nd day of October, 1895, in two injunction suits of The Farmers' Bank of Kentucky *vs.* The County of Henderson, &c., enjoining the collection of any county taxes against said bank for the years 1893 and 1894 as "*res judicata*" and as a bar to the collection or claim of the county of Henderson to collect any taxes for any purpose from said Farmers' bank.

The defendant is also notified that the complainant will file a certified copy — both of said records as exhibits in its amended bill.

THE FARMERS' BANK OF KENTUCKY,
By W. S. PRYOR &
J. W. RODMAN, *Att'ys.*

Said notice is endorsed as follows, viz:

171 Executed on Henderson county by delivering copy of this notice to E. C. Ward, county judge, and one copy to N. Powel Tayler, att'y for said county, this June 22, 1898.

W. G. DIXON, *S. H. C.*

Said amended bill filed herein on June 25th, 1898, is in words and figures as follows, viz:

Circuit Court of the United States for the Sixth Circuit of the State of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant, *versus* S. H. STONE, &c., Defendants.	Amended Bill in Equity.

To the judges of the circuit court of the United States for the circuit and sixth district of Kentucky:

The complainant, The Farmers' Bank of Kentucky, by leave of court for amendment to its original bill heretofore filed herein, states that the amount of the value of its capital stock as fixed by the board of valuation and assessment as of December 31st, 1892, was $1,163,919.27, of which there was apportioned by said board to the defendant, The County of Henderson, $359,000 for the year 1893, and for the year 1894 there was apportioned by said board of valuation and assessment to said county of Henderson $349,400; that this would be substantially the same valuation and apportionment for Henderson county as of December 31st, 1894, and the same as of December 31st, 1895, December 31st, 1896, and December 31st, 1897, for said county.

It states that the said board of valuation and assessment mentioned in the original bill, acting under the law of November 11th, 1892, having certified to the county of Henderson the amount of its proportion of the valuation of complainant's franchise, the defend-

ant The County of Henderson caused to be placed in the hands of Jno. E. Hickman, sheriff of said county and the collector of its revenue, the tax bill made out in accordance with the apportionment, as above set forth, for the year 1893, and the county of Henderson attempting to collect taxes thereon, the complainant, on the
172 16th day of October, 1893, filed in the circuit court of Henderson county, that being a court of general jurisdiction, its petition against The County of Henderson, the defendant herein, and Jno. E. Hickman, sheriff of Henderson county, in apt terms setting forth in the petition the contract between it and the State of Kentucky in regard to taxation under its original charter and under the Hewitt law, claiming the benefit of such contract, and claiming that no taxes could be collected from the complainant, except in pursuance thereof during its charter life, and claiming that the act of the legislature of November 11th, 1892, was unconstitutional and void as impairing the obligation of its contract, and praying the court to establish its contracts, and to enjoin the said county of Henderson and Jno. E. Hickman, sheriff, from attempting to collect any taxes contrary thereto. Afterwards, to wit, on the 22nd day of October, 1895, the summons having been duly served on the defendants on said petition, the court rendered the following judgment:

"At a September term, 1895, of the Henderson circuit court, to wit, Tuesday, October 22nd, 1895, the following order was entered herein: This action coming on to be heard, and it appearing that the court of appeals of Kentucky has rendered decision to the effect that during the corporate existence of plaintiff under its present charter the capital stock, undivided profits, and surplus and other property of said bank are not subject to municipal taxation or to taxation by any county of this Commonwealth, and that the county of Henderson sought to compel the plaintiff to pay taxes to it in the sum of five hundred and thirty-eight dollars & fifty cents, the payment of which was enjoined in this action filed October 16th, 1893, and the defendants declining to plead further, it is adjudged that defendants be enjoined and restrained from collecting from plaintiff said sum of $538.50, and from levying upon or selling the realty or any other property of plaintiff, and that the alleged tax and claim of said county is adjudged illegal and void, and that the said injunction be made perpetual, and that plaintiff recover from the defendants, The County of Henderson, the costs of this action, for which execution may be issued."

No appeal was ever taken from said judgment. A duly certified copy of the record in said case as it appears in the Henderson
173 circuit court is filed herewith as part hereof, marked "Exhibit M." Said exhibit contains the whole proceedings in said cause.

II.

The complainant further states that the said board of valuation and assessments, acting under said law of November 11th, 1892, having certified to the defendant The County of Henderson, as set forth in the above paragraph and in the original bill, the amount

of its proportion of the valuation of complainant's franchise of the year 1894, the defendant The County of Henderson caused to be placed in the hands of Jno. E. Hickman, sheriff of said county and the collector of its revenues, the tax bill made out in accordance with the apportionment for the said year of 1894, and the defendant The County of Henderson attempting to collect taxes thereon, the complainant, on the 1st day of December, 1894, filed in the Henderson circuit court, which is a court of general equity jurisdiction, its petition against the said county of Henderson and said Jno. E. Hickman, sheriff of Henderson county, setting forth its contract under its original charter and under the Hewitt law with the State, and relying upon the same, and setting forth the attempted violation thereof under the act of November 11th, 1892, and claiming that the act of the legislature — November 11th, 1892, was unconstitutional and void as impairing the obligation of its contract, and praying judgment against the defendant- The County of Henderson and the said Jno. E. Hickman, sheriff of Henderson county, that they be enjoined and restrained from collecting from the complainant any of said taxes; that the said alleged taxes be adjudged illegal and void and for all proper relief.

Complainant states that summons was duly issued on said petition and executed on the said defendants The County of Henderson and Jno. E. Hickman, sheriff, and afterwards, to wit, at a September term, 1895, of the Henderson circuit court, to wit, Tuesday, October 22nd, 1895, the following judgment was rendered in said case by said court:

"This action coming on to be heard, and it appearing that the court of appeals of Kentucky has rendered decision to the effect that during the corporate existence of plaintiff under its present charter
the capital stock, surplus, and undivided profits, and other
174 property of said bank is not subject to municipal taxation by
any county of the Commonwealth, and that the defendant The County of Henderson sought to compel plaintiff to pay taxes in the sum of $541.57, the payment of which was enjoined under plaintiff's above-styled action filed December 1st, 1894, and the defendants declining to plead further, it is adjudged that defendants be enjoined and restrained from collecting from plaintiff said sum of $541.47, and from levying upon or selling the realty and other property of plaintiff, and that the alleged tax and claim of said county is adjudged illegal and void, and that the said injunction be made perpetual, and that plaintiff recover from the defendant The County of Henderson the costs of this action, for which execution may be issued."

The complainant files herewith as part hereof a duly certified copy of the proceedings in said cause, being the full record of said case, and marked "Exhibit N."

III.

The premises considered, the complainant says that it has been decided in a proceeding between it and the defendant The County of Henderson that complainant's contract is valid and enforcible

and that the complainant can be subjected to no greater rate of taxation than that agreed to by it under the Hewitt law, and it prays that the said defendants Sam'l H. Stone, Charles Finley, and George W. Long be perpetually enjoined and restrained from assessing the value of complainant's capital stock or any of its property under the act of November 11th, 1892, for the years 1895, '6, or 1897 or any other year, and that the defendant Sam'l H. Stone be enjoined from certifying any such valuation to the said county of Henderson, and that the said county of Henderson be restrained from endeavoring to collect any tax upon any such valuation, and it prays as in its original bill.

W. S. PRYOR &
J. W. RODMAN,
Complainant's Solicitors.

STATE OF KENTUCKY, } *sct:*
Franklin County, }

Thomas Rodman says he is the president of The Farmers' Bank of Kentucky, the complainant; that the facts stated herein, so
175 far as stated from his personal knowledge, are true, and so far as stated from information — to be true.

THOMAS RODMAN.

Subscribed and sworn to before me by Thomas Rodman this 24th day of June, 1898.

W. G. CHAPMAN, *Clerk,*
By CHAS. N. WIARD, *D. C.*

"Exhibit N," filed with the foregoing supplemental bill, is in words and figures as follows, viz:

STATE OF KENTUCKY:

Pleas before Hon M. C. Givens, judge of the Henderson circuit court, at the court-house, in the city of Henderson, Kentucky, on Tuesday, October 22nd, 1895.

Style of suit.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
THE COUNTY OF HENDERSON and JNO. E. HICKMAN, Sheriff of Henderson County, Defendants. } Petition in Equity.

Be it remembered that on the 1st day of December, 1894, the plaintiff filed in the office of the clerk of the Henderson circuit court its petition, which is in words and figures as follows:

Petition.

The plaintiff, The Farmers' Bank of Kentucky, states that it is a banking corporation duly chartered by the General Assembly of the Commonwealth of Kentucky by an act entitled An act to in-

corporate the Farmers' Bank of Kentucky, approved February 16, 1850, and under its charter, which would have expired in the year 1880 but for the act extending it hereinafter mentioned, is possessed of general banking powers, among them those of having and conducting offices of loan and discount, to loan money, discount promissory notes and bills of exchange, and to deal in exchange; and soon after the granting of said charter it organized thereunder and has conducted its banking business ever since such organiza-
176 tion under said charter and under said act hereinafter mentioned, by which the term of charter was extended. At this time its principal office is located at and in the city of Frankfort, Ky., and its branches respectively in the city of Georgetown, Ky., and in the city of Henderson, Ky.; that section 15 of the act first mentioned prescribes that it shall "be the duty of the cashier of the principal bank on the first day of July, 1851, and on the first day of July in each succeeding year during the continuance of this charter to pay into the treasury of this Commonwealth fifty cents (50c.) on each one hundred dollars of stock held and paid for by said bank, which shall be in full of all tax or bonus; provided that no tax shall be paid until said bank goes into operation, and provided further that the tax or bonus hereby proposed to be imposed on such shares of stock in this bank or such as shall hereafter be imposed on each share is set apart and forever dedicated to the cause of education on the common-school system. And whenever the same or any part thereof shall be diverted otherwise — by legislative enactment, said bank shall be exonerated from the payment of any tax or bonus whatever."

Plaintiff says that the said contract and stipulation, as contained in the said charter, fixing the said rate of taxation conduced to the acceptance of said charter & to an organization under it by said bank, and to the maintenance of said bank and its branch banks.

That by an act entitled "An act extending the charter of the Farmers' Bank of Kentucky," approved on March 10th, 1876, the said legislature extended the aforesaid charter for the period of twenty-five years (25) from the time of the expiration of its said original charter in language as follows:

SECT. 1. "That the charter of the Farmers' Bank of Kentucky as amended be extended for the period of twenty-five years from the termination of its charter as therein fixed. Provided that said charter and amendments shall be subject to amendment or repeal by the General Assembly either by general or special act and
177 provided further that whilst the privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested." Said act is contained in the Acts of 1871, volume 1, page 324.

Plaintiff states that in pursuance to s'd provision relating to tax the plaintiff from the time of its first organization and ever since then to the date hereinafter mentioned has always paid and continued to pay to the State of Kentucky said tax on each one hundred dollars of the stock issued and paid for in said bank; that by a general statute passed by said legislature and approved on May

17, 1886, charter 92 of the General Statutes of Kentucky, article 2, section 4, commonly called "Hewitt law," it was provided that each of said banks, viz, (State and national banks) "by its proper corporate authority and the consent of the majority in interest of a quorum of its stockholders, at a regular or called meeting thereof," may give its consent to the levying of a tax of seventy-five cents (75c.) on each share thereof equal to one hundred dollars or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and that each corporation shall pay in addition upon each one hundred dollars or so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock the same rate of taxation that is assessed upon real estate, which shall be in full of all tax—State, county, and municipal—"and agree to pay same" and to waive and release all right under the acts of Congress or under the charter of the State banks to a different mode or smaller rate of taxation, which consent or agreement shall be endorsed by writing under the seal of said bank and delivered to the governor of the Commonwealth of Kentucky; and said section further provides that upon such agreement and consent being delivered and in consideration thereof such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of said bank.

Under the 7th section of the same article it is also provided that nothing in said act contained shall be construed as exempt-
178 ing from taxation for county or municipal purposes any real estate or building owned by said bank or corporation for conducting their business, but the same may be taxed for county or municipal purposes as other real estate is taxed; that in the 5th section thereof it is also provided that said bank may take the proceeding authorized by said 4th section of such act at any time until the meeting of the "next" General Assembly, provided they pay the tax aforementioned.

Now, plaintiff states that within the aforesaid time so fixed by said act for an acceptance of the propositions of the State of Kentucky, to wit, on the 6th day of December, in the year 1887, the said Farmers' Bank of Kentucky, by a majority in interest of a quorum of the stockholders of said bank, did consent and agree to and with the Commonwealth of Kentucky to the payment of the taxes proposed and provided for in aforesaid article 2, and in all other respects did comply with all the requirements of said act, and said bank did thereupon complete its acceptance of the proposed contract with the Commonwealth of Kentucky and delivered its written consent and agreement to the governor of the Commonwealth of Kentucky, as prescribed by the said act, and has always complied with the provisions of said contract from the inception of plaintiff's liability thereunder by paying to the State of Kentucky the above taxes on all the shares of stock and all taxable surplus and profits in the ratio and measure fixed by the act and contemplated by the said act and contract and by paying all the county and municipal taxes assessed against its real estate owned or used by said bank and

its branches in conducting its business until the — day of ——, 1893, and — day of ——, 1894, when it tendered to and offered to pay to State of Kentucky, viz., to its auditor of public accounts, whose duty it was to receive same for said State of Ky., all the taxes for which it was liable, and it refused to receive same.

Plaintiff says also and submits that under its contract with said State of Kentucky it is not liable for the payment of any greater or higher rate or other rate of tax or taxes, State, county,
179 or municipal, than that fixed under its said contract during the period of its existence as a corporation, and that its said contract with the State of Kentucky is in full force and is irrepealable during the corporate existence of the plaintiff corporation so long as said bank continues to observe the same, and that under such agreement said bank and the shares of stock therein and the property of said bank save and except its banking-houses are exempt from both county and municipal taxes. It states the legislature of the State of Kentucky by a late act, which became a law on November 11th, 1892, entitled "revenue and taxation," chapter 103, enacted in article 1, section 2, thereof that all real and personal estate within the State of Kentucky and all personal estate of persons residing within such State and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises, shall be subject to taxation unless the same shall be exempt from taxation by the State constitution, and in the 3rd section thereof that the State of Kentucky and each county, incorporated city, or town and taxing district shall have a lien on all other property of each person or corporation owing the same for the taxes due by them respectively.

Plaintiff submits that if such act was intended by the said legislature to apply to and include this plaintiff or the shares of stock held therein or its property the same is in conflict with the aforesaid agreement made between this plaintiff and the State of Kentucky, and as to this plaintiff and said stock the last-mentioned act is inoperative and void during the corporate existence of said bank; and it further says and submits that the said act of November 11th, 1892, in so far as it conflicts with the aforementioned agreement to and with the State of Kentucky, impairs the obligation of the said contract and is unconstitutional and void, and that said legislation in relation to said contract is in conflict with the constitution of the State of Kentucky, and is also in conflict with the Constitution of the United States in that it impairs the obligation
180 of the contract.

Plaintiff further alleges and submits that if it should be held by the court that the said act of November 11th, 1892, operated as a repeal or abrogation of the said "Hewitt law" of 1886 and as a repudiation by the State of Kentucky of its said contract, however, in that event, the original charter of the plaintiff (under the act of 1850) is in full force and effect and the plaintiff is restored to all its vested rights under its original charter, among which is the exemp-

tion from any greater or other tax than is specifically designated by its said charter.

Plaintiff states that the defendant County of Henderson, in said State of Kentucky, and the defendant Jno. E. Hickman, who is the sheriff of said county, having in charge the collection and enforcement of taxes claimed by said county to be owing to it, now seek to subject and compel the plaintiff to pay certain taxes claimed by said county and said sheriff as owing by the plaintiff to said county to the amount of $541.57, and said sheriff has demanded from the plaintiff the said alleged tax of five hundred and forty-one $\frac{57}{100}$ dollars, which demand plaintiff has refused to comply with, and said sheriff has threatened to and does now threaten to levy upon and expose to sale and sell the property of the plaintiff, viz., certain valuable real estate belonging to the plaintiff in the city of Henderson, Ky., for the satisfaction of said alleged or pretended taxes, and unless restrained by law said defendant sheriff will proceed to enforce or carry out his said threat, and if the injunction hereinafter prayed for is not immediately granted great or irreparable injury will result to plaintiff.

Plaintiff states that no injunction about the matters herein contained has been refused by the court or any circuit judge. Wherefore plaintiff prays that the defendant- The County of Henderson and the sheriff of said county be enjoined and restrained from collecting from the plaintiff the said sum of $541 57 or any part thereof or any other tax or taxes and from levying upon or selling the real
181 estate of said plaintiff at Henderson, Ky., or any other property of plaintiff, and prays that the aforesaid alleged tax and claim of defendant The County of Henderson be adjudged illegal and void, for a restraining order against said defendants to prevent them from collecting said tax or enforcing same by sale of said property or otherwise, and that the injunction prayed for be made perpetual, and for all other relief to which it may be found entitled.

A. T. DUDLEY,
Att'y for Plaintiff.

Martin Schlamp, who is president of the plaintiff, Farmers' Bank of Kentucky, at its branch of said bank in Henderson, Ky., and its chief officer at such bank, says he believes the statements of the foregoing petition are true.

MARTIN SCHLAMP.

Sworn to before me by Martin Schlamp (president) on this 28th day of November, 1894.

A. T. DUDLEY, *N. P., H. C.*

There was filed with the foregoing petition the following notice:

The defendants County of Henderson and J. E. Hickman, sheriff of said county, are notified that said plaintiff in above action will on Monday, Dec. 3rd, 1894, between hours of 9 a. m. & 12 m., apply to the judge of the Henderson county court (the judge at Henderson circuit court being absent from Henderson county) for an order re-

straining the aforesaid defendants from collecting $541.57 and any other sum for taxes claimed as owing by plaintiff to said county of Henderson, and from levying upon, exposing to sale, or selling any of the real estate or other property of plaintiff.

Dec. 1, 1894.

FARMERS' BANK OF KENTUCKY,
By A. T. DUDLEY, *Att'y.*

I hereby accept service of above notice Dec. 1, 1894.

W. P. McCLAIN,
County Att'y.

182 Upon the filing of the foregoing petition summons and two copies were issued. Said summons is here copied as follows:

Summons.

No. 1121. Summons. Equity.

Commonwealth of Kentucky to the jailer of Henderson county, Greeting:

You are commanded to summon the County of Henderson and John E. Hickman, sheriff of Henderson county, to answer on the first day of the next Jan'y term of our Henderson circuit court a petition filed against them in said court by the Farmers' Bank of Kentucky, and warn them that upon failing to answer, the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next Jan'y term of said court.

Witness S. A. Young, clerk of said court, this 1st day of December, 1894.

S. A. YOUNG, *Clerk,*
By J. R. LAMBERT, *D. C.*

The foregoing summons was returned to the office from whence it was issued with the following official end*p*rsement:

Return.

Executed by delivering to Jno. F. Lockett, judge of the Henderson county court, & John E. Hickman, sheriff of Henderson county, a true copy of this writ December 1st, 1894.

E. M. JOHNSON, *J. H. C.*

On 4 December, 1894, the plaintiff filed in the office of the clerk — the Henderson circuit court an order of injunction, which is here copied as follows:

Order of Injunction.

Hon. M. C. Givens, the judge of the Henderson circuit court, being now absent from Henderson county, Kentucky—

The clerk of the Henderson circuit court is ordered to issue an

order of injunction enjoining — restraining the County of Henderson and Jno. E. Hickman, sheriff of Henderson county, from collecting from the plaintiff, The Farmers' Bank of Kentucky, the sum of $541.57 or any part of said sum as a tax or taxes and
183 from levying upon any property of the plaintiff for taxes claimed by said county until the further order of this court or of the Henderson circuit court, upon the execution by the plaintiff of a bond, with good approved security, conditioned that the Farmers' Bank of Kentucky will pay to the defendant- such damages as they may sustain if it should be adjudged that the injunction ought not to have been granted.

Given under my hand, as judge of the Henderson county court, this 3rd day of December, 1894.

JNO. F. LOCKETT,
Judge Henderson County Court.

On December 4, 1894, the plaintiff filed in the office of the clerk of the Henderson circuit court its injunction bond as follows:

Bond.

Henderson Circuit Court, Term 187–.

FARMERS' BANK OF KENTUCKY, Plaintiff,
against
COUNTY OF HENDERSON, &c., Defendant-. } Bond.

We undertake that the plaintiff, The Farmers' Bank of Kentucky, shall pay to the defendant-, The County of Henderson & J. E. Hickman, S. H. C., the damages which they must sustain by reason of the injunction in this action if it is finally decided that said injunction ought not to have been granted.

This 4 day of December, 1894.

FARMERS' BANK OF KENTUCKY,
By A. T. DUDLEY, *Att'y.*
MARTIN SCHLAMP.

Attest: S. A. YOUNG, *C. H. C. C.*
By J. R. LAMBERT, *D. C.*

Upon the filing of the foregoing injunction bond injunction and two copies were issued. Said injunction is here copied as follows:

Injunction.

STATE OF KENTUCKY:

Henderson Circuit Court.

FARMERS' BANK OF KENTUCKY, Pl'ff,
vs.
THE COUNTY OF HENDERSON, Def'ts. } Injunction.

184 The Commonwealth of Kentucky to the County of Henderson and J. E. Hickman, sheriff of Henderson county, Greeting:

You are hereby enjoined and restrained from collecting from the plaintiff, The Farmers' Bank of Kentucky, the sum of $541.57 or any part of said sum as a tax or taxes and from levying upon any property of the plaintiff for taxes claimed by said county until the further order of the Henderson circuit court.

Given under my hand, as clerk of said court, this the 4th day of Dec., 1894.

S. A. YOUNG, *C. H. C. C.*

The foregoing injunction was returned to the office from whence it issued with the following official endorsement:

Return.

Executed by delivering to John F. Lockett, judge of the Henderson county court, and John E. Hickman, sheriff of Henderson county, each a true copy of this writ. December 6th, 1894.

E. M. JOHNSON, *J. H. C.*

At a September term, 1895, of the Henderson circuit court, to wit, Tuesday, October 22nd, 1895, the following order was entered herein:

Judgment.

This action coming on to be heard, and it appearing that the court of appeals of Kentucky has rendered decision to the effect that during the corporate existence of plaintiff under its present charter the capital stock, surplus, and undivided profits and other property of said bank is not subject to municipal taxation or taxation by any county of the Commonwealth, and that the defendant The County of Henderson sought to compel plaintiff to pay taxes in the sum of $541.57, the payment of which was enjoined under plaintiff's above-styled action, filed December 1, 1894, and the defendants declining to plead further, it is adjudged that defendants be enjoined and restrained from collecting from plaintiff said sum of $541.57 and from levying upon or selling the realty and other property of plaintiff, and that the alleged tax and claim of
185 said county is adjudged illegal and void, and that the said injunction be made perpetual, and that plaintiff recover from

the defendant The County of Henderson the costs of this action, for which execution may be issued.

Clerk's Certificate.

STATE OF KENTUCKY, *Henderson County,* } *sct:*

I, J. R. Lambert, clerk of the Henderson circuit court, same being a court of record in and for the State and county aforesaid, do hereby certify that the foregoing 20 pages, from 1 to 20, inclusive, this included, contain a true and complete transcript of all the records and proceedings in the case wherein The Farmers' Bank of Kentucky is the plaintiff and The County of Henderson and Jno. E. Hickman, sheriff of Henderson county (now ex-sheriff), are defendants, as found of record in my office, and directed to be copied by the attorneys of the Farmers' Bank of Kentucky.

Given under my hand, as clerk of said court, this the 16 day of June, 1898.

J. R. LAMBERT, *C. H. C. C.*

Judge's Certificate.

STATE OF KENTUCKY, *Henderson County,* } *sct:*

I, J. L. Dorsey, judge of the circuit court in and for the county of Henderson, State of Kentucky, do hereby certify that J. R. Lambert, whose genuine signature appears above, is the duly elected, qualified, and acting clerk of Henderson circuit court; that his certificate is in due form of law, and his official acts are entitled to full faith and credit.

Given under my hand, as judge of said court, this the 16 day of June, 1898.

J. L. DORSEY, *Judge.*

STATE OF KENTUCKY, *Henderson County,* } *sct:*

I, J. R. Lambert, clerk of the Henderson circuit court, same being a court of record in and for the State and county aforesaid,
186 do hereby certify that J. L. Dorsey, whose genuine signature appears above, is the duly elected, qualified, and acting judge of the Henderson circuit court, and that his official acts are entitled to full faith and credit.

Given under my hand and seal of office this the 16 day of June, 1898.

[SEAL.] J. R. LAMBERT, *C. H. C. C.*

Clerk's fee for this transcript.....	$5.50
Seal.....	.50
	$6.00

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"Exhibit M," filed with said supplemental bill on June 25th, 1898, is in words and figures as follows, viz:

STATE OF KENTUCKY:

Pleas before Hon. M. C. Givens, judge of the Henderson circuit court, at the court-house, in the city of Henderson, Kentucky, on Tuesday, October 22nd 1895.

THE FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
COUNTY OF HENDERSON and JNO. E. HICKMAN, Sheriff of Henderson County, Def'ts. } Petition in Equity.

187 Style of suit.

Be it remembered that on the 16th day of October, 1893, the plaintiff filed in the office of the clerk of the Henderson circuit court its petition, which is in words and figures as follows:

The plaintiff, The Farmers' Bank of Kentucky, states that it is a banking corporation duly chartered by the General Assembly of the Commonwealth of Kentucky by an act entitled An act to incorporate the Farmers' Bank of Kentucky, approved February 16, 1850, and under its charter, which would have expired in the year 1880 but for the act extending it hereinafter mentioned, is possessed of general banking powers, among them those of loan and discount, to loan money, discount promissory notes and bills of exchange, and deal in exchange, and soon after the granting of its said charter it organized thereunder and has conducted its banking business ever since such organization under said charter and under the act hereinafter mentioned by which the term of such charter was extended.

At this time its principal office is located at the city of Frankfort, Ky., and its branches respectively in the city of Georgetown, Ky., and in the city of Henderson, Ky.; that section fifteen (15) of the act first mentioned prescribes that "it shall be the duty of the cashier of the principal bank, on the 1st day of July, 1851, and on the first day of July in each succeeding year during the continu-

ance of this charter, to pay into the treasury of this Commonwealth fifty cents on each hundred dollars of stock held and paid for by said bank, which shall be in full of all tax or bonus. Provided that no tax shall be paid until said bank goes into operation; and provided further, that the tax or bonus hereby proposed to be imposed on such shares of stock in this bank, or such as shall hereafter be imposed on each share is set apart and forever dedicated to the cause of education, on the common-school system, and whenever the same or any part thereof shall be diverted otherwise — by legislative enactment, said bank shall be exhonerated from the payment of any tax or bonus whatever." Plaintiff says that said contract and stipulation, as contained in the said charter fixing the said rate of taxation, conduced to the acceptance of said
188 charter, and to an organization under it by said bank and to the maintenance of said bank and its branch banks.

That by an act entitled "An act extending the charter of the Farmers' Bank of Kentucky," approved on March 10th, 1876, the said legislature extended the aforesaid charter for the period of twenty-five years from the time of the expiration of its said original charter in language as follows:

"SEC. 1. That the charter of the Farmers' Bank of Kentucky as amended be extended for the period of twenty five years from the termination of its charter as therein fixed. Provided that said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act, and provided further that whilst the privileges and franchises, so granted, may be changed or repealed no amendment or repeal shall impair other rights previously vested."

Said act is contained in the act of 1871, volume 1, page 324.

Plaintiff states that in pursuance *to* said provision relating to tax, the plaintiff, from the time of its first organization and ever since then to the date hereinafter mentioned, has always paid and continued to pay to the State of Kentucky said tax on each one hundred dollars of the stock issued and paid for in said bank.

That by a general statute passed by the said legislature and approved on May 17, 1886, charter 92 of the General Statutes of Kentucky, article 2, section 4, commonly called the "Hewitt law," it was provided that each of said banks, (viz., State and national banks) "by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof," may give its consent to the levying of a tax of seventy-five — (75c.) on each share thereof, equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and that such corporations shall pay in addition, upon each one hundred dollars or so much of their surplus undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon
189 real estate, which shall be in full of all tax, State, county, and municipal, "agree to pay same" and to waive and release all right under the acts of Congress, or under the charter of the

State banks to a different mode or smaller rate of taxation, which consent or agreement shall be evidenced by writing under the seal of said bank and delivered to the governor of the Commonwealth of Kentucky; and said section further provides that upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of said bank.

Under the 7th section of the same article it is also provided that nothing in said act contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but that the same may be taxed for county or municipal purposes as other real estate is taxed.

That in the 5th section thereof it is also provided that said banks may take the proceeding authorized by said 4th section of such act at any time until the meeting of the next General Assembly, provided they pay the tax aforementioned.

Now, plaintiff states that within the aforesaid time so fixed by said act for an acceptance of the proposition of the State of Kentucky, to wit, on the 6th day of December, in year 1887, the said Farmers' Bank of Kentucky by a majority in interest of a quorum of the stockholders of said bank, did consent and agree to and with the Commonwealth of Kentucky to the payment of the taxes proposed and provided for in aforesaid article 2, and in all other respects did comply with all the requirements of said act, and said bank thereupon did complete its acceptance of the proposed contract with the Commonwealth of Kentucky, and delivered its written consent and agreement to the governor of the Commonwealth of Kentucky, as provided by the said act, and has always complied with the provisions of said contract from the inception of plaintiff's liability thereunder, by paying to the State of Kentucky the above
190 taxes on all the shares of stock and all taxable surplus and profits in the ratio fixed by the act and contemplated by the said act and contract, and by paying all the county and municipal taxes assessed against its real estate owned or used by said bank and its branches in conducting its business until the — day of ——, 1893, when it tendered and offered to pay to said State all the taxes for which it was liable for that year at said rate of 75 cents per share and at the contract rate on the surplus and undivided profits, the same being the only remaining unpaid tax, and the State of Kentucky, by its auditor of public accounts, whose duty it was to receive same, refused to accept such payment.

Plaintiff says and submits under its said contract with said State of Kentucky it is not liable to the payment of any greater or higher rate, or other rate of tax or taxes, State, county, or municipal, than that fixed under its said contract during the period of its existence as a corporation, and that its said contract with the State of Kentucky is in full force and is irrepealable during the corporate existence of plaintiff, so long as said bank continues to observe the same, and that also under such agreement said bank and the shares of stock

therein and the property of said bank, save and except its banking-houses, are exempt from both county and municipal taxes. It states the legislature of the State of Kentucky by a late act, which became a law on November 11th, 1892, entitled "Revenue and taxation," chapter 103, enacted in article 1, section 2, thereof, that all real and personal estate within the State of Kentucky, and all personal estate of persons residing within such State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises, shall be subject to taxation, unless the same shall be exempt from taxation by the State constitution; and in the 3rd section thereof, that the State of Kentucky, and each county, incorporated city, or
191 town, and taxing district, shall have a lien on all other property of each person or corporation owning the same for the tax due by them respectively. Plaintiff submits that if such act was intended by the said legislature to apply to and include this plaintiff, or the shares of stock held therein, or its property, the same is in conflict with the aforesaid agreement made between this plaintiff and the State of Kentucky; and as to the said plaintiff and said stock, the last-mentioned act is inoperative and void during the existence of said bank.

And it *is* further submits that the said act of November 11th 1892, in so far as it conflicts with the aforementioned agreement, impairs the obligation of the said contract, is unconstitutional and void.

Plaintiff further alleges and submits that if it should be held by the court that the act of Nov. 11th, 1892, operated as a repeal or abrogation of the said "Hewitt law" of 1886, and as a repudiation by the State of Kentucky of its said contract, then the original charter of the plaintiff (under the act of 1850) is in full force and effect, and the plaintiff is restored to all its vested rights under its original charter, among which is its exemption from any greater or other tax than is specifically designated by its said charter.

Plaintiff states that the defendant The County of Henderson, in said State of Kentucky, and the defendant Jno. E. Hickman, the sheriff of said county (having in charge the collection and enforcement of taxes claimed by said county to be owing to it), now seek to subject the plaintiff to the payment of certain taxes claimed by said county and said sheriff as owing by the plaintiff to the amount of $538.50, and that the said sheriff has demanded from plaintiff the said alleged tax of five hundred and thirty-eight $\frac{50}{100}$ dollars, which demand plaintiff has refused to comply with, and said sheriff has threatened to and does now threaten to promptly levy upon and expose to sale and sell the banking-house of said plaintiff at Henderson, Ky., or other of its property, for the satisfaction of said alleged pretended taxes, and unless restrained by law the said sheriff will proceed to carry out its said threat, and if the injunction hereinafter prayed for is not immediately granted great or
192 irreparable injury will result to this plaintiff, and that no injunction about the matter herein has been refused by the

court or any circuit judge. Wherefore plaintiff prays that the defendants, The County of Henderson and the sheriff of said county, be enjoined and restrained from collecting from the plaintiff the said sum of $538.50 or any part thereof, or any other tax or taxes, and from levying upon or selling the banking-house of said plaintiff at Henderson, Ky., or any other property of plaintiff, and prays that said alleged tax and claim of defendant be adjudged illegal and void, and for all other relief to which it may be found entitled.

MONTGOMERY MERRITT AND
A. T. DUDLEY, *Atty's for Plaintiff.*

A. T. Dudley, one of the attorneys for the plaintiff, says the president and principal officer of the plaintiff is Thomas Rodman, who is now absent from Henderson county, Ky., and affiant says he believes the statements of the foregoing petition are true.

A. T. DUDLEY.

Sworn to before me by A. T. Dudley this 13 day of October, 1893.

S. A. YOUNG, *C. H. C. C.*,
By J. R. LAMBERT, *D. C.*

At a September term, 1893, of the Henderson circuit court, to wit, Monday, October 16th, 1893, the following order was entered herein:

The plaintiff filed its petition and its motion, the same is now docketed, and moved the court to grant it an injunction as prayed for in the petition; said motion was for time continued. The defendant J. E. Hickman, sheriff of Henderson county, appeared in open court, entered his appearance herein, and waived notice.

On November 8, 1893, the judge of the Henderson county court granted a temporary order of injunction, which is here copied, as follows:

Hon. M. C. Givens, judge of the Henderson circuit court, being now absent from Henderson county, the clerk of the Henderson circuit court is hereby ordered to issue an injunction enjoining and restraining the county of Henderson and Jno. E. Hickman,
193 sheriff of Henderson county, from collecting from the plaintiff any taxes, and from levying upon any property of the plaintiff for taxes, until the further order of this court, upon the execution by plaintiff of a bond with good security conditioned that said Farmers' Bank of Kentucky will pay to the defendant such damages as they may sustain if it should be adjudged that the injunction ought not to have been granted.

Given under my hand, as judge of the Henderson county court, this November 8th, 1893.

JNO. F. LOCKETT, *P. J., H. C.*

At a subsequent January term, 1894, of said court, to wit, Wednesday, January 10th, 1894, the following order was entered herein:

Came this day the plaintiff, The Farmers' Bank of Kentucky, and made application to the court for a temporary injunction, enjoining and restraining the County of Henderson and Jno. E. Hickman, sheriff thereof, from collecting, enforcing the collection of, and levying the taxes and personalty set forth in the petition upon the property of plaintiff therefor, which application and motion is granted, and the plaintiff thereupon in open court executed bond, with Martin Schlamp surety, approved by the court and to the effect that the plaintiff shall pay to defendant- the damages which they may sustain by reason of the injunction in this action if it is finally decided that said injunction ought not to have been granted, and the clerk of this court is directed to issue the injunction, as prayed for in plaintiff's petition.

The bond referred to in the foregoing order is in words and figures as follows:

Henderson Circuit Court, —— Term, 187–.

FARMERS' BANK OF KY., Plaintiff,
against
COUNTY OF HENDERSON, &c., Defendants. } Bond.

We undertake that the plaintiff, Farmers' Bank of Kentucky, shall pay to the defendant-, The County of Henderson and J. E. Hickman, the damages which they may sustain by reason of the injunction in this action if it is finally decided that said
194 injunction ought not to have been granted.

FARMERS' BANK OF KY.,
By A. T. DUDLEY, *Att'y Pl'ff.*
MARTIN SCHLAMP.

This — day of ——, 187–.

Attest: —— ——, *C. H. C. C.*

No injunction appears to have been issued, as shown by the steps on the papers.

On March 10, 1894, there was issued a summons and two copies on the foregoing petition. The steps show that the summons was executed in full on March 12th, 1894, by B. M. Sandefur, the then coroner of Henderson Co., but the said summons, with the return thereon, has been lost or mislaid and is not now in the papers.

At a subsequent September term, 1895, of said court, to wit, Tuesday, Oct. 22, 1895, the following order was entered herein:

This action coming on to be heard, and it appearing that the court of appeals of Kentucky has rendered a decision to the effect that during the corporate existence of plaintiff under its present charter the capital stock, undivided profits, and surplus and other property of said bank are not subject to municipal taxation or to taxation by any county of this Commonwealth, and that the County of Henderson sought to compel the plaintiff to pay taxes to it in the sum of five hundred and thirty-eight dollars and 50 cents, the payment of which was enjoined in this action filed October 16, 1893, and de-

fendants declining to plead further, it is adjudged that defendants be enjoined and restrained from collecting from plaintiff said sum of $538.50 and from levying upon or selling the realty or any other property of plaintiff, and that the alleged tax and claim of said county *is* adjudged illegal and void, and that the said injunction be made perpetual, and that plaintiff recover from the defendant The County of Henderson the costs of this action, for which execution may be issued.

195 STATE OF KENTUCKY, }
Henderson County, } *sct:*

I, J. R. Lambert, clerk of the Henderson circuit court, same being a court of record, in and for the State and county aforesaid, do hereby certify that the foregoing 17 pages, from 1 to 17, inclusive, this included, contain a true and complete transcript of all the records and proceedings in the case wherein The Farmers' Bank of Kentucky is plaintiff and The County of Henderson and John E. Hickman, sheriff of Henderson county (now ex-sheriff) are defendants, as found of record in my office and directed to be copied by the attorneys of the Farmers' Bank of Kentucky.

Given under my hand, as clerk of said court, this the 16th day of June, 1898.

J. R. LAMBERT, *C. H. C. C.*

STATE OF KENTUCKY, }
Henderson County, } *sct:*

I, J. L. Dorsey, judge of the circuit court in and for the county of Henderson, State of Kentucky, do hereby certify that J. R. Lambert, whose genuine signature appears above, *is* the duly elected, qualified, and acting clerk of Henderson circuit court; that his certificate is in due form of law, and his official acts are entitled to full faith and credit.

Given under my hand, as judge of said court, this the 16 day of June, 1898.

J. L. DORSEY, *Judge.*

STATE OF KENTUCKY, }
Henderson County, } *sct:*

I, J. R. Lambert, clerk of the Henderson circuit court, same being a court of record, in and for the State and county aforesaid, do hereby certify that J. L Dorsey, whose genuine signature appears above, is the duly elected, qualified, and acting judge of the Henderson circuit court, and that his official acts are entitled to full faith and credit.

Given under my hand and seal of office this the 16 day of
196 June, 1898.

[SEAL.] J. R. LAMBERT, *C. H. C. C.*

Clerk's fee for this transcript	$4.75
Seal	.50
	$5.25

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On a day following, to wit, on the 25th day of June, 1898, the following entry was made herein, viz:

FARMERS' BANK OF KENTUCKY
vs.
SAMUEL H. STONE ET AL.

The court, being advised, filed its opinion herein.

It is therefore adjudged, ordered, and decreed as follows:

1st. The demurrer of the defendant The Board of Councilmen of the City of Frankfort to the bill of complaint is hereby overruled, to which the Board of Councilmen and the City of Frankfort except, and the demurrer of the defendants Samuel H. Stone, G. W. Long, and Charles Finley is overruled, to which they except.

2nd. The demurrer of the County of Franklin to the bill of complaint is overruled; to which the defendant excepts.

3rd. The demurrer of the City of Henderson to the bill of complaint is overruled; to which the defendant excepts.

4th. The demurrer of the County of Henderson to the bill
197 of complaint is overruled; to which defendant excepts.

5th. The plea of the Board of Councilmen of the City of Frankfort and the County of Franklin and the City of Henderson and the County of Henderson to the bill of complaint is overruled; to which the said defendants except.

6th. Thereupon came the complainant, by W. S. Pryor and J. W. Rodman, and filed herein replications to the answers of the Board of Councilmen of the City of Frankfort and the County of Franklin and the city of Henderson and the County of Henderson. The defendants The County of Franklin and The City of Frankfort offered to file an amended answer, to which complainant objected, and a motion to file is overruled, to which defendants except, and the said amended answer is made a part of the record by this order; and by consent of the Board of Councilmen of the City of Frankfort and the County of Franklin and the City of Henderson and the County of Henderson and defendants S. H. Stone, Charles Finley, and G. W. Long this cause came on to be heard for final decree. The complainant read upon the hearing its bill of complaint and

its two amended bills of complaint herein and the several exhibits filed herein, namely:

Exhibit "A," being the record of the proceedings in the case of The Farmers' Bank of Kentucky against The County of Franklin, &c.

Exhibit "B," being the record of the proceedings in the case of The Farmers' Bank of Kentucky against The Board of Councilmen of the City of Frankfort.

Exhibit "C," being the resolution of the stockholders.

Exhibit "D," being the record of the proceedings in the court of appeals in the case of the complainant against the County of Franklin.

Exhibit "E," being the judgment of the Franklin circuit court.

Exhibit "F," being the record in the court of appeals in the case of the complainant against the Board of Councilmen of the City of Frankfort.

Exhibit "G," being the judgment of the Franklin circuit court.

Exhibit "H," being the record of the complainant against
198 the City of Henderson in the Kentucky court of appeals.

Exhibit "K," being judgment of the Henderson circuit court.

Also Exhibit "M," it being a copy of the record in the case of the complainant against the County of Henderson, &c., in the Henderson circuit court, including the judgment of said court.

Also Exhibit "N," it being a copy of the record in the case of the complainant against the County of Henderson, in the Henderson circuit court, including the judgment of said court.

The defendant-The Board of Councilmen of the City of Frankfort, The County of Franklin, The City of Henderson, and The County of Henderson read on the hearing their respective answers, and the City of Frankfort read on the hearing the record of the proceedings in the case of The Board of Councilmen of the City of Frankfort against L. C. Norman, &c., being called in the record Exhibit —.

And it is now adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and G. W. Long be, and they are hereby, perpetually enjoined and restrained from certifying the value of the franchise of the complainant under the act of November 11th, 1892, for the years 1895, 1896, 1897, and 1898 and for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Franklin county and the county clerk of Henderson county or to any officer of the Board of Councilmen of the City of Frankfort or of the City of Henderson or of the County of Franklin or the County of Henderson; and the defendants The Board of Councilmen of the City of Frankfort, County of Franklin, The City of Henderson, and The County of Henderson are enjoined and restrained from endeavoring to collect any tax upon any such valuation, and the complainant by making payment in accordance with the Hewitt law is discharged in full from all tax to be exacted from it under any form or by any authority.

It is further adjudged, ordered, and decreed that by reason of the

several pleas of *res judicata* relied on by complainant in its bill and amended bills and as shown by the exhibits therewith the
199 complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky entitled "An act to amend the revenue laws of Commonwealth of Kentucky," approved May 17th, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of Commonwealth of Kentucky and the act of November 11th, 1892, in so far as they are intended to provide for any assessment or taxation of the complainant's property, rights of property or franchise, or shares of stock, except to the extent and in the manner provided by section- one, two, and three of article two of the said act approved May 17th, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; and it is further adjudged that the complainant recover of the defendants The Board of Councilmen of the City of Frankfort, The County of Franklin, and The City of Henderson and The County of Henderson its costs in this action expended; and the court further finds that there is no irrevocable contract established, by judgment or otherwise, binding the county of Scott or the city of Georgetown to a compliance with the Hewitt act in respect to the collection of taxes upon the property or stock of the Farmers' Bank of Kentucky taxable therein, and therefore that as to such property and as to so much of the said stock as is apportioned for taxation to Scott county or the city of Georgetown under the revenue act of 1892 said act applies and is in force, and the Hewitt act has no application thereto. Wherefore it is adjudged that as to the county of Scott and the city of Georgetown the
200 *com-* plaintiff's bill be, and the same is hereby, dismissed, to which the complainant excepts. The question raised by the complainant under the State decisions, whether prior decisions of the court of appeals, though now overruled, prevent the collection of taxes accruing during those years, when the prior decisions holding them uncollectable and void remain unreversed, is neither considered nor decided.

And came defendants The Board of Councilmen of the City of Frankfort, County of Franklin, City of Henderson, and County of Henderson and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed the appeal and orders the assignment of errors to be filed and fixes the appeal bond herein at $1,000.

And came the complainant and prayed an appeal in open court

from the order dismissing its bill as to the city of Georgetown and the county of Scott, and tendered its assignment of errors; whereupon the court allowed the appeal and ordered the assignment of errors to be filed and fixes the appeal bond herein at $1,000.

(Signed) WM. H. TAFT,
Circuit Judge.

Said opinion filed herein on June 25th, 1898, is in words and figures as follows, viz:

201 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, CITY of Louisville, County of Franklin, and The Board of Councilmen of the City of Frankfort, Defendants. } No. 6555.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

This is a bill in equity filed by the Bank of Kentucky, a corporation organized under the laws of Kentucky, to restrain the assessment and collection of certain taxes for the benefit of the defendants The City of Louisville, The County of Franklin and The City of Frankfort. Samuel H. Stone is the auditor of public accounts for the State of Kentucky, Charles Finley is the secretary of state, and George W. Long, is the State treasurer; and these three officers, also made defendants herein, constitute the State board of valuation and assessment. The bill avers that the complainant has an irrevocable contract with the State of Kentucky, by which taxes are limited to a certain amount per share upon its stock, and the usual local taxes on its real estate, but that the revenue act of the legislature of Kentucky passed November 11, 1892, impairs that contract and is in violation of the Constitution of the United States.

The case made by the bill is as follows:

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky approved February 2, 1834. The term of its corporate existence was fixed at thirty years from the date of its incorporation. It was authorized to do a banking business and to issue bank notes; it was directed to keep its principal office of discount and deposit in the city of Louisville and to locate a branch at Frankfort, the seat of the government, to aid and manage the fiscal affairs of the State. The State was
202 given a voice in the control of the bank by a provision that the government of the Commonwealth should appoint three of the bank's directors.

By the fifteenth section of the original charter, it was provided that the bank should pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which should be in full of all tax and bonu

provided that the legislature might increase or diminish the same; but that at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank. By an act of February 12, 1836, the tax was increased to 50 cents a share. By the act of February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from October 1, 1864, but this extension was declared to be granted on certain conditions. The extension was duly accepted by complainants.

On March 18, 1886, an act called the Hewitt act was passed to make taxation equal and uniform. It provided that all State and national banks should pay into the State treasury seventy-five cents on each share of their capital stock and should in addition, pay into said treasury on their surplus, undivided profits and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as that assessed on real property; and that the said taxation should be in full of all tax—State, county and municipal—except that the real estate and buildings, owned and used by the banks in conducting their business should not be exempted from taxation for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed.

The fourth section of the act provided that each of the banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, might give its consent to the levying of said tax, and agree to pay the same and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation, which consent and agreement to and with the State of Kentucky should be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth before the next meeting of the legislature; and said agreement and consent being delivered and in consideration thereof, such bank and its
203 shares of stock should be exempt from all other taxation whatsoever, so long as said taxation should be paid, during the corporate existence of the bank.

On June 25, 1887, within the proper time, at a stockholders' meeting by a vote of the stockholders, the complainants gave their consent to the levying of said tax, and to the waiver and release of all right under their charter to a different mode and a lower rate of taxation, and this consent was duly certified by the governor of the Commonwealth. Since 1887 the complainants have paid this tax under the so-called Hewitt act.

On November 11, 1892, the legislature of Kentucky, under a constitution adopted in 1891, passed an act dealing with the assessment of certain corporations, among others, banks. The act provided that every incorporated bank should, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise might be exercised. The

auditor, treasurer and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. The board is required to apportion the value of the franchise among the several taxing jurisdictions entitled to a share of such tax, and for such apportionment the auditor of State is required, at the expiration of thirty days, to certify to the county clerks of the counties where any portion of the corporate franchise of such banks shall be liable to local taxation the amount thereof liable for county or State taxes; and the county clerk is required to certify the same to the collecting officer of the county and city for collection. If a bank fails to pay its taxes, penalties and interest after thirty days' notice, it is to be deemed guilty of a misdemeanor and upon conviction is to be fined $50 for each day during which the tax remains unpaid—to be recovered by indictment or by civil action—of which the Franklin circuit court shall have jurisdiction. The bill avers that the amount of tax which the complainant would have to pay to the board of valuation and assessment over and above what it has to pay under the Hewitt law would be more than $20,000 per annum.

The complainant avers that the defendants are conclusively estopped by previous litigation to contend in this suit that the complainant has not an irrevocable contract with the State limiting its taxes to those fixed in the Hewitt act; that on February 28, 1894,
the complainant filed in the circuit court of Franklin county,
204 that being a court of general jurisdiction, its petition against
the county court of Franklin and R. D. Armstrong, sheriff of said county, setting forth the contracts between complainant and the State in regard to taxes under its original charter, and under the Hewitt law, claiming that no taxes could be collected from the complainant except under the Hewitt law during its charter life, and further that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of its contracts aforesaid; that the prayer of the petition was that the court should establish the contracts and should enjoin Franklin county and Armstrong, its sheriff, from attempting to collect any taxes contrary to said contracts; that a decree was entered upon this petition in the Franklin circuit court, adjudging that the act of November 11, 1892, did not violate any contract between the complainant and the State, and the petition for injunction was denied; that the complainant thereupon appealed from the decree to the court of appeals of Kentucky, which court reversed the judgment of the lower court and remanded it to the circuit court of Franklin county for judgment in conformity to its opinion; that the circuit court entered the following judgment on January 21, 1896, which is still in full force and effect:

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of

the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and the act of November 11, 1892 (article 3, chapter 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and
205 has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now, made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be, and each of them *are*, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property of the plaintiff, except taxes upon its real estate in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended;"

that a similar suit was filed in the same court by the complainant against the Board of Councilmen of the City of Frankfort to enjoin it from attempting to collect municipal taxes on the apportioned valuation of the franchise certified to the city by the board of valuation and assessment, setting forth exactly the same objection to the validity of the tax; that the court entered a decree for the defendants, and an appeal was taken to the court of appeals, which reversed the decree of the circuit court and directed that a new decree be entered in conformity with the opinion transmitted; that thereupon the Franklin circuit court entered a judgment enjoining the City of Frankfort in exactly the same terms as that already set forth above in the case against the county court of Franklin; that in February, 1894, the city of Louisville, claiming to act under authority given it by an act of the Kentucky legislature affecting the government of cities of the first class, of which the city of Louisville was the only one, passed an ordinance requiring the

banks of the city of Louisville to pay to the city an annual tax of 4 per cent. upon their annual gross earnings; that the complainant failed to pay the tax and thereupon, under the act referred to, a warrant was sued out in a criminal prosecution against the complainant in the city court of Louisville; that the complainant then, in the manner provided by law, filed its petition in the Jefferson circuit court for a writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in apt terms its incorporation, its original charter, the extensions thereof, the passage of the Hewitt law, the contract entered into in conformity therewith, and claiming the benefit of its said contractual relations with the State; that the petition alleged that the said ordinance of the city of Louisville was void because impairing the obligation of the complainant's con-
206 tract, and any authority given to the city of Louisville to pass such ordinance was likewise void for the same reason, and prayed that the judge might be prohibited from taking jurisdiction of the proceeding against the complainant for a violation of the ordinance; that issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville; that the city of Louisville, though not a party in name, in that court, was, in reality, the party defendant and appeared by counsel; that the court found the issues in favor of the complainant, entered a judgment accordingly, and, thereupon, the defendant, The City of Louisville, caused an appeal to be taken in its name from the judgment to the court of appeals of Kentucky, in which court the cause was argued by counsel for the city of Louisville and for the Commonwealth of Kentucky; that the court of appeals affirmed the judgment of the Jefferson county circuit court, and sent a mandate of affirmance to the court of original jurisdiction, where it was duly entered; that the averment of the petition in that case upon which issue was joined and which presented the only point for adjudication was as follows:

"The plaintiff states that the said act granting a charter to cities of the first class, and the said ordinance passed in pursuance thereof, are both unconstitutional and void, in that they impair the obligation of the contract between the plaintiff and the Commonwealth of Kentucky, as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the revenue law of May 17, 1886, and are a violation of the Constitution of the United States, and especially the section thereof, providing that no State shall pass any law impairing the obligation of a contract.

The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance as aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter, and the several acts extending and continuing the same, which were accepted and acted upon by said bank, constituted a contract between the State on the one part and the bank and its stockholders on the other part, continuing during the legal existence of the corporation and the State, never had, and has not now, the right to repeal or annul said agreement or the

rights conferred by said charter, limiting the right of the State to impose a tax on said bank without the consent of said bank.

The plaintiff further states that it did give its consent to said act of May 17, 1886, and did, upon the considerations therein recited, waive and release its right under its charter to a different mode or a smaller rate of taxation than is therein provided. Said consent and waiver was made on the belief that the said act was in-
207 tended to put in operation a permanent legislative policy governing the taxation of all banks then existing, which would accept its provisions, to endure at least during the corporate existence of all said assenting banks. The plaintiff submits that such is the true construction of said act, and that said act and its acceptance constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments."

That the petition was demurred to, the demurrer was overruled, and judgment given for plaintiff, and the police judge was prohibited from proceeding with the criminal prosecution against complainant.

The suits of the Bank of Kentucky against the Franklin county court, against the board of councilmen of the city of Frankfort, and against the judge of the police court of the city of Louisville, were argued and heard at the same time by the court of appeals of Kentucky, and were decided by that court in one opinion, filed June 1, 1895, and reported as the bank-tax cases, 97 Ky. Rep., 590. A majority of the court of appeals held that the complainants here had an irrevocable contract with the State, and all its agencies, by virtue of its charter and the extensions thereof, and its due acceptance of the provisions of the Hewitt act and that the act of 1892 impaired the obligation of that contract in violation of the Constitution of the United States, and was, therefore, null and void.

The 19th clause of the bill in the case at bar is as follows:

"The complainant says that the defendants, Samuel H. Stone, Charles Finley and George W. Long, are threatening and unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896 and 1897 and certify such value to the county clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville and to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such assessments will be illegal; in violation of the complainant's contract, as has been heretofore in causes between the complainant and the said several defendants adjudged and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise; cause a multiplicity of suits to be brought against complainant and damage it in a way that cannot be repaired or estimated at the common law; and from these threatened wrongs the complainant has no remedy at the common law, but its only remedy is by a bill in equity; and unless restrained by this honorable
208 court, the defendants, The City of Louisville, The County of Franklin and The Board of Councilmen of the City of Frank-

fort, will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the embarrassment of many suits, and cast a cloud upon its franchises and property and an effort will be made to enforce penalties against this complainant, as hereinbefore set out."

It further appears that after the decision in the bank-tax cases, 97 Ky., 590, the personnel of the court of appeals changed somewhat, and when a new series of bank-tax cases, presenting the same question, came to that court, a different conclusion was reached. A majority of the court overruled the prior decision, rendered in 1895 and held that the banks, by accepting the provisions of the Hewitt act, did not acquire any contract rights with the State with reference to the mode or right of taxation and that the act of November 11th, 1892, was valid. *Deposit Bank v. Daviess County*, 39 S. W. R., 1030.

The defendants, The Franklin County Court, and The Board of Councilmen of the City of Frankfort, have filed a general demurrer to the bill. The defendants, Stone, Finley and Long, and The City of Louisville, have filed a demurrer, first, to the jurisdiction, and second, for want of equity. By stipulation of counsel for the complainant, defendants were also permitted to file answers without waiving demurrer. The only averment of the answer that is material, is as follows:

"These defendants allege that to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers from executing the State constitution and the present revenue law of the State as construed by the court of last resort of the State. These defendants allege that to grant the injunction prayed for would be (in effect and in fact) to enjoin all proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the State board of assessment to value and apportion complainant's franchise and the auditor to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to collection of the taxes now in controversy herein between these defendants and the complainant."

The cause came on for hearing upon the demurrer to the bill, and upon a motion for a preliminary injunction.

209 TAFT, circuit judge, delivered the opinion of the court:

The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids a State to pass a law impairing the obligation of a contract. The case is, therefore,

one arising under the Constitution of the United States and as it involves more than $2,000 it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of the court? It is well settled that in the Federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void and independently of every other consideration. See *Rich* v. *Braxton*, 158 U. S., 375, 405. It must appear from the special circumstances averred that there is no adequate remedy at law and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. *Ogden City* v. *Armstrong*, 168 U. S., 224, 236; *Pacific Express Co.* v. *Seibert*, 142 U. S., 339; *Allen* v. *Pullman's Palace Car Co.*, 139 U. S., 658, 661; *Shelton* v. *Platt*, 139 U. S., 591; *Union Pacific R'y Co.* v. *Cheyenne*, 113 U. S., 516, 525; *Hannewinkle* v. *Georgetown*, 15 Wall., 547; *Dows* v. *Chicago*, 11 Wall., 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may under the duress of the threatened trespass, pay the taxes alleged to be illegal and then sue the city of Louisville, the county of Frankfort, and the city of Frankfort to recover them back. *Railroad Company* v. *Commissioners*, 98 U. S., 541. It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy as there was in Tennessee in the case of *Shelton* v. *Platt*. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint, they may resort to a simple suit at law for them. In that case, the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be inadequate, but under the pro-
210 visions of the revenue law of Nov., 1892, we do not think it is. By that law the bank on failing to pay the taxes assessed, according to its provisions within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent. and to a fine of fifty dollars a day for every day of the delinquency to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay fifty dollars a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant because by the terms of the act they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk which is absent

in an action in equity. The remedy at law is, therefore, entirely inadequate. *Smyth v. Ames*, 169 U. S., 466, 518; *Pacific Company v. Seibert*, 44 Fed. Rep., 315. It is no answer to say that the payment of the tax and the action to recover it back constitutes an adequate remedy because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer by not distraining may wholly deprive the tax-payer of this remedy. Indeed, the counsel for the city of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However, this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity, upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 210, 215; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S., 806, 811. And the application of the rule depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall., 74, 79.

The practice of the State courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity jurisdiction in the Federal courts in such cases; for it is settled that if
211 a case "in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction." *Smyth v. D. Ames*, 169 U. S., 466, 516. But it is worthy of note that the court of appeals of Kentucky has held that in the absence of a statute allowing an action to recover back from the State taxes illegally collected, the remedy by injunction is the only adequate one. In *Gates v. Barnett*, 79 Ky., 295, 296, the court in a suit to enjoin a distraint upon certain tobacco for the collection of taxes said:

"The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this State that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon the ground of the inadequacy of the remedy at law. The officer acting in good faith and under color of right is justified by his process, and is not liable as a trespasser; and as a suit would not lie against the State directly, the only complete remedy is by injunction."

It is by no means clear that distraints or threatened distraints against a bank in view of the character of its business may not involve such serious detriment to its business and incidentally to the public, as to justify equitable intervention. In the case of *Lenaure County Savings Bank v. The City of Adrian*, 66 Mich., 273, 276, a levy

upon, and seizure of the bank furniture and fixtures was in progress when an injunction was issued.

Mr. Justice Campbell, speaking for the court, said:

"No point was made in the pleadings or on the argument against the jurisdiction of equity in this case. As the bank was not liable to taxation at all on its personal property and the levy was made in such a way as to directly interfere with its business, the case comes within the analogies of the cases represented by *Osborn v. Bank of U. S.*, 9 Wheat, 738, from which it cannot be readily distinguished. The court below does not appear to have doubted the jurisdiction, although deciding in favor of defendants on the merits."

In *Union Pacific Railway Co. v. Cheyenne*, 113 U. S., 516, 525, Mr. Justice Bradley said:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed, have been frequently sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must
212 be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied."

The interference with the business of a bank and the injury to its credit caused by a distress against its personal property would seem to be a mischief equally hard to be remedied by a mere suit to recover the money back when thus collected.

If it were necessary we do think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it? In *Osborn v. Bank of United States*, 9 Wheat, 738, 742, Chief Justice Marshall said: "The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege." See also *Morris Canal and Banking Co. v. Jersey City*, 1 Beasley, 227; High on Injunction, sec. 530. In addition to the suits for future taxes there is also danger of harrassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract it may have equitable relief.

The second question in the case is that raised by the averment of former adjudication. The case of *New Orleans v. Citizens' Bank*, 167 U. S., 371, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' bank, in New Orleans, was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the district court of New Orleans to enjoin the collection of a tax
213 against it, on the ground that it had by legislative contract, exemption from the same. The district court sustained the claim, and enjoined the collection of the tax. A second suit, brought to enjoin another year's taxes, resulted in a similar judgment. Some years later the city of New Orleans having attempted to collect a tax, for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the circuit court of the United States for the eastern district of Louisiana, to enjoin the officers of the State and city from proceeding to collect the tax and set forth the former adjudication as a conclusive estoppel upon the defendants as to the point of the previous litigation, namely, that there was a contract between the State and the bank, forbidding such taxation. The causes of action were not the same in the case brought in the Federal court and the cases adjudged in the State courts, because they involved taxes for different years, but the thing adjudged, to wit, the existence and binding effect of the contract for the exemption from the particular taxation was the same. The Supreme Court of the United States in this case held that the city of New Orleans and the State taxing authorities were conclusively estopped by the judgments in the State courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation and held that the contract having been thus established, the bank was entitled to relief from a violation of that contract by any acts of the State officials acting under the authority of State legislation. It had, theretofore, been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a State or any agency of the State for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court, in a most elaborate opinion, said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore, *res judicata*, cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the
214 elemental rule, stated in the text books and enforced by many decisions of this court." * * *

"It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case before us there can be no question, from the statement of facts and an examination of the records in previous cases as set forth therein, that the question which was adjudged in them was the identical question presented in the same way and for the same purpose as in the case at bar, to wit: whether there was a contract between the bank and the State which forbade the imposition of higher taxes than those imposed under the Hewitt act. It was distinctly adjudged, in behalf of the complainant against Franklin county and the city of Frankfort, by the court of appeals by the decision rendered in 1895, and by a mandate issued from that court to the Franklin circuit court, that such a contract in fact existed and rendered null and void the provisions of the revenue act of November 11th, 1892, under which the defendants now seek to impose taxes upon the complainant.

It is vigorously pressed upon us, however, that the judgment in the prohibition suit cannot be relied upon by the complainant bank to establish the existence of a contract of exemption between it and the city of Louisville, because there is nothing in the record to show that the issue made by the demurrer to the petition in that suit was the existence of such an exemption and its violation. Neither the mandate of the court of appeals nor the judgment of the Jefferson court states the ground for holding the ordinance void. It is said that some thirty days before the decision of the prohibition case by the court of appeals, that court, in *Levi v. City of Louisville*, 97 Ky., 394, held that the city of Louisville had no power under the constitution to substitute a license tax for *ad valorem* tax on personal property, and that this ruling must have led to overruling the demurrer to the petition in the prohibition suit, because it necessarily rendered the license tax upon the banks void. The Levi case was a suit by an owner of real estate to enjoin the collection of an *ad valorem* tax on his land on the ground that the city had not imposed such a tax on personalty, but had substituted therefor a license tax upon it,
215 and so had discriminated in favor of personal property and against realty. The court of appeals held that it was the duty of the city to impose an *ad valorem* tax on personalty, and that it could only impose a license tax on a business in addition to an *ad valorem* tax on property. We confess we cannot see how this decision would have determined the question at issue between the complainant bank and the city of Louisville, in the prohibition suit. There was nothing in the petition for prohibition to show that the license tax was a substitute for an *ad valorem* tax upon the personal property of the bank. There was nothing to show that the city of Louisville had not, under the revenue act of 1892 assessed an *ad valorem* tax on the bank's personalty. The license tax

was graduated by a percentage, not of the bank's personal property, but of the bank's gross receipts, and did not, therefore, purport to be a taxation on its personal property. The petition was not, therefore, demurrable under the Levi case. When we further consider that the sole ground stated in the petition for a prohibition was that the license tax was void, because it impaired the bank's contract of exemption and so violated the Constitution of the United States, and we find that this was the sole ground considered by the court of appeals in its opinion, we can have no doubt what was the point adjudged.

The case of *New Orleans v. The Citizens' Bank*, 167 U. S., 371, is relied on to support the contention that a judgment that a license tax violated the bank's contract of exemption cannot be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the New Orleans case, the language of the exemption was "the capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter." It was held that a judgment holding this to be a valid exemption and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract so as to exempt capital and business property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock and
216 upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that "*such bank and its shares of stock* shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, *a fortiori* does it prevent a direct tax upon its property, tangible and intangible. The tax imposed by the revenue act of 1892 was called a franchise tax, but it has been held, both by the Supreme Court of the United States and of the court of appeals of Kentucky to be in fact nothing but an *ad valorem* property tax. *Henderson Bridge Company v. Kentucky*, 166 U. S., 150; *Adams Express Co. v. Kentucky*, 166 U. S., 171; *Henderson Bridge Company v. Commonwealth*, 99 Ky., 623.

Nor can there be any doubt that the parties to the former adjudications and this litigation are the same. The real parties in interest to this cause among the defendants are Franklin County, the City

of Frankfort and the City of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated value of the franchise and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by the prior litigation, certainly the agencies acting for them under the law are equally bound. In this light the board of valuation and assessment is in respect to the former judgments privy to the city of Louisville and county of Franklin and the city of Frankfort. There is no dispute that the county of Franklin and the city of Frankfort were parties to the respective suits pleaded as former adjudications. The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its
217 jurisdiction, because proceeding under a void law. To that writ of prohibition, the city of Louisville was not formally made a party in the Jefferson circuit court, but the litigation before the Jefferson circuit court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson circuit court to the court of appeals, the appellants were the City of Louisville and the Judge of the Police Court. By this means the city of Louisville formally made itself a party to the record and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution it might have been attached for contempt. Bacon's Abridgement, prohibition M. It is urged that the litigation was really a criminal litigation and that a judgment in a criminal case cannot be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil and the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. *Armstrong v. Taylor County Court*, 15 W. Va., 190; *Walton v. Greenwood*, 60 Me., 356. However this may be, the city of Louisville, admitting its interest, did appear as appellant and so made itself a party to the whole litigation, and was so treated by the court of appeals of Kentucky. As the parties to this litigation are the same as those in the former suits except the board of assessment which is in privity with the other defendants and as the point adjudged is exactly the same, we can see no escape from the conclusion that the defendants here

are estopped from asserting that the complainant has not a contract exempting it from any other taxation than that provided in the Hewitt law, and, therefore, that the act of November 11, 1892, is an infringement of that contract and impairs its obligation in violation of the Constitution of the United States.

It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does not arise under the laws or Constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation,
218 the obligation of which the city of Louisville, the city of Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State are seeking to impair. The defendants deny the existence of such a contract and we must determine whether, as between the parties such a contract exists. It appears that as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties, but it does not free the court from the obligation to enforce the Constitution of the United States, in favor of the complainant by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of *New Orleans v. Citizens' Bank*, 167 U. S., 371, which presented precisely this aspect was begun in the circuit court of the United States and was carried to the Supreme Court of the United States and the jurisdiction by the circuit court was not even questioned.

It is argued that the Federal courts, in considering the question whether a State law impairs the obligation of a contract, will not accept as conclusive the construction which the supreme court of the State has put upon its constitution or laws in determining the existence of a contract and its violation. This is true and is settled by a long line of authorities. *Shelby Co. v. Union Bank*, 161 U. S., 149; *Mobile & Ohio R. R. Co. v. Tennessee*, 153 U. S., 492, '3; *Bryan v. The Board of Education*, 151 U. S., 650; *L. & N. R. R. Co. v. Palmes*, 109 U. S., 256; *Douglas v. Kentucky*, 168 U. S., 488, 502, and cases cited. But the rule has application only where the judgment of the State court is under direct review or in cases in which the opinion of the State court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the State court between the same parties is pleaded or is offered in evidence in a subsequent suit in a Federal court as *res judicata* binding the parties. The State court is as much bound by the Constitution of the United States as a Federal court and is vested with as complete jurisdiction in causes otherwise within its cognizance to decide between the parties before it whether a statute of the State impairs the obligation of a contract. *Robb v. Connolly*, 111 U. S., 624, 637. Such decision embodied in a judgment unreversed is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State

decisions, and its obligations to respect the bar of *res*
219 *judicata* as between the parties, is quite clearly made in *Douglas v. Kentucky*, 168 U. S., 488, 503, although not expressly commented on. In that case after maintaining in the strongest terms the obligation of the Supreme Court to exercise an independent judgment in determining the existence of a contract and its impairment, and after declining to follow a prior decision of the State court upon the subject, the court considered as a distinct matter the question whether the point had not been formerly adjudged in a State court between the same parties, and pointed out with much care that the point of the former adjudication was not the same as that then before the court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of *res judicata* has no application in the Federal courts when the former adjudication is that of a State court upon a question arising under the Federal Constitution.

One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a State court by the city of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration and is pending, and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the State court. We do not think so. It is settled that the pendency of a suit in a State court is no bar to a suit upon the same subject-matter in this court. *City of North Muskegon v. Clark*, 22 U. S. App., 522, and cases therein cited. The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. We do not enjoin any suit at all by our order; all we do enjoin is the certification of the taxes. That does not require the defendants to disobey an order of any other court or restrain their prosecution of a suit therein.

The demurrer to the bill must therefore be overruled and the preliminary injunction prayed for must issue.

220 Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6568.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE and Others and THE CITY of Louisville, Defendants. } No. 6567.

Before Harlan, circuit judge, and Taft and Lurton, circuit judges.

Heard on demurrer to the bill and motion for preliminary injunction.

The Bank of Commerce is a State bank of Kentucky, organized under a statute of that State, approved February 10, 1865. It is situated in Louisville, and when the Hewitt act was passed to amend the revenue laws of the Commonwealth of Kentucky, May 17, 1886, it duly accepted the terms of that act before the meeting of the next legislature of Kentucky. One of the grounds relied upon in the bill was that of *res judicata*. The averments of the bill upon this point were contained in paragraphs 4 and 5 of the bill, as follows:

"Paragraph 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator, and of every other bank and trust company in the city of Louisville, a tax equal to 4 per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville, in behalf of the city, against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of
221 Louisville, including your orator, upon the other, that pending the litigation which, by the agreement, was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

"First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the Hewitt bill. This sum, it was provided, should be an actual payment, and not be repaid under any circumstances, but its payment was not in any manner or to any extent to prejudice the banks or trust com-

panies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

"Second. In addition to making the above payments, the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum, which, added to said payment, would equal 4 per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations, agreeing to repay the same with interest at 4 per centum per annum; and, if it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

"Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to 4 per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

"Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such action as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them, or any of them, for doing business without license.

"The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked "A."

The Exhibit "A," referred to is as follows:

"SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist
222 the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement, whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies,

who will be subject to the payment of the license fees, if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the Hewitt bill. This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved shall each lend the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This agreement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

223 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville:

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of said board and the mayor of the city of Louisville on one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphreys & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust

and title companies, acting through their committee, to wit: Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit: Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill, would fall in class B, named above.

Third. In pursuance of that agreement the sinking fund commissioners, caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof
224 under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners, of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved.

C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Louisville.

A true copy.
Attest:

HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN."

So much of the certified transcript of the judgment in the proceedings in prohibition as is of importance has been set forth in the report of the case of the Louisville Banking Company against the same defendants.

TAFT, circuit judge, delivered the opinion of the court:

In the case of the *Bank of Kentucky v. Stone*, just decided, we have held that by the judgment of the court of appeals and of the Jefferson circuit court in the prohibition suits, the city of Louisville was estopped to deny as against the parties to that judgment, that they had an irrevocable contract of exemption from any greater burden of taxation than that imposed in the Hewitt act. The complainant in the case now before us was not a party to the record in either of the three prohibition suits, but it claims the benefit of the judgment therein as a privy to the parties. This privity is said to arise from an agreement between the city of Louisville on the one part and certain banks of Louisville, including the complainant, on the other, by which it was stipulated that the controversies between all the banks and the city should abide the event in test suits to be instituted by three banks selected to represent three classes.

Two questions are presented for our consideration:

225 First. Was the contract described in the bill and attached to it as an exhibit, the contract of the city of Louisville?

Second. If so, did the contract bring the complainant into such relation to the prohibition judgment and the parties thereto that it may claim the benefit of the estoppel of that judgment?

First. The averment of the bill is that the contract set forth was signed by the president of the sinking fund and by the attorney for the city under the authority and direction of the mayor and board of sinking fund commissioners and by the counsel who represented the banks in said litigations. The bill further recites that the agreement was made between the city of Louisville and its sinking fund commissioners and the banks and trust companies including the complainant. Upon demurrer to the bill, these averments would doubtless be sufficient to show that the contract which was made was the contract of the city of Louisville. But the case is pending also upon the motion for a preliminary injunction; and upon that motion it is proper for us to consider the answer of the city of Louisville, which by stipulation, was permitted to be filed without the withdrawal of the demurrer. The answer contains this averment:

"This defendant denies that said alleged agreement, an alleged

copy of which, or the substance of which is filed with complainant's bill, marked 'A,' was signed by the attorney for the city of Louisville, under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville and said alleged agreement or contract set forth in said copy marked 'A' is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled 'An act for the government of cities of the first class' approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to
226 execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations or covenants or either of them, contained in said alleged agreement or contract at the time, in the manner or under the circumstances alleged in complainant's bill or otherwise."

Upon a motion for preliminary injunction, therefore, the issue is raised whether those who signed the contract on behalf of the city of Louisville were authorized to bind it thereto. We are of opinion that the city attorney was vested with ample authority to bind the city of Louisville to the contract mentioned in so far as it affected the complainant herein. By section 2909 of the Revised Statutes of Kentucky it is provided that "there shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

The foregoing section makes this officer the retained attorney of the city in every suit brought against it. The question at issue between the banks and the city of Louisville was whether the city

could collect license taxes under one of its ordinances. The banks notified the city attorney and the commissioners of the sinking fund whose duty it was to receive the money for the benefit of the city that they intended to resist the collection of the tax by litigation. It was the duty of the city attorney under the statute above set forth to take charge of the litigation thus about to be brought. It was his duty as the attorney of the city to save, so far as he could without prejudice to the city's interest, costs which might be accumulated should suits to the number of twenty be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of a stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation and was entirely
227 under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the city attorney and the attorneys for the banks of this character would have been as clearly part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the city attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation and the authorities fully sustain this conclusion.

In *North Missouri R. R. Co. v. Stevens*, 36 Mo., 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that as the same facts arose in all the cases they would abide by the judgment that should be rendered in one of them and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement and that it was void. The court sustained the agreement as within the authority of the attorney. It said:

"The arrangement in this case is not a compromise according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of thing to be recovered; it comes nearer within the general management of the case."

In *Ohlquest v. Farwell & Co.*, 71 Iowa, 231, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only

one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client or waive any cause of action or de-
228 fense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial."

See also *Eidon v. Finnegan*, 48 Mo., 33; *Gilmore v. American Central Ins. Co.*, 67 Cal., 366.

In Thompson on Trials, 1st vol., section 195, the author says:

"Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys in virtue of their general retainers, to stipulate that only one shall be tried and that the others shall abide the result of that one."

We think therefore, that in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In *Patton v. Caldwell*, reported in 1st Dallas, 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties and therefore, not admissible; upon which an agreement of all the underwriters to be bound by one verdict was proven.

McKean, chief justice, said:

"The defendant had no opportunity of cross-examining, upon

the former trial; and the answer is, that he, with the
229 rest of the underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel.

Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read without full proof of the agreement, yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire that all such agreements may be entered on the records of the court."

The court then held that the verdict thus offered was not conclusive. As this latter proposition, however, is in conflict with the rule laid down by the Supreme Court of the United States in a recent case of *South Pacific R. R. Co. v. United States*, 168 U. S., 1, that part of the decision cannot be regarded as authority here.

In *Brown, Russell & Russell v. Sprague*, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

Mr. Freeman, in his work on Judgments, says, section 174:

"Neither the benefit of judgments on the one side nor the obligations on the other are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. * * * The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against
him to the same extent as if he were the nominal as well as
230 the real party to the action. * * * Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party and for the protection of his own interests."

These principles are sustained by the cases cited by that learned author. See *Cole v. Favorite*, 69 Ills., 457; *Wood v. Ensell*, 63 Mo.,

193; *Executors of Tate v. Hunter*, 3 Strobhart, 136–140; *Palmer v. Hayes*, 112 Ind., 289; *Gill v. United States*, 7 Court of Claims, 522, 526. See also Herman on Estoppel, section 139.

In Greenleaf on Evidence, vol. 1, section 523, the principle is stated as follows:

"But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim, under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with them in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him."

In the case of *Rapelye & Purdy v. Prince & Prince*, 4 Hill, 119, Mr. Justice Bronson, speaking for the supreme court of New York, said:

"When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party."

In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits which were conducted were openly conducted in the interest of all the parties to the agreement with the knowledge and by the consent of the city of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have been
231 so bound. Had the result gone the other way and a judgment been rendered in favor of the city of Louisville in the cases referred to, it cannot admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the sinking fund commissioners for the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city and a

formal judgment was not taken. It is just that inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit. This conclusion necessarily leads to the result that the demurrer to the bill must be overruled and the motion for a preliminary injunction allowed.

232 Circuit Court of the United States, District of Kentucky.

LOUISVILLE TRUST COMPANY
vs.
SAMUEL H. STONE and Others. } No. 6583.

LOUISVILLE TRUST COMPANY
vs.
CITY OF LOUISVILLE. } No. 6584.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
SAMUEL H. STONE and Others. } No. 6581.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
CITY OF LOUISVILLE. } No. 6582.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The Louisville Trust Company and the Fidelity Trust & Safety Vault Company were parties to the agreement made between the banks of Louisville and the city attorney, by which the question of the liability of the banks of Louisville under the license ordinance of the city of Louisville was carried by three test cases to the court of appeals. By that agreement these trust companies were included within the clause represented by the Louisville Banking Company, as a bank of the State, organized since the act of 1856.

The trust companies were organized under charters, each of which contained the following clause: "But nothing herein shall
233 be construed to permit said company to discount paper or to engage in the business of banking." By subsequent amendments some additional powers were given which are usually exercised by banks, but there was no amendment to the charter of either permitting it to engage in the business of regular or general banking. The power to qualify and act in various trust or fiduciary capacities constituted the chief object in the organization of these companies. Section 5 of the amended charter of the Louisville Trust Company contains the following:

"For purposes of taxation, this company shall be classed and treated as one of the banks of this State, and shall be subject to and pay the same rate of taxes, to same parties, at the same time, in same manner and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this State."

In the case of the *Louisville Trust Co. v. City of Louisville*, 30 S. W. R., 991, Judge Grace, in the course of his opinion, expressed the view that this was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, and that this was the only ground upon which it could be excused from taxation under the old constitution. It has been held by the court of appeals of Kentucky that it was competent to exempt banks, under that constitution, because they did render public services. It is thus apparent that the question whether the trust companies had an irrevocable contract under the Hewitt act, was not the same as that presented with respect to the banks. The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question, can only exist where the two cases involve the same questions of law and fact. Otherwise, the attorney might conclude his client's rights by an event having no relevant relation to the merits of the controversy in which he is acting as attorney. Hence, it follows that the contract of the city attorney on behalf of the city of Louisville, in so far as it attempted to make the taxation of the trust companies depend upon the judgments in the three test cases of the banks, was beyond his authority, and that the trust companies cannot rely on those judgments as *res judicata*.

Indeed, the same conclusion may be reached irrespective of the city attorney's authority. The point adjudged in the three cases was, that banks accepting the Hewitt act had an irrevocable tax exemption. The point at issue here concerns the tax exemption of the trust companies. This is a different question, as we
234 have seen, and is not foreclosed, therefore, by the judgment in favor of the banks. The indispensable element in a successful plea of *res judicata* is that the point adjudged and the point at issue shall be the same.

If the complainants cannot rely on the bar of the prior adjudication, we must of course reach the same conclusion upon the question of irrevocable contract on its merits that we have reached in the case of the Northern Bank of Kentucky.

The motion for preliminary injunction must, therefore, be denied, the demurrers to the bills sustained and the bills dismissed.

235 Circuit Court of the United States, District of Kentucky.

FIRST NATIONAL BANK
vs.
SAMUEL H. STONE and Others. } No. 6575.

FIRST NATIONAL BANK
vs.
CITY OF LOUISVILLE. } No. 6576.

AMERICAN NATIONAL BANK
vs.
SAMUEL H. STONE and Others. } No. 6569.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The First National bank was organized in October, 1863, under the national banking laws and its charter rights were extended September 6, 1882. It did not formally accept the Hewitt act in accordance with the terms of that act. The averment of the bill upon this point is: "Your orator shows that from the first day of July, 1887, although it was not by the United States banking acts bound to submit to taxation under the 'Hewitt bill,' it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said 'Hewitt bill,' and the said State through its proper officers received and appropriated said taxes paid by your orator as aforesaid. Your orator has no real estate and never had. In the way above stated, your orator accepted the provisions of the 'Hewitt bill.'"

The American national bank was organized after the passage of the Hewitt act, so that it could not accept that act in accordance with its provisions. The averment of its bill upon this point is: "Your orator shows that from the first day of July, 1890, although it was not by the United States banking acts bound to submit
236 to taxation under the Hewitt bill it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said Hewitt bill, and the said State through its proper officers received and appropriated said taxes paid by your orator as aforesaid. Your orator has since its organization paid to the city taxes on the building in which it does business. In the way above stated your orator accepted the provisions of the Hewitt bill."

Each of the bills in the above-entitled causes contained these averments: "Your orator respectfully shows to the court that the existing laws of the State of Kentucky do not provide for taxing the shares of your orator as permitted by the act of Congress, but attempt to subject to taxation its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and

provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress. And your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

"Your orator further shows and submits to the court that by rsason of the formal contract entered into by all the other banks and trust companies in the city of Louisville, and by reason of the former adjudication in favor of said banks and trust companies establishing the validity of said contracts, they will escape local taxation, except on the houses owned by them, respectively, in which they respectively do business, and your orator, coming as it does into direct competition with said institutions, will be driven out of business if subjected to local taxation; wherefore it respectfully insists it is protected by the acts of Congress against such unjust discrimination."

The first question is whether the revenue act of November, 1892, taxes the national banks in a way inconsistent with the permission given by Congress.

Section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by
237 authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent according to its value, as other real property is taxed."

The State derives its power to tax national banks from this section. The question is whether the provision for taxation of banks under the revenue act of November, 1892, is a violation of this section. The provisions of that act are that all banks shall be taxed upon their real property, and personal property and also taxed upon their franchises to be assessed by subtracting the value of the tangible property from the value of the capital stock of the company. It is argued that the State has no right to tax the franchises conferred by the Government of the United States. But it has been decided in the case of *Henderson Bridge Co. v. Kentucky*, 166 U. S., 150, and *Adams Express Company v. Kentucky*, 166 U. S., 171, that the word franchise in the revenue act of 1892 was not employed in a technical sense, and that the legislative intention was plain that the entire property, tangible and intangible, of all for-

eign and domestic corporations, and all foreign and domestic companies, possessing no franchise, should be valued as an entirety, that the value of the tangible property should be deducted, and that the value of the intangible property thus ascertained should be taxed under these provisions. It will be seen therefore that the taxation upon all banks is nothing but a tax upon the value of its capital stock. There is no discrimination whatever against national banks in favor of State banks because they are all subject to the same rule of taxation. The Supreme Court of the United States has given section 5219 a very liberal construction in sustaining State taxation of national banks if not inconsistent with the purpose of Congress to prevent a discrimination in favor of State banks as against national banks. Mr. Justice Miller in delivering the opinion of the court in the case of *Davenport Bank v. Daven port Board of Equalization*, 123 U. S., 83, said:

238 "It has never been held by this court that the States should abandon systems of taxation of their own banks or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of State taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress."

See also *Mercantile Bank v. New York*, 121 U. S., 138, and *Bank of Redemption v. Boston*, 125 U. S., 60; *Palmer v. McMahon*, 133 U. S., 660.

It is contended however that the definition given to the term capital stock used in the revenue act of 1892 includes more than the sum of the value of the shares of the capital stock of a corporation. It is true that in the case referred to, *Henderson Bridge Co. v. Kentucky*, 17 Ky. L. Rept., 390, the court of appeals held that it was proper for the board of valuation and assessment to fix a valuation of the capital stock of the Henderson Bridge Company at more than the market value of the sum of the shares of the capital stock. In that company, the shares of capital stock aggregated $1,000,000, the market value of which was 90 cents on the dollar. It had a mortgage upon its property to secure a bonded indebtedness of $2,000,000. In reaching the amount of the capital stock of the bridge company the board added the market value of the shares of the capital stock to the value of the mortgaged property, taking it for granted that that would show the real amount of property, tangible and intangible, owned by the company. This mode of assessing the capital stock was held to be proper under the law. In such a case of course the assessment for taxation would be more than

the value of the shares of the capital stock. There could be no such result, however, in the application of the law to national banks, because they are not permitted to issue bonds and do not hold property under mortgage. It is not averred in the bill and it does not appear that the assessment of valuation for taxation against these complainant banks exceeds the market value of their shares of capital stock. However the law may operate, therefore,
239 upon that class of corporations which have bonded indebtedness, it certainly does not in the case of the national banks tax anything more than the equivalent in value of the shares of the capital stock. If it does so, there ought to be some averment to show this. *Supervisors v. Stanley*, 105 U. S., 311. The bill contains no such statement.

Another objection to the operation of the revenue act upon the complainants is, that certain of the State banks and national banks are now, by reason of the previous litigation, enabled to escape all taxation except that provided under the Hewitt act, and that this is a discrimination against them in violation of section 5219, above quoted.

In *Lionberger v. Rouse*, 9 Wall., 468, the fact that a State could not collect a tax past a certain amount in the two banks of issue, which it had at that time, was held no bar to the collection of the tax on the shares of the national banks for a greater amount. In this case Mr. Justice Davis, who delivered the opinion of the court, concluded as follows:

"Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the national banking act than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

In the former litigation certain banks have been declared to be free from taxation by reason of a contract of exemption. By subsequent decisions in the same court—if that be a material question in that court—the former ruling was declared erroneous. But by the doctrine of *res adjudicata* the particular banks engaged in the prior litigation are able to rely upon it as a bar to the enforcement of the law of 1892. That law, by its terms, applied to all banks equally. In so far as the State has had the power to do so, therefore, it has made the taxation of all banks equal. We do not think that the exceptions to the operation of the law, produced by the accident of litigation, can make the discrimination arising between the parties to the litigation, and those who were not parties, a discrimination within the inhibition of section 5219 of the national banking act.

The motions for preliminary injunction will be denied, the demurrers to the bills will be sustained, and the bills dismissed.

240 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE NORTHERN Bank of Kentucky
vs.
SAMUEL H. STONE and Others, CITY OF LEXINGTON, County of Fayette, City of Paris, County of Bourbon, and The City of Covington. } No. 6585.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

The bill in this case averred that the complainant bank was a corporation originally organized by an act of the General Assembly of Kentucky, approved Feb. 20, 1835, to do a general banking business. Its corporate life was made to terminate May 1, 1865. The act of Feb. 15, 1858, continued the charter privileges of the complainant in full force for twenty years from May 1, 1865, upon its acceptance of certain conditions to which the complainant duly consented. An act approved February 6, 1882, provided that the charter rights and privileges of the complainant should continue and extend in full force for twenty years from and after May 1, 1885; reserved to the General Assembly the right to alter, change, amend or repeal the act, and the charter and amendments thereto; and required that before the act should go into effect it should be approved and accepted by a majority in interest of the stockholders. The act was never accepted or approved by the stockholders. Thereafter another act was passed, approved March 6, 1884, providing that the chartered rights and privileges of the complainant should be extended in full force for twenty years from and after the first of May, 1885, and that the act should go into effect when it should be approved by the stockholders of the bank and notice of the approval given to the governor of the Commonwealth. It did not contain the clause reserving to the legislature the power of repeal. It was duly accepted. The 15th section of the original charter of the complainant required the cashier to pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank
241 which should be in full of all tax or bonus; provided, that the legislature might increase or diminish the same, but at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank. By an act of 1836, the legislature increased the tax to fifty cents, and this the complainant paid each year down to July 1, 1886, when the Hewitt law was passed. The court of appeals of Kentucky as early as 1838 held that the language in the complainant's charter constituted a contract with the State, which was inviolable, and a limitation on the legislative power to tax the stock of the bank, or its property. *Johnson v. Commonwealth*, 7 Dana, 339. By a subsequent decision it was determined by the same court that the limitation included taxation by any of the municipal subdivisions of the State, and therefore prevented such municipal subdivisions from taxing the real estate of the bank, although situated within their boundaries.

Commonwealth and Greenup County v. Farmers' Bank, 6 Bush, 127. The complainant duly accepted, within the required time, the benefit of the Hewitt act by filing a consent in writing under the seal of the bank with the governor of the Commonwealth; and paid the tax under the Hewitt act from that time down to July 1, 1893. Thereafter the auditor of the State refused to receive the tax under the Hewitt law, although tendered by the complainant. Upon the announcement of the decision of the court of appeals in 1895, payment was accepted from the bank for the amount due under the Hewitt law from 1893 to 1896. The principal office of the complainant is in the city of Lexington, in the county of Fayette. It has one branch in the city of Paris, in the county of Bourbon, and another in the city of Covington. The bill avers that the revenue act of 1892 violates the contract between it and the State in the charter and the amendments to the charter and the contract between it and the State under the Hewitt law.

The bill further avers that under the revenue act of 1892 the board of valuation and assessment certified to the authorities of the county of *Bourbon* the proportion of the franchises found to be taxable by the county of Bourbon in the year 1893; that thereupon the county of Bourbon caused to be placed in the hands of James McClure, sheriff of said county, and the collector of its revenue, the tax bill made out accordingly; that on July 13, 1894, the complainant filed in the circuit court of Bourbon county—that being a court of general jurisdiction—its petition against the said county and sheriff, setting forth in said petition, in apt terms, the contract between it and the State in regard to taxation under the original charter and under the Hewitt law, claiming that no taxes
242 could be collected from the complainant except in pursuance thereof during its charter life, and that the act of November 11, 1892, was unconstitutional and void, as impairing the obligation of these contracts, and praying the court to establish these contracts and to enjoin the said Bourbon county and McClure, the sheriff, from attempting to collect any taxes contrary thereto; that issue having been joined upon the complainant's said suit, a judgment was rendered in the Bourbon circuit court to the effect that the act of November 11, 1892, did not violate any contract between the complainant and the State, and judgment was entered accordingly; that thereupon the complainant appealed from said judgment to the court of appeals of Kentucky; that in that court, its appeal having come on to be heard, was argued by counsel, among others, by the attorney general for the Commonwealth of Kentucky on behalf of the Commonwealth, who insisted upon the affirmance of the judgment; but the court adjudged that the judgment of the lower court was erroneous, and remanded the case to the Bourbon circuit court for a judgment in conformity to its opinion, in which opinion it was held that the Northern Bank of Kentucky had an irrevocable contract under the Hewitt act and its charter which prevented the authorities of the State or any of its municipal subdivisions from imposing any other tax than that prescribed in the Hewitt act. The bill concludes as follows:

"The premises considered, the complainant says it has been fully and finally adjudicated in proceedings between it and the said Bourbon county—which represented the Commonwealth, and in law all other municipalities deriving power from the Commonwealth—that complainant's contract is valid and enforcible, and that the complainant cannot be subjected to any greater rate of taxation than that agreed upon by it under the Hewitt law; if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for under the complainant's charter and amendments."

TAFT, circuit judge, delivered the opinion of the court:

Under the decision already rendered in the case of The Bank of Kentucky against Stone and others there can be no doubt that on the case made both in the bill and on the proof, the defendants, The Board of Valuation and Assessment and Bourbon County, are stopped by the former adjudication from asserting that the complainant bank is liable for any taxes to Bourbon county under the revenue act of 1892, because, as between the complainant and
243 that county, it was adjudicated that the complainant had an irrevocable contract with the Commonwealth by which all taxation against it should be limited to the tax provided in the Hewitt act, and that the tax upon the franchise under the revenue act was a violation of such contract.

It is also contended on behalf of the complainant that the other defendants, Fayette County, The City of Lexington, The City of Covington, and The City of Paris, are equally bound by the adjudication against the county of Bourbon. We do not think that this contention can be sustained. The theory seems to be that, as the county of Bourbon is a municipal corporation under the State government, the State is bound by the adjudication against it, and therefore every other subdivision is bound. It seems to us that this would be extending the doctrine of *res judicata* further than any authority will justify. The argument is based upon the decision of the court of appeals of Kentucky in *Franklin County Court v. The Deposit Bank of Frankfort*, 87 Kentucky, 382. In that case, the Deposit Bank of Frankfort was seeking to enjoin the county court of Franklin county from levying a tax upon its property in addition to the tax of fifty cents a share upon its stock which its charter provided should be in full of all tax or bonus. It was held that this was a contract which prevented any additional tax in any form upon its property by the State. The court then continued:

"But it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they cannot levy and collect taxes without the authority of the State conferring that right upon them. So the absurdity is presented that the State contracts with the appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of all tax or bonus—this is the meaning of the language—and at the same

time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee but may, notwithstanding, authorize all of its subdivisions, if the appellee's property were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract. Under such a contract between individuals a doubt could not exist. The State when she makes a contract, based upon a valuable consideration stands upon precisely the same footing."

244 This decision adjudged two things, first that the State had power by contract to impose a limitation upon the taxing power whether exercised by itself or by municipalities in which it might vest the same power, and second, that the language of the restriction in this case must be construed as intended to limit the whole power whether exercised by State or with the State's permission by municipalities. The argument of counsel assumes that as the county derives its power to tax from the State which is all that was decided in the case cited, it is, in levying taxes, the mere agent of the State and therefore a judgment against the county on a tax question is a judgment against the agent in respect of the business of the principal and is binding upon the latter as a privy. Indeed the argument goes further. It assumes that a county is a part of the State government and therefore a judgment against the county is a judgment in fact against the State. This is applying the doctrines of agency and privity under circumstances to which they have but little application. The source of all political power including the power to tax is in the people of the State. By a constitution they create a State government and a legislature and confer upon the legislature power to organize local municipal governments and to give such governments the power to levy taxes in order to discharge their other appointed functions. The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest. Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some other State function, there is no relation between the one and the other of principal and agent as that relation is usually understood in the law. The State may through its legislative branch confer upon, and withdraw from the counties and cities power of taxation, but when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by an agent for a principal; it is by a quasi independent government for the benefit of the people within its limits. The legislature, if not restrained by the constitution may by contract with individuals limit its power either to levy taxes itself or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof either by the State or municipality.

But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is con-
245 tending for the benefit of itself and its people, not for the State and its people. The taxes it proposes to collect are to be spent not for the State at large but for the convenience and benefit of the people within its limits. In seeking by suit to establish its right to tax, therefore, the city or county is not acting as agent for the State but for itself. Hence the judgment is not binding upon the State as principal.

The only other possible relation of privity of the State to the litigation must grow out of the fact that it involves the validity of a power granted by the State to the city or county; but this does not make the State privy to the judgment. In granting the power the State did not enter into an enforceable covenant of warranty with the counties and cities that the power as against every individual was valid. Certainly it cannot be claimed that the State could be vouched in by the county or city as a warrantor of the validity of the power, or by notice of the pendency of the suit could be bound conclusively by the subsequent judgment. If the contention of counsel for the complainant is sound, it must follow that the State and all its municipalities, great and small, would, by a judgment in favor of an individual or corporation against a village in a remote county adjudging a limitation upon the taxing power of the State, be estopped to deny the limitation in any future litigation with the same individual or corporation, although no appeal may have been taken to a higher court and although neither the State nor the other municipalities may have had any notice whatever of the litigation or any right or opportunity to be heard upon the question decided. We do not decide, because it is not necessary to do so, whether a county or city would be privy to a judgment against the State adjudging a limitation upon the taxing power; but it suffices to say that the question is in some important respects different from the one we have been discussing.

The case of *People v. Holladay*, 93 Cal., 241, does not, it seems to us, support the contention of the complainant. In that case the question was of the title to certain property claimed to have been dedicated as a park. The lot was situated in the city of San Francisco and the city and county of San Francisco brought a suit in ejectment to recover possession of the tract from the defendant who had obstructed the use of the same by the public and excluded them therefrom. In this action the city and county were defeated and a judgment rendered, finding that the defendant was the owner of the undivided $\frac{12}{20}$ of land and his title thereto was quieted as against the city and county. Subsequently the attorney general on behalf of the people of the State on relation of one Bryant,
246 brought another suit raising the same question and seeking to oust the defendant from the possession of the same tract. It was held that the city and county of San Francisco had the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and in such action it was authorized to

put in issue the alleged rights of the people to such easement; and the State was bound by the result of such litigation, if the same was not collusive. It is unnecessary for us to express an opinion upon the correctness of this decision because it can be easily distinguished from the case at bar. The city and county of San Francisco in the former litigation represented the same public which was represented by the State in the case before the court. The controversy was over the public use in the city of land claimed as a public square. It was obvious that the city, county and State were representing the same interest and the same right with respect to exactly the same subject-matter. In the present case the subject-matter of the former litigation was the taxes due from the complainant bank to Bourbon county—taxes which were to be expended by Bourbon county for county purposes and for the benefit of the people living in Bourbon county. The subject-matter of the present action which it is sought to conclude by the former action is the taxes due from the complainant bank to the city of Paris to be expended for the benefit of the people of that city, to the county of Fayette to be expended for the benefit of the people of Fayette, to the city of Lexington to be expended for the benefit of the people of Lexington, and to the city of Covington to be expended for the benefit of the people of the city of Covington. The rights of these various municipal corporations to the taxes claimed grow out of the same revenue act of November, 1892, but the parties and the persons in interest are different.

We have not deemed it necessary to consider another serious objection which might be urged to the use of a decree against Bourbon county to bar the State and other counties, and that is that in the absence of power to enjoin the State in a suit, it would be difficult to justify the plea against the State of *res judicata* based on a decree of injunction against a municipality or State agency which does not enjoy the same immunity. To give the decree the effect would seem to violate the State's exemption from suit. It suffices, however, to place our decision on the ground first above stated.

247 The fact that the attorney general appeared on behalf of the Commonwealth in this litigation when it reached the court of appeals is not a circumstance which could be held to bind the Commonwealth and all of its agencies by the litigation. There were a great many tax cases pending before the court at the same time. In some of these cases, the Commonwealth was a party and the attorney general was therefore present to argue the question on its behalf in those cases. Even if this had not been the case, the case of *Carr v. The United States*, 98 U. S., 433, shows that the appearance of the attorney general on behalf of the counties could not bind the State. In the case referred to the point in controversy was over the title to land of the United States to certain lots in possession of its officers in San Francisco. The United States filed a bill to quiet title to the property. The defendant set up by way of estoppel certain judgments in ejectment rendered by the State court at the suit of his grantor against certain officers of the Government who as its agents, had possession of the lots. In those actions the United States district attorney and additional counsel employed by

the secretary of the treasury appeared for the defendants and the question of title had been the same. It was held that the former judgment was not an estoppel against the United States. Mr. Justice Bradley in delivering the opinion of the court said:

"It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And in fact, he had no authority to waive these rights."

The attorney general of the State in these cases in appearing in the court of appeals of Kentucky for the county of Bourbon did not intend to waive any rights of the State, and, so far as appeared, he had no authority to do so.

Our conclusion therefore is that the complainant bank cannot in its controversy with the city of Lexington, Fayette county, the city of Paris and the city of Covington and with the board of valuation and assessment so far as concerns the apportionment and certification of the assessment by the board to *those* municipalities, rely upon or derive any benefit from the decree in the complainant's favor against Bourbon county.

We are thus brought to the question whether, as between
248 the defendants just named and the Northern Bank of Kentucky, the latter has by virtue of its acceptance of the Hewitt act an irrevocable contract with the State of Kentucky, by which the taxes to be imposed during its corporate existence upon it shall be limited to those provided in the Hewitt act. A second and alternative question is presented by the bill of the bank and by the argument of its counsel. It is contended that even if the State had the right at any time to withdraw from the contract with the complainant bank entered into by the latter's acceptance of the Hewitt act, there must be restored to the complainant the tax limitation under its charter which it was enjoying when it accepted the terms of the Hewitt act.

The original charter of the bank granted in 1835, provided that it should pay into the treasury twenty-five cents a share of stock which should "be in full of all tax or bonus; provided that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each" share of stock. In 1836 the legislature increased the tax to 50 cents a share. In 1838 this was held by the court of appeals of Kentucky to be an irrevocable contract between the bank and the State preventing the State from taxing the property of the bank or its stock either against the bank or against its holders. (*Johnson v. Commonwealth*, 7 Dana, 339.) In 1869, it was held by the same court that the same contract in another charter prevented taxation of the bank by counties and cities. *Farmers' Bank v. Commonwealth*, 6 Bush, 127. These decisions never have been overruled. Manifestly if the limitation was

continued in extensions of the charter, it was broad enough to prevent taxation by the counties and cities, defendants in this case, under the revenue act of 1892.

The original charter of the bank expired May 1, 1865. By an act approved February 15, 1858, the chartered privileges and rights of the president, directors and company of the Northern Bank of Kentucky were continued in force for twenty years from the first day of May, 1865. The extension was granted subject to certain restrictions on the powers of the bank not contained in the original charter and imposed on it the obligation to establish certain branches. In 1882, the legislature passed an act to extend the charter of the bank for twenty years from May 1, 1885. That act contained this clause:

"SECTION 3. The General Assembly of the Commonwealth of Kentucky hereby reserves to itself the right to alter, change, amend or repeal this act, and the charter and amendments thereto extending this act at its pleasure."

249 This act was not accepted by the bank in accordance with its terms. Two years later another act was passed which read as follows:

"SECTION 1. That the chartered rights and privileges of the President, Directors and Company of the Northern Bank of Kentucky shall continue and be extended in full force for twenty years from and after the first day of May, one thousand and eight hundred and eighty-five.

"SECTION 2. That said bank, under the continuance and extension hereby granted, shall be subject to all the restrictions, limitations, penalties, conditions and duties, and be entitled to all the rights granted to and imposed upon it by the act of its incorporation, and the acts amendatory of or relating thereto.

"SECTION 3. Said bank may be known by, and sue and be sued, contract and be contracted with, by and under the name of the Northern Bank of Kentucky, as fully as by and under its present name.

"SECTION 4. This act shall go into effect when it shall be approved by the stockholders of said bank at their regular annual meeting, or at a called meeting ordered for that purpose by the president and directors of said board, at which called meeting a majority in interest of said stockholders shall be present. Notice of said approval shall be given by the president of the bank to the governor of this Commonwealth."

The question is whether this act is to be construed and read with the act of 1856, as a part of it. The act of 1856, read as follows:

"SECTION 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

"SECTION 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason

of a repeal of its charter, or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

"SECTION 3. That the provisions of this act shall only apply to charters and acts of incorporations to be granted hereafter; and that this act shall take effect from its passage."

The court of appeals of Kentucky, in the case of the *Franklin County Court v. Deposit Bank of Frankfort*, 87 Ky., 382 (June,
250 1888), held that the act of 1856 did not apply to subsequent acts extending charters granted before its passage, and that the exemption from further taxation was as inviolable under the extended charter as it was during the life of the original charter. But in the case of *Deposit Bank of Owensboro v. Daviess County*, 39 S. W. R., 1050 (March, 1897), a majority of the court of appeals expressly overruled the decision in *Franklin County Court v. Deposit Bank*, and held that the act of 1856 must be read into all charter extensions granted after its passage, whether the original charter was granted before the act of 1856 or not. It was said that the last ruling was *obiter dictum*, and unnecessary in deciding the case before the court. But this is by no means clear. In the latter case the question involved the construction of the Hewitt act. In all discussions of that act it had been supposed to be a material preliminary step to determine whether there were any banks which would surrender an irrevocable tax exemption privilege in accepting the terms of the Hewitt act. We think we must, therefore, treat the two decisions above cited as conflicting; and, in any event, it is for us now to exercise an independent judgment in the matter.

In the earlier decision the court of appeals held that the extension related back to the date of the original charter, and that therefore the act of 1856 did not apply, because, by its third section, its application was limited "to charters and acts of incorporation to be granted" thereafter. It was further held that even if the act of 1856 would apply to extensions of old charters, it did not do so here, because the various provisions of the extension act of 1872 manifested an intention of the legislature so clear as to be "plainly expressed" that the act of 1856 should not apply. We cannot concur in the view that the act of 1856 did not apply to subsequent extensions of old charters. The purpose of such a reservation act is too clear to be misunderstood. It was to prevent the granting of corporate powers, franchises or privileges in such a way as to be beyond the control and regulation of the legislature, unless the legislature "plainly expressed" its purpose to reserve the power to alter, amend or repeal. The reason for the act was the inconvenience experienced from the irrevocable charters theretofore granted. Is it to be supposed that the legislature, in the act of 1856, intended to allow those charters, which had led to the enactment of the law, to be extended without being affected by its restrictive provisions? The first section of the act applies "to *all* charters

and grants of or to corporations *or amendments* thereof, and *all other* statutes." The third section limits the application
251 of the act "to charters and acts of incorporations to be granted hereafter." We think that this extension was a grant to a corporation or an act of incorporation granted after the act of 1856. It seems to us a strained and narrow construction to carry back its date by relation to the time of the original charter. In some senses it is true that the extension merely carries on the same old corporation, giving it additional life, but within the purpose of the act of 1856 to prevent the granting of irrevocable exemptions, the giving of additional life to such an immunity was a new grant—a new charter. It is our duty to give effect to this act so as to avoid the evil aimed at by the legislature, and no refined reasoning as to the question whether an extension is the lengthening of an old life, or the granting of a new one, ought to blind us to the palpable intention of the legislature to prevent, except by express words, the future granting of irrevocable powers, privileges or exceptions. It is well settled by the Supreme Court of the United States that tax exemptions are not favored, and are to be given the strictest construction (*Ohio Life Insurance & Trust Company v. Debolt*, 15 How., 435); and it may well follow, as a corollary to these principles, that laws passed by the legislature to prevent irrevocable tax exemptions are to be liberally construed.

The next question is whether there is anything in the act of extension to justify us in holding that there is an intention "plainly expressed" in it to make the rights and privileges therein extended irrevocable. The act of extension under consideration in the case of *Franklin County v. Deposit Bank, supra*, was the first act of extension, which was quite elaborate and contained many new conditions; but the one we have to consider is a simple extension without new conditions, except that it shall be formally accepted by the bank. We are unable to perceive any plain expression of the intention of the legislature to make the rights and privileges granted irrevocable. They are granted for twenty years, and without the rule of construction enjoined in the act of 1856, this would be held to imply an intention that they should not be subject to amendment or repeal during that period. But the act of 1856 was passed for the precise purpose of avoiding the usual implication and of requiring affirmative language to sustain the claim, that rights and privileges granted for any length of time could not be revoked before its expiration. *Griffin v. Kentucky Ins. Co.*, 3 Bush, 592; *Cumberland & Ohio Railroad Co. v. Barren County*, 10 Bush, 609. We find no such affirmative lan-
guage in this act. We cannot attach the significance
252 that counsel do to the passage of two acts, extending the charter of the Northern bank, the one containing an express reservation, and the other enacted two years later omitting it. Each act must be construed as it stands, and in the absence of something affirmative in the latter act itself to exclude the act of 1856, it is to be treated as part thereof. This conclusion makes it unnecessary for us to consider the soundness of the proposition that, upon repeal

of the Hewitt act, those who had surrendered exemptions were entitled to a restoration of them.

We come, then, to the question: Did the Hewitt act confer on the banks accepting it a contractual immunity from taxation incapable of repeal during their corporate existence? The first section of the article of the Hewitt act provided that shares of stock in State and national banks, and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock should be taxed seventy-five cents a share, and upon all surplus over and above 10 per cent. on their capital stock the same rate of taxation as was assessed upon real estate which, it was declared, should be in full of all tax, State, county and municipal. The fourth and remaining sections of the article we give below:

"SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

"SECTION 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: Provided, they pay the tax provided in section 1 from the passage of this act.

"SECTION 6. This act shall be subject to the provisions of section 8, chapter 68 of the General Statutes.

"SECTION 7. If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes—State, county and municipal—shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

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Section 8, chapter 68 of the General Statutes, referred to in section 6, *was the above act of 1856.*

But for the respect we feel for the judgment of the majority of

the court of appeals, deciding the bank-tax cases, 97 Ky., 591, and the very able opinion of Chief Justice Pryor in support of that judgment, we should have thought that there could be no doubt of the necessary construction of the article of the Hewitt act, above quoted. The act of 1856 is incorporated in the article of the Hewitt act above quoted, not merely by a rule of construction enjoined by a preceding legislature, and presumably accepted by the legislature passing the Hewitt act, but the latter legislature has expressly and affirmatively adopted it *as part of the article.*

It is said, however, that the sixth section was not intended to apply at all to the contract of limited tax exemption contained in the fourth section, but that its purpose is to be found in, and limited to, the desire of the legislature to secure to itself the right to repeal the act before the acceptance of its terms by the banks. The suggestion seems to us utterly inadequate to explain the insertion of the section in the act. All the banks were required to accept the act before the next meeting of the legislature, so that the right to repeal must, in this view, have been limited to the short time remaining of the pending session of the legislature, and the interval when the legislature was not in session. With submission, a construction limiting the reservation clause to so inconsequential a purpose is unreasonable. Since the decision by the Supreme Court in *State Bank v. Knoop*, 16 How., 369, in 1853, that a State might restrict its taxing power over a corporation by charter provisions in the nature of a contract which was irrevocable, the main object of the clause reserving power in the legislature to alter or repeal charters and acts of incorporation has been to render tax exemption revocable, and it is to miss wholly the significance of such a clause to hold that it has no application to a tax limitation, *when it is*
254 *expressly made part of the act declaring such limitation.* It would be extremely difficult for a court, bound to follow the decisions of the Supreme Court of the United States, to hold that a clause of an act expressly reserving in the legislature the right to amend or repeal it does not apply to tax exemptions conferred by the same act. In *Tomlinson v. Jessup*, 15 Wall., 454, an act of South Carolina provided that every charter or incorporation granted or renewed should, at all times, be subject to amendment, alteration or repeal, unless the granting or renewing act should, in express terms, provide otherwise. The question was, whether this applied to a tax exemption of the property of a company which was in terms to last during the continuance of the existing charter. The Supreme Court held that it did. Mr. Justice Field said, in delivering the opinion of the court:

"There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has, nevertheless, been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. * * * In these cases, and in others of a similar character, the exemption is upheld as

being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation, the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State. Rights acquired by third parties and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

The "reservation" clause has been applied to tax-exemption privileges in accordance with the doctrine above declared in *Railroad Company v. Georgia*, 98 U. S., 359, and *Hoge v. Railroad*, 99 U. S., 348.

The court of appeals of Kentucky in the bank-tax cases relied much on the case of *New Jersey v. Yard*, 95 U. S., 104. In that case the question was whether a tax exemption was subject to repeal under a general reservation act. The railroad company which was claiming the exemption had been organized in 1835 before the passage of the reservation act. A supplement was passed expressly reserving the power of repeal. A second supplement without any reservation was passed. This second supplement related to a tax controversy and provided for a settlement of it by written acceptance by the railroad company. It was held that the general reservation act did not apply to a limited tax exemption granted to the company in this supplement. The court pointed out that general acts of reservation passed by one legislature are binding on a subsequent legislature only so far as it chooses to conform to them, and that it is a question in every case whether the legislature making a contract intends the former reservation act to become by implication a part of the contract. In the case before the court it was held that the provision for specific rate of taxation was inconsistent with such an implication because there was a fair adjustment of a sub-

ject of dispute for a valuable consideration on both sides, because the contract assumed the shape of a formal written contract, and because of the scope of the words of the contract, which were that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof." Were it not for the sixth section of the Hewitt act, the case would have a most important bearing in considering whether the legislature passing the Hewitt act intended that the act of 1856 should be incorporated by implication in the Hewitt act. But that which was a matter of inference and argument in *New Jersey v. Yard*, is in the case before us determined by the express declaration of the legislature passing the Hewitt act. Those circumstances and that language of the act under consideration which were regarded in the Yard case as inconsistent with an implication that the general reservation act should be read into it, cannot
256 prevail against the express direction by the legislature that the reservation act must be applied to it. It is as the Supreme Court declares it to be, only a question of legislative intention, and when the intention is expressly declared there is no room for implication.

The fourth section of the Hewitt act, construed in the light of the reserved power of repeal in the sixth section, was a proposal to the banks that they should pay a certain tax and no more during their corporate existence unless the legislature should see fit sooner to withdraw from the agreement. The question is asked why the old banks should surrender their charter right to a lower tax assessment for the rate fixed under the Hewitt act if it is true that the legislature could withdraw from it at pleasure. It is a sufficient answer to say that they had in fact no irrevocable exemption to surrender, and though they claimed it, and had then the decision of a State circuit court upholding the claim, it was so doubtful that they preferred to accept a somewhat higher rate of taxation by the State alone than to run the risk of being subjected to the much heavier taxation, both State and local, imposed by the seventh section of the Hewitt act upon banks which should not accept the proposal of the fourth section.

Having concluded that the act of 1856 must be applied to the fourth section, the question remained whether the tax exemption, after acceptance by the banks, was a "right previously vested" within the proviso of that act. If so it cannot be impaired. The court of appeals held that it was such a right. We cannot concur in this view. It seems to us that the legislature in this proviso was merely expressing in words the limitation that always exists upon the reserved power of amendment or repeal of corporate charters. A legislature cannot by amendment or repeal of a charter deprive the member of a corporation of the property or contract rights it has acquired by the exercise of its corporate powers. *Commonwealth v. Essex Co.*, 13 Gray, 239; *Miller v. State*, 15 Wall, 478; *Sage v. Dillard*, 15 B. Mon., 349; *Holyoke Company v. Lyman*, 15 Wall., 478. It cannot annul contracts made by the corporation with third persons in the exercise of its lawful franchises. It cannot undo that which is

done. It cannot say that that does not exist which does in fact exist. It cannot recall an executed grant of property. But it can revoke for the future anything in the charter of a promissory character, whether it is contractual or merely gratuitous. In *Greenwood v. Freight Co.*, 105 U. S., 13–19, the question was of the effect of the repeal of an act conferring a charter upon a street railway
257 company that had built its track in the streets. Mr. Justice Miller, speaking for the court, said :

"If the essence of the grant of the charter be to operate a railroad and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter and which could not be exercised by unincorporated private persons under the general laws of the State is abrogated by the repeal of the law which granted these special rights."

See also *State v. Miller*, 21 Barb.; *Zabriskie v. H. & N. R. R. Co.*, 18 N. J. Eq., 175; *Oldtown v. Lincoln R. R. Co. v. Veazie*, 39 Me., 571 : *Hathorn v. Calef*, 2 Wall., 10–24 ; *Commonwealth v. Essex Co.*, 13 Gray, 239. The limited tax exemption under the Hewitt act was a contract between the bank and the State. The reserved right to repeal made the contract one which the State could revoke at pleasure. The court of appeals in the bank-tax cases relied on the *Commissioners of the Sinking Fund v. Green & Barren River Navigation Co.*, 79 Ky., 73. It that case it was decided that the legislature could not, under the act of 1856, take from the navigation company, without making compensation therefor, the right it had acquired under a contract with the State to take for a term of years tolls from vessels navigating the Green and Barren rivers in consideration of its agreement, then fully performed, to put in repair and maintain at its own expense the line of navigation. It may be hard to reconcile this case with *Greenwood v. The Freight Company*, but it can be distinguished from the case at bar. In the case cited the court treated the right which the State proposed to exercise as a reserved right of rescission and held that it could only be exercised on condition that the grantee of the State should receive compensation for the money advanced to improve the property of the State the use of which he was not permitted to enjoy. In the case at bar, the banks surrendered nothing of value to the State for the limited tax exemption of the Hewitt act, and the power of revocation was not in any view, therefore, trammelled by conditions.

In view of our conclusion that the complainant has not established, as against any of the defendants, except Bourbon County, the existence of an irrevocable contract of tax exemption, either by *res judicata* or on the merits, and as this issue thus presented and decided is the only one upon which complainant, a corporate citizen of Kentucky, can ask a Federal court for relief, we do not pass upon or decide the question raised by complainant under the
258 State decisions whether prior decisions of the court of appeals, though now overruled, prevent the collection of taxes

accruing during those years when the prior decisions holding them uncollectible and void remained unreversed.

For the reasons given the order of the court will be that the motion for an injunction against Bourbon County and the certification of the assessment to it by the board of valuation is granted and to this extent the demurrers to the bills are overruled. But as to the certifications of the assessment to the other municipalities the demurrers are sustained and the bill dismissed.

259 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky *vs.* CITY OF LOUISVILLE. } No. 6556.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The bill filed herein presents the same questions as those already considered in the case of the *Bank of Kentucky v. Samuel H. Stone, etc.*, but it relates to the taxes for 1893–'94, which were certified down by the State board of valuation and assessment to the city of Louisville for collection. We do not think that the questions differ in any respect from those already considered, and must, therefore, hold that the city of Louisville is estopped by the former judgment between the Bank of Kentucky and it, in which it was held by the court of appeals of Kentucky that the Bank of Kentucky had an irrevocable contract under the Hewitt act for the exemption of the property and franchise of the Bank of Kentucky from any other taxation than as therein imposed; and, therefore, that the bank is entitled to the preliminary injunction against the collection by the city of Louisville and its agents of the taxes provided in the revenue act of November, 1892.

The demurrer to the bill is overruled, and the motion for an injunction granted.

260 Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING COMPANY *vs.* CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

This case presents the same questions as are presented in the case of the *Louisville Banking Co. v. Samuel H. Stone, etc.*, already disposed of, but involves the taxes for 1893 and 1894. The taxes for 1895, 1896, 1897 and 1898 were involved in the prior case.

The order will be that the preliminary injunction prayed for shall issue, and that the demurrers to the bills be overruled.

261 Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING CO. *vs.* SAMUEL H. STONE, ETC. } No. 6561.

LOUISVILLE BANKING CO. *vs.* CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases present substantially the same questions as those already passed upon in the case of the Bank of Kentucky against the same defendants. The complainant company was a corporation organized after the act of 1856, but before the Hewitt act. It duly accepted the provisions of the Hewitt act. After the passage of the revenue act of November, 1892, and the adoption of the ordinance by the city of Louisville imposing a license upon the gross receipts of banks doing business within its limits, a warrant was sued out by the city of Louisville in its police court against the Louisville Banking Company for a failure to pay the license. This bank filed a petition for a writ of prohibition in the circuit court of Jefferson county against R. H. Thompson, the police judge, averring that the ordinance of the city of Louisville was void as impairing an obligation of the complainant's contract with the State under the Hewitt act, and that any authority given to the city of Louisville to pass such ordinance by the revenue act of November, 1892, was likewise void as impairing the obligation of the contract. The petition prayed that the police judge might be prohibited from taking jurisdiction of the proceeding against complainant for a violation of the ordinance. Issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville. The city of Louisville, though not a party in name,
262 was, in reality, the party defendant, and appeared by counsel. Indeed, the proceedings were taken for the purpose of testing the validity of the license ordinance by agreement between the city attorney and the complainant bank. The Jefferson circuit court found the issues in favor of the defendant and entered a decree dismissing the petition. Thereupon the complainant banking company caused an appeal to be taken in its name from the judgment of the Jefferson circuit court to the court of appeals, and to that appeal it made the city of Louisville and R. H. Thompson, the police judge, parties. In the court of appeals the cause was argued by the counsel for the city of Louisville. The court of appeals reversed the judgment of the Jefferson county circuit court, and in its opinion held that the ordinance of the city of Louisville was void, for the reason that the Louisville Banking Company had an irrevocable contract with the Commonwealth upon its due acceptance of the terms of the Hewitt act, limiting the amount of taxes to

which it was subject to those imposed by that act during its corporate existence.

For the reasons already stated in the case of the bank of Kentucky against the same defendants, we think it conclusively established, as between the parties by a former adjudication, that the complainant had an irrevocable contract under the Hewitt act with the Commonwealth of Kentucky, by which no greater taxes than therein provided could be imposed upon it by the Commonwealth or under its authority.

For the reasons stated in the same opinion, we think the complainant entitled to equitable relief to prevent a violation of that contract by the taxes assessed under the revenue act of 1892. An order for a preliminary injunction, therefore, must issue in these cases, and the demurrers to the bills must be overruled.

263 Circuit Court of the United States, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY
vs.
SAMUEL H. STONE and Others.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

This case is controlled by the points already decided. The Farmers' bank, in prior adjudications with the county of Franklin, the city of Frankfort and the city of Henderson, was conclusively adjudged to have an irrevocable contract under the Hewitt act, exempting it from any taxation in excess of that provided therein. There was no such adjudication, however, between the Farmers' bank and either Scott county or Henderson county. It therefore follows, from what has already been decided, that as to Scott county and Henderson county, the demurrers to the bill should be sustained, and the bill must be dismissed; while as to the other defendants, the demurrers will be overruled and the motions for a preliminary injunction granted.

264 Circuit Court of the United States, District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE and Others.
No. 275.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

In an injunction suit brought by the Deposit Bank of Frankfort against the county of Franklin, in the Franklin circuit court, to prevent the collection of any taxes under the revenue act of 1892, in excess of those imposed by the Hewitt act, it was expressly adjudged on appeal by the court of appeals that the bank had, by its due acceptance of the terms of the Hewitt act, an irrevocable con-

tract of exemption from taxation in excess of that imposed in the Hewitt act, and that the revenue act of 1892 violated this contract. In a similar injunction suit brought by the bank against the city of Frankfort, a decree, in all respect similar, was entered on the same ground. In accordance with our decision, in the case of Bank of Kentucky against Stone, just decided, we must, therefore, grant the motion for a preliminary injunction, and overrule the demurrer to the bill.

265 Circuit Court of the United States, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, and The City of Louisville, Defendants. } No. 6573.

THIRD NATIONAL BANK, Complainant,
vs.
THE CITY OF LOUISVILLE, Defendants. } No. 6574.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases present the same question which arose in the case of the Louisville Banking Company against the same defendants already decided. The suit against the city of Louisville relates to the taxes under the revenue act of 1892, for the years 1893 and 1894, and the suit against Stone and others and the city of Louisville relates to the taxes for 1895, 1896, 1897 and 1898. In the prohibition suit brought by the Third national bank against the judge of the police court, to which the city of Louisville became a party on appeal, it was held by the court of appeals of Kentucky that the Third national bank, by its formal acceptance of the provisions of the Hewitt act, had acquired a contract right irrevocable by the State exempting it from all taxes except those provided under the Hewitt act, and that the license tax imposed by the city of Louisville under a statute of the State was, therefore, a violation of the contract, and void under the Constitution of the United States.

The demurrer to the bills are therefore overruled, and the motions for preliminary injunction against the defendants are granted.

266 Circuit Court of the United States, District of Kentucky.

LOUISVILLE CITY NATIONAL BANK
vs.
SAMUEL H STONE AND OTHERS. } No. 6565.

LOUISVILLE CITY NATIONAL BANK
vs.
CITY OF LOUISVILLE. } No. 6566.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges. Taft, circuit judge, delivered the opinion of the court.

These cases are controlled by the case of Bank of Commerce against City of Louisville. On the principle of privity and *res judicata* laid down in that case, we grant the motion for a preliminary injunction and overrule the demurrer to the bill.

267 Said replication to the answer of the Board of Councilmen of the City of Frankfort and the County of Franklin, filed herein by order of court on June 25th, 1898, is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE and Others, Defendants.

Replication to the Answer of the Board of Councilmen of the City of Frankfort and the County of Franklin.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto, saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants

268 are uncertain, untrue, and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, are true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct; and humbly prays in and by its said bill it hath already prayed.

W. S. PRYOR &
JNO. W. RODMAN,
Att'ys for Complainants.

Said replication to the answer of the city of Henderson and county of Henderson filed herein on June 25th, 1898, is in the following words and figures, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE and Others, Defendants.

Replication to the Answer of the City of Henderson and County of Henderson.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant. Without this that any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, are true; all which matters and things this repliant is and will be ready to aver and prove as this honorable — shall direct, and humbly prays as in and by its said bill it hath already prayed.

W. S. PRYOR &
JNO. W. RODMAN,
Atty's for Compl't.

269 Said supplemental answer of the Board of Councilmen of the City of Frankfort, tendered and made a part of the record herein on June 25th, 1898, is in words and figures as follows, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE FARMERS' BANK OF KENTUCKY
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, City of Louisville, County of Franklin, and Board of Councilmen of City of Frankfort. } In Equity.

Supplemental answer of the above-named Board of Councilmen of the City of Frankfort, one of the defendants, to the bill of complaint of the above-named Farmers' Bank of Kentucky.

Reiterating its original answer to the said bill, and without waiving demurrer to the jurisdiction of its general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort, for supplement to its original answer to the said bill, says as follows:

On January 21st, 1898, the board of councilmen of the city of Frankfort filed in the office of the clerk of the Kentucky court of appeals a certified copy of the judgment of the Franklin circuit

court rendered on January 21st, 1896, in the case of The Farmers' Bank of Kentucky against The Board of Councilmen of the City of Frankfort (set forth on pages — of the printed record herein and relied upon by complainant bank as conclusive of this defendant's rights herein), and prayed an appeal from said judgment to the court of appeals of Kentucky, which appeal was granted and process thereon to Franklin county was issued by the clerk of said court of appeals on January 21st, 1898, which process (summons) was duly executed by the sheriff of Franklin county upon complainant bank on January 21st, 1898. By said summons the complainant bank was duly notified of the pendency of said appeal and was thereby warned to appear before said court of appeals at its then approaching April term (1898), and show cause why said judgment of the Franklin circuit court should not be reversed for errors therein contained. Said appeal is now pending
270 in the Kentucky court of appeals, and will be duly prosecuted to decision in said court by this defendant, and same will stand for hearing in said court of appeals at its next (September) term.

A certified copy of the said proceedings in the Kentucky court of appeals for reversal and vacation of said judgment is attached hereto and filed herewith as part hereof.

This defendant Board of Councilmen of the City of Frankfort, submits that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and prays that said bill be dismissed with costs.

IRA & W. H. JULIAN,
Att'ys for City of Frankfort.

T. HITER CROCKETT, *City Att'y.*

The undersigned, W. S. Dehoney, says that he is the duly elected and qualified and acting mayor of the city of Frankfort, Ky., and that the statements contained in the foregoing supplemental answer of the Board of Councilmen of the City are true.

W. S. DEHONEY, *Mayor.*

Subscribed and sworn to before me by W. S. Dehoney, mayor of the city of Frankfort, on this 21st day of June, 1898.

GUY H. BRIGGS.
Ex. Franklin Co.

Said exhibit filed with the supplemental answer of the Board of Councilmen of the City of Frankfort is as follows, viz:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable judges of the court of appeals of Kentucky.

Kentucky Court of Appeals.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellants,
vs.
FARMERS' BANK OF KENTUCKY, Appellee.

Be it remembered that heretofore, to wit, on the 21st day of January, 1898, the appellants filed in the clerk's office of said court a copy of a judgment, which is in the words and figures following:

271 Franklin Circuit Court.

FARMERS' BANK OF KENTUCKY, Plaintiff,
vs.
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Defendant. } Judgment.

This day came the parties, by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals, heretofore filed, reversing the former judgment of this court, and the court being sufficiently advised, it is adjudged that article 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 14th, 1886 (General Statutes, chapter 92, art. 2), and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the State and of the act of November 11th, 1892 (act 3, chap. 103, Acts 1891, '2, & '3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property, or franchises, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same

is hereby, made perpetual, and the defendant- be, and each of
272 them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the — of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes on its real estate used in conducting its business; and it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

A copy.
Attest:

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

(Upon the filing of said copy of judgment the appellants, by counsel, endorsed thereon the following statement, to wit:)

Court of Appeals, Ky.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant, *vs.* THE FARMERS' BANK OF KENTUCKY, Appellee.	Application for Appeal.

The Board of Councilmen of the City of Frankfort, filing herewith a copy of the judgment of the Franklin circuit court in the case of The Farmers' Bank of Kentucky, pl't'ff, *vs.* Board of Councilmen of the City of Frankfort, def't, rendered at the January term of said circuit court, 1896, hereby made application to the clerk of the court of appelas for an appeal from said judgment, — with process to Franklin.

T. HITER CROCKETT, *City Att'y.*
W. H. JULIAN,
Att'y for Board of Councilmen of the City of Frankfort.

(Whereupon an appeal was granted in accordance with said statement and the following summons issued:)

Summons on Appeal.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

We command you to summon Farmers' Bank of Kentucky to appear before the judges of the court of appeals of Kentucky, at the capitol, in Frankfort, on the first day of their next April term, to show cause, if any it can, why a judgment obtained by it in
273 the Franklin circuit court against the Board of Councilmen of the City of Frankfort, at its January term, 1896, should not be reversed for the errors therein contained, as we from its complaint are informed; and have then and there this writ.

Witness A. Addams, clerk of our said court, at the capitol aforesaid, this 21 day of January, 1898.

A. ADDAMS, *C. C. A.*
—— ——, *D. S.*

(Here is the officer's return of the foregoing summons:)

Executed on the Farmers' Bank of Kentucky by delivering to Thomas Rodman, president of said bank, a true copy of the within summons June the 21, 1898.

B. F. SUTER, *S. F. C.*,
By P. C. TOWLES, *D. S.*

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, do certify that the foregoing is a full and complete transcript of the proceedings had upon copy of judgment in the case wherein The Board of Councilmen of the City of Frankfort are appellants and The Farmers' Bank of Kentucky is appellee, as shown by the records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 10th day of June, A. D. 1898.

[SEAL.]

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Said petition for appeal and assignment of errors, filed herein on June 25th, 1898, by certain defendants, *was* and *is* in words and figures as follows, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

274	THE FARMERS' BANK OF KENTUCKY, at Frankfort, Complainant, *vs.* SAMUEL H. STONE ET AL., defendants.	Petition for Appeal and Assignment of Errors.

The defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer of the Commonwealth of Kentucky, The Board of Councilmen of The City of Frankfort, Kentucky, and The County of Franklin, and the County of Henderson and City of Henderson, conceiving themselves aggrieved by the decree made and entered on the 25th day of June, 1898, in the above-entitled cause, do hereby appeal from the said order and decree to the United States Supreme Court for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that the transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

And the said defendants further say that said decree is erroneous and against the just rights of the said defendants for the following reasons:

First. Because the court erred in overruling the demurrers of each of said defendants to the complainant's petition.

Second. Because the court erred in overruling the plea of the Board of Councilmen of the City of Frankfort and County of Franklin to the jurisdiction herein.

Third. Because the court erred in refusing to permit defendants The Board of Councilmen of the City of Frankfort to file the amended answer offered by them herein on the 25th day of June, 1898.

Fourth. Because the court erred (after deciding that complainant did not have any irrevocable contract under and by virtue of article 2 of the act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May the 17th, 1886) in adjudging and decreeing, nevertheless, that by reason of the several pleas of *res judicata* relied on by complainant in its bill the complainant has established a contract with the Commonwealth of Kentucky under the provisions of the act aforesaid.

275 Fifth. Because the court erred in enjoining and restraining the defendants Samuel H. Stone, auditor; Charles Finley, and George W. Long from proceeding to value the franchise of the complainant under the act of November the 11th, 1892, for the years 1895, 1896, 1897, and 1898 and for all subsequent years until the expiration of complainant's charter, and also erred in enjoining and restraining the County of Franklin and Board of Councilmen of the City of Frankfort from endeavoring to collect any tax upon any valuation from the complainant, and also erred in adjudging that complainant, by making payment of taxes to the State only in accordance with the Hewitt law, is discharged in full from all taxes, and also erred in adjudging that the present constitution of Kentucky and the act of November the 11th, 1892, in so far as intended to provide or do provide for any assessment or taxation of complainant's property, rights of property, or franchise except under said Hewitt bill, are repugnant to the Federal Constitution and void.

Wherefore the defendants pray that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of defendants' answers herein.

W. S. TAYLOR, *Att'y Gen'l for Ky.*
T. HITER CROCKET, *City Att'y.*
IRS & W. H. JULIAN, *Attorneys.*
JAS. H. POLSGROVE,
Co. Att'y of Franklin Co.
CLAY & CLAY,
Att'ys for City of Henderson.
C. E. WARD,
For County of Henderson.

Said petition for appeal and assignment of errors filed herein on June 25th, 1898, by the defendant (?), *is* in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

276 THE FARMERS' BANK OF KENTUCKY, at Frankfort, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.
} Petition for Appeal and Assignment of Errors.

The complainant, The Farmers' Bank of Kentucky, conceiving itself aggrieved by the decree entered on the 25th day of June, 1898, in the above-entitled cause, in so far as it relates to the defendants The City of Georgetown and The County of Scott, dismissing its bill of complaint as to said defendants, does hereby appeal from said order and decree to the United States Supreme Court for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that the transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

And the said complainant further says that said decree is erroneous and against the rights of th ecomplainant, because the court erred in dismissing the complainant's bill as to the County of Scott and the City of Henderson.

2nd. Because the court erred in not deciding that complainant's contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to the City of Georgetown or the County of Scott for any purpose whatever.

2. Because the court erred in not issuing an order of injunction against the defendants Sam'l Stone, Chas. Finley, & George Long, enjoining them from making an assessment in any way upon any of the stock of complainant at its bank, at Georgetown, for municipal or county taxation, and it erred in not enjoining the said Stone from making any apportionment of complainant's capital stock to the bank at Georgetown for taxation for any purpose whatever.

Wherefore the complainant prays that the said decree as to the City of Georgetown and the County of Scott be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of complainant's bill of complaint.

W. S. PRYOR &
J. W. RODMAN,
Attorneys for Farmers' Bank of Ky.

277 And on a day following, to wit, on the 16th day of July, 1898, the following agreement was filed herein, viz:

U. S. Circuit Court for the District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Kentucky, and Franklin County, &c., Defendants. } Stipulation.

Citation on the appeal herein is waived, and it is agreed that the clerk in making the transcript for appeal herein may compare the printed record (used in this cause in the application for injunction before Judge Taft) with the record on file in his office and use said printed record, correcting same where it is not the same as the original, and that the clerk may also use the printed opinion of Judge Taft without making a special copy in the transcript for appeal.

Witness our hands this 13th July, 1898.

IRA AND W. H. JULIAN,
Att'ys for Defendants.
J. W. RODMAN,
Att'y for Plaintiff.
J. C. B. SEBREE,
County Att'y for Scott County, Ky.
L. L. BRISTOW,
City Att'y for City of Georgetown, Ky.
W. S. TAYLOR, *Att'y Gen'l.*

And on a day following, to wit, on the 21st day of July, 1898, the following bond was filed herein by defendants, viz:

278 *Bond.*

Know all men by these presents that The Farmers' Bank of Kentucky, as principal, and Jno. W. Rodman, as sure*ties*, are held and firmly bound unto the City of Georgetown, Ky., and the County of Scott, in the State of Kentucky, and Samuel H. Stone, Charles Finley, and Geo. W. Long in the sum of one thousand ($1,000.00) dollars; the payment of which, well and truly to be made, they bind themselves, their successors, administrators, and executors, jointly and severally, by these presents.

Done this 18th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Farmers' Bank of Kentucky has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the circuit court of the United States for the district of Kentucky in the case of The Farmers' Bank of Kentucky *vs.* Samuel H. Stone *et al.*, numbered 274 on the docket of said court:

Now, therefore, the condition of this obligation is such that if the said Farmers' Bank of Kentucky shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE FARMERS' BANK OF KY.,
By THOMAS RODMAN, *Pres.* [L. S.]
JNO. W. RODMAN. [L. S.]

Sealed and delivered and taken and acknowledged this 18th day of July, 1898, before me—

WALTER G. CHAPMAN,
Clerk U. S. Circuit Court, Dist. of Ky., at Frankfort.

Approved:
JNO. W. BARR, *Judge.*

Attached to said bond is the following affidavit of surety, viz:

UNITED STATES OF AMERICA, *District of Kentucky,* } *sct:*

I, Jno. W. Rodman, a surety on the annexed bond, being duly sworn, depose and say that I am worth over and above my just debts, liabilities, and legal exemptions in property subject to execution under the laws of the State of Kentucky the sum of five thousand dollars. Said property consists of real estate situated in the county of —— and State of Kentucky.

JNO. W. RODMAN.

279 Subscribed and sworn to before me by Jno. W. Rodman this July 18th, 1898.

WALTER G. CHAPMAN,
Clerk U. S. Cir. Court, Dist. of Ky., at Frankfort.

And on a day following, to wit, on July 22nd, 1898, the following stipulation was filed herein, viz:

United States Circuit Court for the District of Kentucky.

THE FARMERS' BANK OF KENTUCKY, Complainant,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Kentucky, and County of Franklin, &c., Defendants. } Stipulation.

Citation on the appeal herein is waived, and to save expense it is agreed that the clerk in making the transcript for appeal herein may compare the printed record used in this cause in the application for injunction before Judge Taft with the record on file in his office and use said printed record, correcting same where it is not the same as the original, and the clerk may also use the printed opinion of Judge Taft without making a special copy and transcript for appeal, one record to answer for both appeals.

Witness our hands this 13th day of July, 1898.

JNO. W. RODMAN,
Att'y for Farmers' Bank of Ky.
IRA & W. H. JULIAN,
For All the Defendants Except City of Georgetown & County of Scott.
THE CITY OF GEORGETOWN, KY.,
By A. H. SINCLAIR, *Mayor.*
J. J. YATES,
Judge of Scott Co., Ky., on Behalf of said County.

And on the same day, to wit, on July 22nd, 1898, the following appeal bond was filed herein, viz:

280 *Appeal Bond.*

Know all men by these presents that Samuel H. Stone, auditor; Charles Finley, secretary of state; G. W. Long, treasurer, of the State of Kentucky; The Board of Councilmen of the City of Frankfort, Kentucky; Franklin County, Kentucky; The City and County of Henderson, Kentucky, as principals, and J. S. Darnell, as surety, are held and firmly bound unto the Farmers' Bank of Kentucky in the sum of one thousand ($1,000.00) dollars; the payment of which, well and truly to be made, they bind themselves, their successors, administrators, and executors, jointly and severally, by these presents.

Done this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the circuit court of the United States for the district of Kentucky in the case of Farmers' Bank of Kentucky, complainant, *vs.* Samuel H. Stone *et al.*, defendants, numbered 2744 on the docket of said court:

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAM'L H. STONE, *Auditor*, [SEAL.]
By W. H. JULIAN, *Att'y.*
CHAS. FINLEY, *Secretary of State*, [SEAL.]
By W. H. JULIAN, *Att'y.*
GEO. W. LONG, *Treasurer*, [SEAL.]
By W. H. JULIAN, *Att'y.*
CITY OF HENDERSON, [SEAL.]
By W. H. JULIAN, *Att'y.*
COUNTY OF HENDERSON, [SEAL.]
By W. H. JULIAN, *Att'y.*
FRANKLIN COUNTY, [SEAL.]
By J. D. MOORE, *Judge Co.*
CITY OF FRANKFORT, [SEAL.]
By W. S. DEHONEY, *Mayor.*
J. S. DARNELL. [SEAL.]

Sealed and delivered and taken and acknowledged this 20th day of July, 1898, before me—

W. G. CHAPMAN,
Cl'k U. S. Cir. Court, Dist. of Ky., at Frankfort,
By CHAS. N. WIARD, *D. C.*

Approved by—
JNO. W. BARR,
Judge *U. S. Dist. Judge.*

281 Annexed to the foregoing appeal bond is the following affidavit of surety, viz:

UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

J. S. Darnell, a surety on the annexed bond, being duly sworn, deposes and says that he resides at Frankfort, Kentucky, in the county of Franklin, in said district; that he is a freeholder in the State of Kentucky; that he is worth the sum of two thousand ($2,000.00) dollars over and above all his just debts and liabilities in property subject to execution and sale, and that his property consists of real and personal property.

J. S. DARNELL.

Subscribed and sworn to before me by J. S. Darnell this July 20th, 1898.

W. G. CHAPMAN,
Clerk U. S. Cir. Court, Dist. of Ky., at Frankfort,
By CHAS. N. WIARD, *D. C.*

282 UNITED STATES OF AMERICA, *District of Kentucky*, } *sct:*

I, Walter G. Chapman, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at Frankfort, do hereby certify that the foregoing 281 pages contain a full and true transcript of the record of the proceedings had in this court in the suit wherein The Farmers' Bank of Kentucky was the plaintiff and Samuel H. Stone, auditor, &c., were the defendants, except exhibit filed with the answer of the Board of Councilmen of the City of Frankfort and the County of Franklin, as the same appears from the records and files of my office.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office, this 21st day of July, A. D. 1898.

WALTER G. CHAPMAN, *Clerk*,
By CHAS. N. WIARD, *D. C.*

Endorsed on cover: Case No. 16,970. Kentucky C. C. U. S. Term No., 385. Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky, *et al.*, appellants, *vs.* The Farmers' Bank of Kentucky; and case No. 16,971. Term No., 386. The Farmers' Bank of Kentucky, appellant, *vs.* Samuel H. Stone, auditor; Charles Finley, secretary of state, & G. W. Long, treasurer, of the Commonwealth of Kentucky, *et al.* Filed September 1st, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 387.

SAMUEL H. STONE, AUDITOR, CHARLES FINLEY, SECRETARY OF STATE, AND G. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, ET AL., APPELLANTS,

vs.

THE DEPOSIT BANK OF FRANKFORT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 1, 1902.

(16,972.)

(16,972.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 387.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND G. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, ET AL., APPELLANTS,

vs.

THE DEPOSIT BANK OF FRANKFORT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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Circuit Court of the United States, Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
S. H. STONE ET AL., Defendants. } No. 275.

5 Proceedings of the circuit court of the United States for the district of Kentucy at its regular term, begun and held at the Federal court hall in the city of Frankfort, on Monday, June 13, 1898.

Present: Honorable John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants. } No. 275. Bill of Complaint.

Be it remembered that heretofore, to wit, on May 12, 1897, came the complainant, The Deposit Bank of Frankfort, by its counsel, Frank Chinn, and filed in the clerk's office of our said court its bill of complaint and exhibits against the above-named defendants, S. H. Stone *et al.*, which bill of complaint is in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The Deposit Bank of Frankfort brings this its bill of complaint against Samuel H. Stone, G. W. Long, Charles Finley, County of Franklin and the Board of Councilmen of the City of Frankfort, and thereupon the complainant says: The complainant is a corporation duly created by and organized under the laws of the Commonwealth of Kentucky, and is a citizen of that State.

The defendant, Charles Finley, is the secretary of state of the State of Kentucky; the defendant, Samuel H. Stone, is the auditor of public accounts of the said State of Kentucky; and the defendant, George W. Long, is the treasurer of said State of Kentucky; the Board of Councilmen of the City of Frankfort is a municipal
6 corporation created by and organized under the laws of the State of Kentucky, and the County of Franklin is also a corporation created by and organized under the laws of said State.

The complainant was created a body corporate and politic by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3rd, 1863. By the said act the complainant was authorized to acquire, hold and use, such estate, goods and chattels as should be convenient for the transaction of its business. Its place of

business was to be in the city of Frankfort, and its business was to be loaning money, discounting, buying and selling promissory notes and bills, and dealing in exchange, and the general powers of a banking corporation were conferred upon it.

The said corporation was duly organized under its said charter on the — day of ——, 1867, and its corporate existence has been continued ever since, and it has continuously since then performed all the duties required of it by the said act of incorporation, and the several amendments thereof, and the laws of the land.

By the terms of the said act of incorporation the complainant was authorized to transact the business of a bank under the terms of said charter for the period of twenty years from March 3, 1863.

By the general laws in force in the State of Kentucky in the year 1863, and continuously thereafter until the 8th day of March, 1871, the banks doing business in the State were required to pay to the State of Kentucky fifty cents on each one hundred dollars' worth of the capital stock of each bank, and by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 8, 1871, it was provided "that the tax or bonus now (then) paid by said bank (meaning this complainant), in future, shall be in full of all taxation, but this shall not apply to city tax on real estate owned by it." The tax or bonus above referred to was the fifty cents on each one hundred dollars' worth of its capital stock required by the general law to be paid by all the banks in Kentucky.

By another act of the General Assembly of the State of Kentucky, approved February 23, 1882, and entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to said bank under the said act of March, 1863, as amended by the act of March 8, 1871, were extended and continued in force for the period of twenty years from February 23, 1882. See Acts of 1881, vol. 1, page 495.

The complainant paid each year the tax required by its said charter to be paid, to wit, fifty cents on each hundred dollars of its capital stock, down to July 1, 1886, since which time it has paid seventy-five cents on each one hundred dollars' worth of its said stock, as hereinafter fully set out

The complainant says that by the settled course of the decisions of the court of appeals of the State of Kentucky, which is the
7 highest court in said State, the meaning of the provisions in the complainant's charter has been fixed and determined. By a decision of the court rendered on June 5, 1888, the judgment of the Franklin court of common pleas was confirmed, by which judgment said court held that the Commonwealth could not tax the complainant at a greater rate than fifty cents on each hundred dollars of the value of its stock, and that this included all taxation of all kinds, State, county and city, except alone city tax on real estate owned by said bank. By an act of the said General Assembly of the Commonwealth of Kentucky entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the court," approved March 18, 1876, it was made the duty

of the chief officer of any bank doing business or owning property in the county to list with the assessor all the property owned by the bank, and it was provided that all the property thus listed and assessed should be subject to an uniform and equal rate of taxation.

Under this act the county court of Franklin county, being the fiscal authority of the defendant, The County of Franklin, attempted to assess for county taxation the property and choses in action of the complainant situated in the county of Franklin. And thereupon the plaintiff filed a bill in equity in the court of common pleas for said county against the said Franklin county, and prayed for an injunction against said county, enjoining and restraining it from endeavoring to collect any tax upon the basis of said assessment. In that suit the complainant set forth and claimed the exemption from other taxation than that provided by the aforesaid amendments to its charter, and claimed that the said act of 1876, so far as it attempted to repeal or impair the same, was void. The said county of Franklin was duly brought before the said court and the cause was fully heard, and a judgment was rendered, exonerating the complainant from the payment of said tax, and enjoined the said county of Franklin from collecting and from endeavoring to collect or enforce the said assessment.

The complainant pleaded and relied upon the said exemption contained in its said charter, as amended, as a complete protection against the said tax sought to be collected from it, and both the common pleas court and the said court of appeals upheld the said exemption, and adjudged that the complainant was not liable for said tax during its corporate existence.

The complainant here pleads and relies upon the said judgment of the said common pleas court, and of the said court of appeals, and files herewith, as part hereof, a copy of the record of the said suit in the said court of appeals, and marks the same Exhibit "A."

By another act of the General Assembly of the Commonwealth of Kentucky approved May 7th, 1886, and entitled "An act to amend the revenue law of the Commonwealth of Kentucky," it was provided that the cashiers of all State and national banks should annually, on the first day of July, each year, make a report
8 of the condition of said banks to the auditor of public accounts, and should pay into the State treasury seventy-five cents on each one hundred dollars of the capital stock of said bank, and should, in addition, pay into said treasury, on their surplus, undivided profits, and undivided accumulations, in excess of ten per cent. of their capital stock, the same rate of taxation as was paid on real property. And it was provided by the said act that the said taxation should be in full of all tax, State, county, or municipal, except that the real estate and buildings owned and used by the banks in conducting their business should not be exempt from taxation for municipal and county purposes, and that such real estate alone might be taxed for county and State purposes as other real estate was taxed. By the terms of said act the following condition was annexed, upon which any of the banks referred to therein were to become subject to such act:

SECTION 4. "That each of said banks, institutions and corporations by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockolders, at a regular or called meeting thereof may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive or release all rights under acts of Congress or under the charters of the State banks to a different mode, or a smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

The complainant avers that at a meeting of the stockholders of the complainant held on the — day of July, 1887, at which a quorum of the stockholders was present, and a majority of said stockholders, and a majority in interest thereof, did accept the provisions of said act and give their consent to the levying of seventy-five cents on each share of its capital stock, equal to one hundred dollars in value, and agreed to pay the same, together with the same tax as was assessed on real estate by the general law, upon so much of its surplus, undivided profits, etc., as exceeded an amount equal to ten per cent. of its capital stock, as in said act provided, and did further agree to waive and release all rights under its charter to a different mode or smaller rate of taxation. And the said consent of the complainant to the release and waiver aforesaid, together with the said agreement, was certified in writing under the seal of the complainant by its proper corporate authority to the governor of the Commonwealth of Kentucky, and delivered to him on the — day of July, 1887, before the next meeting of the General Assembly after the passage of said act.

The complainant avers that it has annually, since the above-recited act became a law, through its cashier, reported on
9 oath on the first day of July, each year, to the auditor of public accounts the true amount of its capital stock, surplus, undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and has annually in each year since the said act went into effect, up to and including July, 1892, paid into the treasury of the Commonwealth of Kentucky the full amont of the taxas due from the complainant, as required by the terms of said act, the said amount being seventy-five cents on each hundred dollars' worth of its capital stock, and a tax at the same rate as that assessed by the State upon real property upon its surplus, undivided profits, and undivided accumulations in excess of ten per cent. of its capital stock.

The complainant made these reports and payments up to July 1, 1893, when the said auditor of public accounts refused to receive the said tax under the aforesaid act (which is known as the Hewitt act), although the complainant tendered the same to the said auditor as required by the said act. The complainant paid the same

about the first of July, 1895, and first of July, 1896, and in the spring of 1896, at the request of the auditor, and after the judgments hereinafter set out had been rendered in complainant's favor, paid to the auditor the difference between the amounts paid on July 1, 1893, and July 1, 1894, and the amount which it tendered at those times, which was the amount due under the Hewitt law. And the complainant avers that it has, ever since the said Hewitt act became a law down to and including 1896, paid the full tax called for and required by the said Hewitt law.

By the 3d article of an act passed by the General Assembly of the Commonwealth of Kentucky, in 1892, in relation to the assessment of the banks and other corporations, it is provided in substance that every incorporated bank, in addition to other tax imposed upon it by law, shall pay a tax upon its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. By the terms of said act the auditor, treasurer and secretary of State constitute the board of valuation and assessment for fixing the value of said franchises. It is provided that in order to determine the value of the franchise, the banks shall each fully report on or before the 1st day of March in each year, which reports shall be made up to include the 31st day of the preceding December. These reports are to be verified by the chief officer of the bank, and are required to show these facts: The name and principal place of business of the bank; the amount of its capital stock; number of shares; amount of stock paid up, with nominal and real value thereof; highest price at which said stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the said statement was required to be made; the amount of surplus funds and undivided profits, and the value of all other assets; total amount of indebtedness as principal; amount of gross or net earnings or income including interest on investments, and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and any other facts which the auditor may require.

With this information and such other information as the board can obtain, it is authorized to direct and fix the value of the capital stock of the bank, and from the amount thus fixed to deduct the assessed value of all tangible property assessed in the State or in the counties where situated, and the remainder thus found is to be the value of the corporate franchise subject to taxation under said act.

It is further provided that the said board shall apportion the value of said franchise upon the several taxing jurisdictions entitled to a share of said tax.

It is further provided that the auditor of the State, at the expiration of thirty days after the final determination of said values, shall certify to the county clerk of the counties where any portion of the

corporate franchises of the banks shall be liable for local taxation, the amount thereof for county or State taxes, and such certificate is by the county clerk to be filed in his office, and by him certified to the collecting officer of the county and State for collection.

It is further provided that the taxes assessed by the State board of valuation and assessment shall be due and payable on the first day of July succeeding such report.

The said act also provides that in event the banks fail to make such report and pay such tax, a penalty of ten per cent. shall attach upon the tax, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum, and any bank or trust company failing to pay its taxes, penalty or interest, after becoming delinquent, is to — deemed guilty of a misdemeanor, and, upon a conviction, is to be fined for each day it remains unpaid, to be recovered by indictment or civil action in the Franklin circuit court, which has jurisdiction.

The complainant avers that the amount of its capital stock on the 31st of December, 1893, the 31st day of December, 1894, and on the 31st day of December, 1895, and on the 31st day of December, 1896, was $77,400.00; and its surplus on December 31, 1894, $38,010.44; December 31, 1895, $41,200.00; and December 31, 1896, $42,200.00, and that the amount of the value of its capital stock, as fixed by the board of valuation and assessment as of December 31, 1893, was $116,015.80; and this would be the valuation as of December 31, 1894; December 31, 1895, and December 31, 1896; that the tax rate for the county of Franklin for the year 1894 was 56¾ cents; for the year 1895, 56¾ cents; for the year 1896, 55 cents on the hundred dollars. The rate of tax for the year 1897 has not been
11 fixed, but will be about 55 cents. The city tax of Frankfort was $1.45 for 1895 and 1896, and the rate for 1897 has not yet been established, but will be about the same.

Complainant therefore avers that the amount of tax which it would be required to pay under the board of valuation and assessment law would be much greater than it would be compelled to pay under the aforesaid Hewitt law. And the matter in dispute in this case exceeds $2,000.00, exclusive of interest and cost.

The complainant alleges that the aforesaid scheme of taxation violates the contract made between it and the State of Kentucky, in its aforesaid charter as amended, and violates the contract between it add the said State under the said Hewitt law, and is very largely in excess of the taxation provided for by its charter or by the said Hewitt law, and the act of the legislature of Kentucky, instituting such a method of taxation violates the Constitution of the United States, and particularly the clause thereof which prohibits any State from passing any law which impairs the obligation of contracts, and is void.

The aforesaid method of taxation also violates the constitution of the State of Kentucky, in that by the said constitution of the State of Kentucky it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer upon the proper authorities thereof, respectively, the power to assess and

collect such taxes; and in this, that the said law provided for an assessment of the capital stock of corporations, banks amongst the others, by a State board of valuation and assessment, and provides for the certification of such value by the said State board to counties and municipalities where any such capital stock is situated, or franchises employed; giving to said State board the right to apportion same among the taxing districts, and provided that said corporation shall pay to the local taxing districts local taxes thereon.

The said law having been thus passed in 1892, the State board of valuation and assessment valued the capital stock of the complainant and certified to the authorities of the defendant-, The County of Franklin, and The Board of Councilmen of the City of Frankfort, the said value for taxation by the said county and city for the year 1893. The county of Franklin caused to be placed in the hands of R. D. Armstrong, sheriff of said county, and the collector of its revenue, the tax bill made out accordingly, and the board of councilmen of the city of Frankfort caused to be made out a tax bill upon such valuation for the collection of its tax thereon.

The complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the county court of Franklin county and R. D. Armstrong, sheriff of said county, on the 22nd day of December, 1893, alleging in its petition in apt terms the contract between it and the State in
12 regard to taxation under its charter as amended, and under the aforesaid Hewitt law, and claimed the benefit of such contracts, and claimed that no tax could be collected from the complainant, except in pursuance of the said Hewitt law, during its corporate existence, and claimed further that the act of the legislature of November 11th, 1892, was unconstitutional and void, as impairing the obligation of this contract, and prayed the court to establish these contracts, and to enjoin the said county and the sheriff from attempting to collect any tax contrary thereto.

Issue was joined upon complainant's said suit, and the judgment was rendered in said circuit court, upholding the said act of November 11th, 1892, and adjudged the complainant liable for the said tax, which judgment was entered accordingly.

Thereupon the complainant appealed from the said judgment to the court of appeals of Kentucky. Its appeal having been heard fully in that court, it was adjudged that the judgment of the lower court was erroneous, and the said case was remanded to the said circuit court for judgment in conformity to the opinion of said court of appeals.

Thereupon the said Franklin circuit court entered the following judgment on February 1st, 1896, which has ever since, and does now, remain in full force and effect, to wit:

"Franklin Circuit Court, Feb. 1st, 1896.

"DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
FRANKLIN COUNTY, &c., Defendant. } Judgment.

"The plaintiff having heretofore filed a notice accepted by the defendants' attorney, together with the mandate and opinion of the court of appeals in this action, and the defendants, by their attorneys, waiving the filing of said mandate in the clerk's office as required by law, and consenting to the submission of this case for judgment at this time, it is now ordered and adjudged in accordance with the mandate and opinion of said court in this action, that art. 2 of the act of the General Assembly entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' May 17th, 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxatian than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act
13 of November 11th, 1892 (art. 3, chap. 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise except its said real estate, are in violation of, and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county and municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now hereby made perpetual, and the defendants be and each of them *are* perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise of property of the plaintiff except upon its real estate. And it is further adjudged that the plaintiff recover of the defendant its cost in this action expended, to all which the County of Franklin excepts, and prays an appeal to the court of appeals, which is granted."

A duly certified copy of the record in said cause as it appeared in the court of appeals is filed herewith as a part hereof marked Exhibit "B," and the complainant states that the said exhibit contains the whole record in the said case, except the decree made by the said Franklin circuit court on January 21st, 1896, the terms of which have been stated above, and a duly certified copy of which is filed herewith as part hereof, marked Exhibit "C."

The defendant, Board of Councilmen of the City of Frankfort, filed its petition in the said circuit court, which is a court of general jurisdiction, on August 22, 1894, against this complainant, alleging that complainant was indebted to the city in the sum of $4,243.10 taxes and $299.31 penalty and interest for the years 1892, 1893 and 1894, upon its notes, money, choses in action, and other property of the value of one hundred thousand dollars for 1892, and upon the franchise as valued by the said board of assessmant, 1893, $109.246.31, and upon said franchise for 1894 valued by said board at $112,278.91. The rate of taxation in said city being $1.25 in 1892, $1.30 in 1893 and $1.40 in 1894, the said assessments being made by the collector of the city for 1892, and by the said board of assessment pursuant to art. 3 of the said act of November 11, 1892.

Process having been served upon this complainant upon this suit the complainant filed it answer in said suit September 27, 1894, in which answer it set forth its contract under its charter as amended, and under the said Hewitt law with the State, and relied upon the same, and set forth the attempted violation of said contracts, and prayed judgment that the said contracts between the complain-
14 ant and the State be sustained and declared valid by the court, and that the said State be restrained from assessing or attempting to assess, or from collecting or attempting to collect from the complainant any tax upon its property or franchise, except upon real estate which complainant might thereafter acquire, the complainant then being the owner of no real estate whatever.

Issue was joined in said suit by said answer, and it was agreed between the counsel for this complainant and the counsel for the board of councilmen of the city of Frankfort, that the said cause should stand upon the answer filed by the complainant until the decision by the court of appeals in the two cases appealed to said court from the said circuit court, in one of which the complainant was plaintiff, and the County of Franklin and others were defendants, and in the other the Commonwealth for the use of said county was the plaintiff, and this complainant was the defendant. In both which cases the same contract hereinbefore set out between the State and this complainant was alleged and relied upon, and the liability of the complainant for the tax claimed in said case, should be settled and determined by the decision of the court of appeals in the said two cases. And after the said two cases in the court of appeals had been decided by that court, and the validity of the contracts with this complainant upheld by the said judgment, the said Franklin county circuit court, entered on February 1st, 1896, the following judgment:

"Franklin Circuit Court.

"BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *vs.* DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

"It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and de-

fendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the County of Franklin, &c., were defendants, and in the other the Commonwealth, for the use of said county, was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two case, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case: It is now ordered and adjudged that art. 2 of the General Assembly entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17th, 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own: that the provisions of the present constitution of this State and of the act of November 11th, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for an assessment or taxation of the defendant's property, rights of property or franchise, except its said real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of Nov. 11, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action be and the same is now hereby granted, and the defendants be, and each of them *are*, perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant except upon its real estate. And it is further adjudged that the defendant recover of the plaintiff its cost in this action expended, to all of which the Board of Councilmen of the City of Frankfort except, and pray an appeal to the court of appeals, which is granted."

The said Board of Councilmen has never prosecuted the said appeal to the said court of appeals, which was granted in the said judgment.

The complainant files herewith as part hereof a duly certified

copy of the record and proceedings in the said case, and makes the same part hereof, marked Exhibit "D."

The plaintiff avers that it has been fully and finally adjudicated in proceedings between the complainants and defendants The County of Franklin and Board of Councilmen of the City of Frankfort that the complainant's contract aforesaid is valid and enforcible, and that the complainant cannot be subjected to any greater rate of taxation than that agreed to by it under the aforesaid Hewitt law.

16 The complainant has always been ready to pay, and has paid all the taxes due by it under the provisions of the Hewitt law, and is still ready and willing to pay all taxes that may be demanded of it under the said act.

The complainant says that the defendants, Samuel H. Stone, Charles Finley and George W. Long, are threatening, and unless restrained by this honorable court, will proceed to value the franchise of the complain-t under the act of November 11, 1892, for the years 1894, 1895, 1896 and 1897, and certify such value to the county clerk of Franklin county, to be by him certified to the collecting officer of the Board of Councilmen of the City of Frankfort, and the collecting officer of the County of Franklin; that such assessments will be illegal, in violation of the complainant's contract hereinbefore set out and upheld by the courts, and in the causes hereinbefore stated between the complainant and the said defendants, and will be unlawful and in violation of complainant's contract, and would cast a cloud over complainant's franchise; will cause a multiplicity of suits to be brought against the complainant and damage it in a way that cannot be repaired or estimated at the common law; and from these threatened wrongs the complainant has no remedy at the common law, but its only remedy is in equity; and unless restrained by this honorable court the defendants, The County of Franklin and Board of Councilmen of the City of Frankfort, will attempt to levy and collect taxes based upon the apportionment of valuation found by said board of valuation and assessment, and will subject the complainants to the costs and annoyance of many suits, and cast a cloud upon its franchise and property, an effort will be made to enforce penalties against this complainant, as hereinbefore stated.

The premises considered, the complainant prays that the said Samuel H. Stone, Charles Finley and George W. Long be perpetually enjoined and restrained from assessing the value of the complainant's capital stock under the said act of November 11, 1892, for the years 1894, 1895, 1896 and 1897, or any other year, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said county and Board of Councilmen, and that the said county and Board of Councilmen of the City of Frankfort be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as hereinbefore set up, by making the payments

under the Hewitt law, no other or further tax shall be exacted from it under any form or by any authority.

May it please your honors to grant unto your complainant a writ of subpœna under proper authority to be issued against the said Samuel H. Stone, Charles Finley, George W. Long, the County of Franklin and Board of Councilmen of the City of Frankfort, commanding them, under suitable penalty therein fixed, and
17 upon a day therein fixed, to appear and answer to this bill; but not under oath (answer under oath being waived), and stand to and abide by all orders and decrees that the court may enter in the premises, and your orator will ever pray for this and all other proper relief.

FRANK CHINN,
Solicitor for Complainant.

STATE OF KENTUCKY, }
County of Franklin, } *sct:*

Benjamin Milam says he is the president of the complainant, Deposit Bank of Frankfort; that the facts stated in the foregoing bill, in so far as stated from his personal knowledge are true, and so far as stated from information he believes them to be true.

BENJAMIN C. MILAM.

Subscribed and sworn to before me this 12th day of May, 1897, by Benjamin Milam.

W. G. CHAPMAN, *Clerk*,
By CHAS. N. WIARD, *D. C.*

Exhibit "A," referred to in foregoing bill of complaint, is in words and figures, as follows, to wit:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 5th day of June, A. D. 1888.

Chief Justice W. S. Pryor, Joseph H. Lewis, W. H. Holt and Caswell Bennett, sitting.

FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellants,
versus
DEPOSIT BANK OF FRANKFORT, Appellee.

Be it remembered that heretofore, to wit, on the 16th day of July, A. D. 1884, the appellants, by their counsel, filed in the clerk's office of the court of appeals, a transcript of record in words and figures following, to wit:

STATE OF KENTUCKY:

Proceedings before the Honorable C. S. French, judge of the court of common pleas for Franklin county, at the court-house, in the city of Frankfort, on the 17th day of May, 1884.

18 Be it remembered that on the 6th day of September, 1883, the following petition was filed in the clerk's office of the court aforesaid.

Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
versus
FRANKLIN COUNTY and JNO. W. GAINES, Sheriff of Franklin County, Defendants. } Petition in Equity.

The plaintiff, Deposit Bank of Frankfort, says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3, 1863, and organized and constituted as such corporation under the corporate name of Deposit Bank of Frankfort, and doing business in the city of Frankfort under the authority of said act and the several amendments thereto; by the terms of said act the plaintiff, The Deposit Bank of Frankfort, was authorized to transact the business of a bank for the period of twenty years from March 3, 1863, or from August 8, 1868, when said bank was duly constituted a body politic and corporate, in the name pointed out by said act of March 3, 1863.

It says that by an act entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 18, 1871, it is provided that the tax or bonus now paid by said bank (meaning this plaintiff) in future shall be in full for all taxation; but this shall not apply to city tax on real estate owned by it.

It further said that by an act of said General Assembly approved February 23, 1882, entitled "To extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to said bank under the said act of March, 1863, as amended by act of March 18, 1871, were extended and continued in force for the period of twenty years from the 3d day of March, 1883.

Plaintiff alleges that it has not owned, nor has it had in its possession, either in its own right or as agent for any one else, any real estate or any other tangible property, which is or was assessible under the law in any kind or specie, for any purpose whatever, either State or county, for either of the years from 1876 to 1883 inclusive; and all its property except office furniture of the value of about $500, which it is compelled to use in the management of its business, consists and is made up of notes, bills, accounts, choses in action and evidences of debt, and that the aggregate amount of all these is fully equaled and covered by its indebtedness to its stockholders, depositors and other credidors, and that it owns no balance whatever subject to taxation under General Statutes, chap. 92, art. 1, sec. 5, and that this is true as to each of the years 1876 to 1883, inclusive.

19 It says further, that by the general law in force at passage of its charter in 1863, and which law has ever been in force, it was required to, and has in fact paid to, the auditor of public accounts, on the first days of each of the years, from the year 1868 to the year 1883, inclusive, an amount equal to fifty cents on each hundred dollars of its capital stock, to wit, on $77,400.

It alleges that this payment to the auditor of fifty cents on each one hundred dollars of its stock was "the tax or bonus" referred to and meant by the act of March 18, 1871, which provides that "the tax on bonus now (then) paid by said banks shall in future be in full of all taxation, etc., etc."

Plaintiff further says that notwithstanding all the facts hereinbefore set out, the defendant, Franklin County, without authority of law, has proceeded, upon a report made on April 20, 1881, by the sheriff, E. O. Hawkins, to the county clerk of said county, that "the Deposit Bank of Frankfort has property in its possession in this county owned by itself or others, and had said property in its possession for the last five years, of the value of $77,400, upon which no taxes have during said years been paid this county, because the assessor omitted to list the same for taxation. Said property consists of the capital stock of said bank, and its fixtures and furniture," to summons this plaintiff on the 17th day of March, 1883, to appear before the county court of said county on the 2d day of April, 1883, and list all the property of said bank situated in said county for assessment and taxation for county purposes for the years 1876 to 1883, inclusive.

This plaintiff appeared in said court in obedience to said summons or rule, and filed its response and plea, in which it denies that said county court had power or jurisdiction to assess or list, or to direct or order any one else to assess or list, its property for purposes of county taxation, or for any other purposes; it denied that it owned or possessed in its own right, or as agent for any one else, any real estate or any other tangible property, assessable for any purpose, State or county, in kind or specie; it stated that all its property, except office furniture, consisted of notes, bills, accounts, choses in action, and evidences of debt, and that the total of these was fully covered by its indebtedness to its depositors, stockholders and other creditors; that it had paid said fifty cents on each one hundred dollars' worth of its capital stock, to wit, on $77,400.00 worth, for each of said years from 1876 to 1882, inclusive, to the auditor, and it pleaded said payment to the auditor of fifty cents on each one hundred dollars of its capital stock, to wit, on $77,400.00 in full of, and as a protection against, all other taxation, as provided in the aforesaid act of March 18, 1871.

But said court held said reponse and answer to be insufficient, and without hearing any evidence whatever made and entered the following order in said proceedings, to wit:

20 Franklin County Court.

FRANKLIN COUNTY, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Order.

In the matter of the summons and rule awarded heretofore herein, it appearing from the sheriff's report made to the clerk of this county that the Deposit Bank of Frankfort has failed and refused, after demand made, to list its property or any part thereof for taxation for county purposes for the year- 1877–'78–'79–'80–'81–'82–'83 and the assessor and sheriff being unable to ascertain the amount of or to list said property; it is now ordered and adjudged that the demurrer of the attorneys for Franklin county to the response of said bank herein be sustained and the bank still refusing to list, or show further cause why it shall not list, the clerk of this court is hereby ordered and directed to list and assess the property of said bank under the equalization law, viz., its notes, bonds, bills, money, choses in action and evidences of debt after deducting therefrom its indebtedness (except the amount of its so-called liability to its stockholders) and one hundred dollars additional. Said balance of property, as appears by its own statements and response herein, amounted in the year 1877 to $77,300.00; in 1878 to $77,300.00; in 1879, $77,300.00; in 1880, $77,300.00; in 1881, $77,300.00; in 1882, $77,300.00.

The clerk will also list the office furniture and tangible property of said bank for each of said years at the valuation fixed upon the same by the said bank in its response, viz., $500.00 for each and all of said years, 1877 to 1883, inclusive. All the foregoing property to be assessed and taxed according to the amount of the *ad valorem* county levy tax for each of the said years, respectively, as appears by the records of this county. And the clerk will certify the foregoing lists to the sheriff of Franklin county for collection.

The clerk of said county court on the 23rd day of May, 1883, without any authority of law, assessed the property of this plaintiff for county purposes (professing) to make said assessment pursuant to judgment of the Franklin county court, heretofore rendered as follows, to wit:

Val. property	..1876...	$77,800	20c. on	$100	$	155.60
" "	.....1877....	77,800	20c. on	100		155.60
" "	.....1878....	77,800	20c. on	100		155.60
" "	.....1879....	77,800	25c. on	100		194.60
" "	.....1880....	77,800	40c. on	100		311.20
" "	.....1881....	77,800	40c. on	100		311.20
" "	.....1882....	77,800	40c. on	100		311.20
" "	.....1883....	77,800	40c. on	100		311.20
						$1,906.10

And has certified to the defendant, J. W. Gaines, sheriff of Frank-

lin county, said so-called list or assessment, amounting in all
21 to $1,906.10, for collection. And said Gaines, sheriff, has levied on the property of this plaintiff, and unless prevented will sell same to satisfy said taxes. Copies of said report, summons, response, judgment and tax lists are filed herewith as part thereof.

Plaintiff here avers that none of the aforesaid property is subject or liable to taxation for county purposes in Franklin county; that said county court had no jurisdiction whatever to make any assessment or list of plaintiff's property for taxation for county purposes or to direct or to order any one else to assess or list it.

And plaintiff avers that the aforesaid pretended assessment was made up and consists of the capital stock of the plaintiff, and no other or different property whatever, and is an attempt to tax its capital stock, in violation of the acts of 1871 aforesaid, which declares that the tax then and now paid, as aforesaid, by plaintiff to the auditor, shall be in full of all taxation except city tax on real estate owned by plaintiff; and it further alleges that said county court had no right or authority to assess, levy or collect an *ad valorem* tax on the property of the plaintiff at the rate of twenty cents on the one hundred dollars' worth of property for each or either of the years 1876, 1877 and 1878, or at the rate of twenty-five cents on the one hundred dollars' worth of property for the year 1879 or at the rate of forty cents on the one hundred dollars' worth of property for either of the years 1880, 1881 or 1882, or at rate of forty-five cents on the one hundred dollars' worth of property for the year 1883 for county purposes.

Plaintiff alleges that it has no remedy at law for its protection against the wrongs hereinbefore set out and complained of; that it would sustain great and irreparable injury from a sale of its property levied on by said sheriff as hereinbefore stated; that no previous injunction herein has been asked of, applied for, or refused by the court or any circuit judge.

Wherefore it prays that the defendant, John W. Gaines, sheriff, be enjoined and restrained from enforcing the levy made by him on plaintiff's property, and from subjecting any property of plaintiff's to sale under said alleged tax list or to satisfy any tax alleged or claimed to be due Franklin county or any property of this plaintiff, and that defendant, Franklin County, be enjoined and restrained from assessing or collecting and from attempting to collect or assess hereafter any tax whatever on plaintiff's property for county or other purposes. And it prays for costs and all other proper relief.

WM. LINDSAY,
FRANK CHINN,
For Plaintiffs.

W. J. Chinn says that he is president of the Deposit Bank of Frankfort, and that he believes the foregoing statements are true.

W. J. CHINN.

Sworn to before me by W. J. Shinn this 5th day of September, 1883.

W. FRANKLIN, *C. F. C. C.*

22 Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
JNO. W. GAINES, Sheriff Franklin County, and Franklin County, Defendants. } Order.

This day came the parties with above-styled action by their attorneys, the plaintiffs applying for an injunction, and the defendants appearing by Ira Julian their attorney and waiving of the notice of the time and place of said application, and it appearing that the judge of this court and also the judge of the Franklin circuit court are absent from Franklin county, an injunction is granted and will be issued by the clerk of this court, agreeable to the prayers of the petition herein upon the execution by the plaintiff of a bond before the clerk of this court, with good security, to the effect that the plaintiff will pay to the defendant such damages as they may sustain, not exceeding double the amount enjoined, if it be finally decided that the injunction ought not to have been given.

W. FRANKLIN,
C. F. C. P. Ct.

September 6, 1883.

FRANKFORT, KY., *April* 20, 1881.

To the county clerk of Franklin county:

I hereby report to you that the Deposit Bank of Frankfort has property in its possession in this county, owned by itself or others, and has said property in its possession for the last five years of the value of $77,400.00, upon which no taxes have, during said years, been paid this county because the assessor omitted to list the same for taxation. Said property consists of the capital stock of the said bank, and its furniture and fixtures.

E. C. HAWKINS, *S. F. C.*

Commonwealth of Kentucky, to the sheriff of Franklin:

You are commanded to summons the Deposit Bank of Frankfort to appear before the Franklin county court on Monday, April 2, 1883, and list, (or show cause why it shall not list), all the property of said bank situated in Franklin county, for assessment and taxation for county purposes for the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883, as required by the laws of this State, and warn it that upon failure to answer or list said property, the same will be listed and twenty-five per centum added to the value thereof as a penalty for said failure and refusal, and its "chief officers or agents" will be proceeded against for contempt.

Witness our hand this 14th day of March, 1883.

JAMES G. CROCKETT, *Clerk*,
By W. D. GRAVES, *D. C.*

23 The following return was endorsed on the summons:

Executed on W. J. Chinn, president of the Deposit Bank of Frank-

fort, Kentucky, by delivering to him a copy of the within summons. March 17, 1873.

J. W. GAINES, *S. F. C.*,
By G. B. THOMPSON, *D. S.*

Response and Plea.

Franklin County Court.

In the Matter of the Proceeding to Assess Property of Deposit Bank of Frankfort for County Taxation.

In response to the rule herein the Deposit Bank of Frankfort comes and denies that this court has power or jurisdiction to assess or list its property for the purpose of county taxation or for any other purpose.

It says, further, it neither owns nor possesses in his own right, or as agent for any one else, any real estate or any other taxable property assessable for any purpose, State or county in kind or specie.

It says all its property, except a small amount of office furniture, worth not exceeding five hundred dollars, consists and is made up of notes, bills, accounts, choses in action and evidences of debt, and that the aggregate of the same is fully covered by its indebtedness to its stockholders, depositors, and other creditors, and that it holds and owns no balance whatever, under the provisions of sec. 5, art. —, chap. 92, of the General Statutes.

It says, further, that the general laws in force at the date of its charter, provided, that it shall pay each year to the auditor of public accounts an amount equal to 50 cents on each one hundred dollars of its capital stock, and that an act approved March 18th, 1871, entitled An act to amend the charter of the Deposit Bank of Frankfort provides:

1st. That the tax or bonus paid by said bank in future shall be in full of all taxation, but this shall not apply to city tax upon real estate owned by it:

2nd. This act shall take effect from its passage.

And it says it has, each year since 1871, including each of the years named in the notice or rule on which this proceeding is based, reported and paid to the auditor 50 cents on each one hundred dollars' worth of its said capital stock, to wit, on $77,400.00 worth, and it pleads and relies on each exemption and said payments in bar of this proceeding.

It says further that the facts stated herein are true as to each of the years 1876, 1877, 1878, 1879, 1880, 1881, and 1882, and it asks that this response and plea shall be made to apply to each of said years.

Wherefore it p-ays to be dismissed, &c.

FRANK CHINN AND
W. LINDSAY,
For Defendants.

24 COMMONWEALTH, for FRANKLIN County, *versus* DEPOSIT BANK OF FRANKFORT. } Rule to List Property For Taxation.

In the matter of the summons and rule heretofore awarded herein, it appearing from the sheriff's report made to the clerk of this court that the Deposit Bank of Frankfort has failed and refused, after demand made, to list its property or any part thereof for county purposes for the years 1877, 1878, 1879, 1880, 1881, 1882, and 1883, and the assessor and sheriff being unable to ascertain the amount of or list to said property, it is now ordered and adjudged that demurrer of the attorneys for Franklin county to the response of said bank herein be sustained, and it still refusing to list or show further cause why it should not list, the clerk of this court is hereby ordered and directed to list and assess the property of said bank under the equalization law, viz: its notes, bonds, bills, money, choses in action and evidences of debt, after deducting therefrom its indebtedness (except the amount of its so-called liability to its stockholders), and one hundred dollars additional. Said balance of property, as appears by its own statements and response herein, amounted in the year 1877 to $77,300; in the year 1878 to $77,300; in 1879 to $77,300; in 1880 to $77,300; in 1881 to $77,300; in 1882 to $77,300. The clerk will also list the office furniture and tangible property of said bank for each of the years at the valuation fixed upon same by said bank in its response herein, viz: $500 for each and all of the said years from 1877 to 1882, inclusive. All the foregoing property to be assessed and taxed according to the amount of the *ad valorem* county levy tax for each of the said years, respectively, as appears from the records of this court. And the clerk will certify the foregoing lists to the sheriff of Franklin county for collection.

STATE OF KENTUCKY, *County of Frankfort,* } *sct:*

I, James G. Crockett, clerk of the county court for the county and State aforesaid, do certify that the foregoing five pages contain true copies of the report of E. O. Hawkins, sheriff of Franklin county, to the clerk of the Franklin county court, stating that the capital stock, furniture and fixtures of the Deposit Bank of Frankfort (had not been listed by the assessor of Franklin county for taxation), and of the summons issued by said court and the sheriff's return thereon, and of the response of said bank to said summons, and the judgment of said court rendered thereon, all of which are on file in my office.

Given under my hand this July 18, 1883.

JAS. G. CROCKETT, *Clerk,*
By W. D. GRAVES, *D. C.*

25 Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
JAMES W. GAINES, ETC., Defendants. } Injunction Bond.

We undertake that the plaintiff, The Deposit Bank of Frankfort, shall pay to the defendants, J. W. Gaines, sheriff of Franklin county, and Franklin County, the damages, not exceeding four thousand dollars, which they, or either of them, may sustain if it be finally decided that the injunction ought not to have been granted.

Witness our hands this 6th day of September, 1883.

DEPOSIT BANK OF KENTUCKY,
By W. J. CHINN, *President.*
W. J. CHINN.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon Franklin County and Jno. W. Gaines, sheriff of Franklin county, to answer on the first day of the next November term, a petition filed against them in Franklin common pleas court, by Deposit Bank of Frankfort, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next November term of said court.

Witness W. Franklin, clerk of said court, this 6th day of September, 1883.

W. FRANKLIN, *C. F. C. C.*,
By R. B. FRANKLIN, *D. C.*

Executed on J. W. Gaines, sheriff of Franklin county, and R. A. Thompson, judge of Franklin county court, by delivering to each of them a copy of the within summons.

September 6th, 1883.

W. L. COLLING, *S. F. C.*
JNO. L. TOBIN, *D. S.*

At a court held on the first day of December, 1883—

The defendants filed a demurrer to the plaintiff's petition and the cause was submitted upon said demrrer, and the court, not being advised, took time.

Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
J. W. GAINES, &c., Defendant-. } Demurrer.

Defendant, The Franklin County Court, comes and demurs to the plaintiff's petition herein because the same is insufficient in law.

IRA JULIAN,
For Defendant.

26 At a court held on the 7th day of May, 1884—

The demurrer to the petition being heard, the court overruled the demurrer and defendants except, and defendants, by their attorney declining to answer, it is adjudged that the injunction in this cause be perpetuated, and the defendants are perpetually enjoined and restrained from further proceeding to collect the taxes mentioned in this action, and that plaintiff recover of the defendant its costs herein expended, to all of which defendants except and pray an appeal to the court of appeals, which is granted.

Franklin Court of Common Pleas.

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing twenty-one pages and the above lines contain a full, true and complete transcript of the record and proceedings had in the cause therein mentioned.

Witness my hand, this 11th day of June, 1884.

W. FRANKLIN, *C. F. C. C.*

Fees for record, $5.50.

Upon which transcript was endorsed the following statement:

FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellants,
versus
THE DEPOSIT BANK OF FRANKFORT, Appellees. } Statement.

The judgment appealed from was rendered at the May term, 1884, of the Franklin common pleas court and may be found on page 22 of this record. Appeal granted below, and no summons desired.

IRA JULIAN,
Attorney for Appellants.

Afterwards at a court of appeals begun and held for the Commonwealth of Kentucky at the capitol, in the city of Frankfort, on the 23d day of May, A. D. 1884, the following order was entered:

FRANKLIN COUNTY, &c.,
versus.
DEPOSIT BANK OF FRANKFORT. } Franklin. (3 Cases.)

Ordered that these cases be continued for oral argument.

Afterwards at a court of appeals held as aforesaid on the 23d day of February, 1896, the following order was entered:

FRANKLIN COUNTY COURT, &c.,
versus.
DEPOSIT BANK OF KENTUCKY, } Franklin. (3 Cases.)

These causes came on and were argued by D. W. Lindsay for appellee, W. H. Julian for appellant, and laid over for further argument.

27 Afterwards, at a court of appeals held as aforesaid on the 25th day of February, 1886, the following order was entered:

These causes were argued by Wm. Lindsay for the appellees, John Rodman for appellant, and laid over.

Afterwards, at a court of appeals held as aforesaid, on the 2d day March, 1886, the following order was entered:

These causes were argued by Ira Julian for appellant, and submitted.

Afterwards, at a court of appeals held as aforesaid, on the 5th day of June, 1888, the following order was entered:

FRANKLIN COUNTY COURT, Appellants,
versus
DEPOSIT BANK OF FRANKFORT, Appellee.
} Appeal from the Franklin Common Pleas Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is, therefore, considered that said judgment be affirmed, which is ordered to be certified to the said court.

It is further considered that appellee recover of appellant its costs herein.

At the same time, to wit, June 5, 1888, the court, through Judge Caswell Bennett, delivered the following opinion, to wit:

THE FRANKLIN COUNTY COURT, Appellant,
versus
BANK OF KENTUCKY, Appellee.

SAME, Appellant,
versus
FARMERS' BANK OF KENTUCKY, Appellee.

SAME, Appellant,
versus
THE DEPOSIT BANK OF FRANKFORT, Appellee.

THE CITY OF FRANKFORT, Appellant,
versus
THE BANK OF KENTUCKY, Appellee.

SAME, Appellant,
versus
THE FARMERS' BANK OF KENTUCKY, Appellee.

The Franklin County Court, appellant, having assessed for county taxation, all the corporate property in Franklin county of the appellees, including their notes, bonds, bills, money, and choses in action, the appellees brought their separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

28 The City of Frankfort, appellant, having assessed the real estate of the appellees within the corporate limits of Frank-

fort for the purpose of taxation, the appellees brought separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

The lower court having perpetuated the appellees' injunction in each action, the appellants have separately appealed to this court. It is agreed that the cases may be heard together. They will be noticed in the order in which they stand.

FRANKLIN COUNTY
vs.
THE BANK OF KENTUCKY.

The appellee, The Bank of Kentucky, was chartered in 1834 by an act of the legislature of this State. This incorporating act provides that the appellee shall have and keep its principal office of discount and deposit in the city of Louisville, and it shall be the appellee's duty to establish not less than four, nor more than six, branches, and one branch shall be located at the seat of government, "to aid in the management of the fiscal affairs of the State." The act authorizes the appellee to have "a capital stock of five million dollars, divided into shares of one hundred dollars each;" that the amount of capital that "shall be employed at the principal bank, and at the several branches, shall be under the control of the president and directors of the principal bank;" that the appellee shall have "full power and authority to acquire, hold and enjoy such real estate as shall be convenient for the transaction of its business, or which may be received in the discharge of any debt, or purchased in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which the said bank may have a lien." The 15th section provides: "That it shall be the duty of the cashier of the principal bank, on the first day of July, 1836, and on the first day of July in each succeeding year, during the continuance of this charter, to pay to the treasury of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus: *Provided*, that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

In 1857 the legislature fixed fifty cents as the sum that the appellee should pay into the treasury on each one hundred dollars of its capital stock, "which shall be in full of tax or bonus." By the act of 1834 the appellee's charter was to continue in force until the first day of October, 1864.

The legislature, by an act approved February 15, 1858, enacted that the chartered privileges and rights of the appellee should continue in force for twenty years from the first day of October,
29 1864. But said extension of the charter of said bank shall be subject to the following restrictions and provisions:

1. It shall be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation.

3. After this act of extension takes effect the amount of circula-

tion shall not be greater than the amount of capital actually paid in.

4. The appellee shall establish a branch at the town of Columbus, Ky., with a capital of $150,000.

5. The appellee shall, within a year from the 10th day of May, 1858, by a vote of a majority of its stockholders, determine whether it will accept the "proposed extension;" and if it determines to accept, it shall notify the governor of the Commonwealth of the acceptance by the certificate of its president and directors; and this act shall be in force from that date.

The 6th section provides that the appellee "shall pay annually to the commissioners of the sinking fund fifty cents upon each one hundred dollars of the contingent fund now held, or may hereafter accrue, to said bank over and above the amount now required to be retained by its charter."

By an act of the legislature, approved February 1, 1872, the appellee was authorized to purchase from the Commonwealth the stock which she owned in its bank. But the "bank shall annually, on the 1st day of January, pay into the treasury a tax of fifty cents on each share of one hundred dollars of its increased capital stock, which shall be in full of all tax or bonus on such increased capital stock."

The 5th section provides: "That the charter of the Bank of Kentucky be, and the same is hereby, extended twenty-five years."

The appellant's first contention is, that the legislature had no constitutional power to exempt the appellee from the common burden of taxation except "in consideration of public services." It contends that the exemption of the appellee from all taxation, except fifty cents on each one hundred dollars of its capital stock, was not "in consideration of public services," and, therefore, void.

At the time the appellee was chartered, and for years afterwards, the Federal Government issued no paper currency. Banks and banking were the creatures of the respective States. It was the policy of this Commonwealth to charter banks, with authority to issue paper currency, based upon a gold and silver redemption upon the demand of the holder. The issue of these banks constituted, in the main, the circulating medium in the Commonwealth for individual, commercial and public uses. While the aggregation of capital for banking purposes was, on the part of the projectors, for the purpose of individual gain, yet, the Commonwealth accepted the overture as auspicious to the purpose of furnishing a currency as stable as in the nature of things it could be made, for the
30 private, commercial and public benefit of her citizens, also to aid her in the management of her fiscal affairs, which not only consisted in the providing of means to meet the ordinary administration of State affairs, but sometimes extended, at least might extend, to the borrowing of money to meet any extraordinary or unforeseen emergency. Therefore, we should hesitate to decide, were it material to decide, the question, that the granting of the charter to the appellee, and the fixing of a specific tax of fifty cents on each share of its capital stock was not in consideration of public services.

But the right of the State to grant the charter to the appellees and exempt it from the payment of all taxes, except fifty cents on each share of its capital stock, rests upon the power of the State to make, for a valuable consideration, a valid and irrevocable contract.

The State of Kentucky, in the management and control of her affairs, in her relation to the other States, in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States, to the Federal Government, or one denied to the States, is sovereign by right. It is, by virtue of her sovereignty, that she has the power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the State makes contracts with individuals; that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign. Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contract, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration coming to him from the other party to the contract he surrenders something and reserves something in its stead, which he deems as an equivalent. Whether the one or the other has in fact received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevocably binding. In thus contracting he does not surrender his sovereign power, he merely exercises it. Upon precisely the same principle the Commonwealth contracts.

If her contract is without any valuable consideration it is an *nudum pactum*, so is that of the citizen, but if there is a valuable consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State possessing the power to make, for a valuable consideration, a binding contract, she falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts she stands upon precisely the same footing that she does in reference to the contracts made between individuals—she shall pass no law impairing their obligation. In accordance with
31 the foregoing views the Supreme Court of the United States, every since the Dartmouth College case, 4 Wheaton, 518, have consistently held that the creation of a corporation, especially banks, by the legislature of a State, whereby it was agreed that the corporation, in consideration of paying to the State a specific tax or bonus, was to be released from the payment of all other taxes, constituted a binding contract from which the State could not recede without the consent of the corporation; unless the State, in making the contract, expressly reserved the power to alter or amend it; or unless there was a general law in force at the time

of making the contract which authorized the State, by subsequent legislation, to alter or amend it, and that there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. State Bank of Ohio *vs.* Knoop, 16 Howard, 369; New Jersey *vs.* Yard, 95 U. S., 104; Farrington, *vs.* Tennessee, 95 U. S., 679. This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recognized by the courts of last resort of all the States, that a decision by us, holding the contrary, would be regarded as eminently sporadic.

Does the provision in appellee's charter and amendments, declaring that the payment of fifty cents on each one hundred dollars of its capital stock "shall be in full of all tax or bonus," exempt the appellee from the payment of county or city taxes? The appellant contends that it does not.

It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank and the means of conducting its operations. The bank cannot increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee, first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations for the benefit of its stockholders. The shares of the capital stock are represented by certificates. Each holder is a beneficiary to the extent of his ownership. But he cannot control or withdraw a dollar of the principal; that must remain as the basis of the appellee's business operations. The shareholder is entitled only to share in the profits. So, the capital stock and the shares of the capital stock are distinct things, and both may be taxed. So, also, the franchise—the right of the bank to exercise its powers in the prosecution of its business as a distinct right from its capital stock—may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, but only its earnings, which are not a part of its capital stock, may be taxed. Angell & Ames
32 on Corporations, sections 556, 557; Bradley *vs.* The People, 4 Wall., 459; National Bank *vs.* Commonwealth, 9 Wall., 353.

If, when the State granted to the appellee its charter, she had been silent as to her right to tax it, she would have the absolute right to tax it, under the foregoing heads, without being amenable to the objection of being guilty of imposing double taxation. Nor could it be successfully maintained that the appellee would not be liable to be taxed by the appellant, The County Court, under the act of the 17th of March, 1876, and by the appellant, The City of Frankfort, under its charter. But the State did not choose to be silent. It did speak. It said, that in consideration of the appellees paying into the treasury fifty cents on each $100 of its capital stock paid in without reference to its real value, such payment

should be "in full of all tax or bonus." To say that this language has reference to the capital stock of the appellee, and not to the shares of its stockholders, or *vice versa*, or that it has no reference to the real estate of the appellee, acquired or used in its legitimate business, would be to torture the meaning of language. The State agrees that, in consideration of receiving fifty cents on each $100 of the appellee's capital stock paid in, the same shall be in full of all tax or bonus. It is conceded that this language binds the State to make no other assessment; and well may the concession be made, because, regarding the fifty cents in the light of a payment on the stock as capital stock proper or as the stockholders' shares, yet the contract says that the payment "shall be in full of all tax or bonus." Also regarding the appellee's real estate as a separate subject of taxation (and so is the capital stock and shares), yet the contract says that the payment of the fifty cents shall be in full of all taxation. If any part of appellee's property, its franchise, its capital stock, or the shares of its capital stock, or its real property, used in the operation of its business, is to be taxed in addition to the fifty cents, then it cannot be truthfully said that the payment of the fifty cents is "in full of all tax or bonus." As before said, it is conceded that the terms of the contract bar the State from imposing any additional taxation; but it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they cannot levy and collect taxes without the authority of the State conferring that right upon them; so, the absurdity is presented, that the State contracts with the appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of "all tax or bonus"—this is the meaning of the language—and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off the appellee, but may, notwithstanding,
33 authorize all of its subdivisions, if the appellee's property and business were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one, at first blush, that such a procedure would be a palpable violation of the contract. "Under such a contract between individuals a doubt could not exist." The State, when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing.

In the Bank of Cape Fear *vs.* Edwards, 5 Ired, 516, where the charter provided that the bank should pay annually into the treasury of the State twenty-five cents on each share of its stock owned by individuals, and that the bank should not be liable to any further tax, it was held that the bank was liable to no other tax, State or county. See also Farrington *vs.* Tennessee, 95 U. S., 679, and New Jersey *vs.* Yard, 95 U. S., 104, and the authorities there cited. Also in the case of the Farmers' Bank (one of the present appellees) *vs.* Commonwealth and Greenup County, 6 Bush, 127, where the

bank's charter provided that the annual payment into the State treasury of fifty cents on each one hundred dollars of the bank's capital stock "shall be in full of all tax or bonus," it was held that said provision exempted the bank from the payment of all other tax, whether State or county, including the bank's real estate, purchased for debt.

The appellant's next contention is that, if the appellee's charter exempted it from all taxation except that herein provided for, the same expired on the first day of October, 1864, and that the act of the 15th of February, 1858, extending the charter for twenty years, created a new corporation, which the legislature, under the act of February 14, 1856, reserved the right to amend at pleasure; and that the act of the 17th of February, 1876, authorizing counties that levied and collected *ad valorem* taxes, to assess banks and other corporations within said counties, operated as a valid amendment of the appellee's charter to the extent of authorizing the collection of said taxes.

The act of the 14th of February, 1856, provides:

"SECTION 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

"SEC. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

There is a broad distinction between the extension of a charter and the grant of a new one. An act which continues the life of a charter to a period beyond the time fixed in the charter for its expiration, and reserves the corporate organization, privileges, powers, duties and rights, is an extension of the charter. Thus ex-
34 tended, it is the same charter with a continued lease of life, under which the organization must be kept up; to which the company must look for its powers, privileges and rights; by which it is to be granted and controlled. The act of extension relates back to the date of the charter. The legislature and the company are presumed to contract for the extension with reference to that event, by which the respective rights of the contracting parties were agreed on, which agreement, in consideration of the continuous discharge of the obligations therein expressed, is to be continued beyond the time first agreed on. See Angell & Ames on Corporation, section 780; Temple *vs.* Marshall, 1 Gillman, Illinois, 672; Exeter Bank *vs.* Rogers, &c., 7 New Hampshire, 32; Lincoln and Kennebec Bank *vs.* Richardson, 1 Greenleaf, 72.

Here the legislature, by the act of 15th of February, 1858, continued the chartered privileges and rights of the appellee twenty years from the first day of October, 1864. This extension did not have the effect of creating a new charter, but merely extended the life of the old one which was already in existence. Therefore the act of the 14th of February, 1856, does not apply, for the third section

expressly provides that the act shall only apply "to charters and acts of incorporation to be granted" thereafter.

Conceding, however, that the act of 15th of February, 1858, creates a new charter, was it not the intention of the legislature, "plainly expressed," not in so many words, it is true, that the first section of the act of 1856 should not apply to it? Let us see. The act of 1858, as an additional consideration for the extension, provides that the appellee should establish a bank at Columbus, Ky.; that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share on its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions, and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension. In addition to this the act of the 1st of March, 1872, authorized the appellee to purchase the stock that the State held in its bank, upon which it was to pay annually fifty cents upon each one hundred dollars, which was to "be in full of all tax or bonus" on such increased stock; also, her charter was "extended twenty-five years." That the appellee, in addition to its former obligation, agreed to pay annually fifty cents on each hundred dollars of its contingent fund and increased capital stock for the period of twenty-five years; that it was to be exempt from all other taxation thereon during that period; that it was to establish another branch at Columbus, Ky.; that it was to restrict its circulation; that its business involved a large capital, the profits of which were limited to six per cent. interest; that well-defined and permanent rules were essential to its successful management; that changes in its chartered privileges might hazard its success and safety, and render uncertain and precarious a business whose success depended upon a steady adherence upon the part of the State to its plighted faith.

These consideration- induce the belief that the acts of 1858 and 1872 were intended to continue in force an irrevocable contract.

FRANKLIN COUNTY COURT
versus
FARMERS' BANK.

The appellee was chartered in 1850, which was to continue in force until the — day of ——, 1880. By the 15th section of said charter the appellee was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock, "which," according to said section, "shall be in full of all tax or bonus." By an act of the legislature, approved March the 10th, 1876, the appellee's charter was extended for the period of twenty-five years from and after the expiration of the time fixed in said charter. The principles announced in the Bank of Kentucky case, *supra*, apply to this case.

FRANKLIN COUNTY COURT
versus
DEPOSIT BANK OF FRANKFORT.

The appellee was chartered March 3rd, 1863, to continue twenty years. There was no specific tax agreed on in the charter; but by the general law then in force, the appellee was required to pay annually into the State treasury fifty cents on each one hundred dollars of its stock. It may be conceded that, as the appellee and the State, by the terms of the charter, made no contract in reference to taxation, the State would have the power to subject the appellee to the payment of such taxes as are imposed upon persons generally; and that the appellant would have the right to tax the appellee, under the law of 1876. But the legislature, by an act approved March 18, 1871, declared "that the tax or bonus now paid by said bank in future shall be in full of all taxation; but this shall not be construed to apply to city tax upon real estate owned by it."

By an act approved February 23rd, 1882, the appellee's charter, together with the foregoing amendment, was extended and continued in force for twenty-five years from the third of March, 1883.

The language of the amendment of 1871, "in full of all taxation," not only exempts the appellees from the payment of any other tax, whether county or State, but its meaning is made doubly clear by the succeeding clause that excepts from the exemption city taxes on its real estate. Also, if the act of 1876, in the light of the act of 1856, should ordinarily be construed as repealing the exemption from taxation, so far as the appellant is concerned, the act of
36 1882 puts that matter at rest; for, by said act, the act of 1871 is expressly continued in force, thereby showing that it was the intention of the legislature that the act of 1876 should not apply to the appellee.

THE CITY OF FRANKFORT
versus
THE FARMERS' BANK OF KENTUCKY.

From what has been said in the case of The Franklin County Court *vs.* The Bank of Kentucky, it follows that the appellant, The City of Frankfort, has no authority to tax the real estate belonging to either of the appellees.

The judgment of the lower court in each case is affirmed.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 33 pages contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein Franklin County Court, &c., are appellants, and Deposit Bank of Frankfort is appellee, except the proceeding upon and the petition for a rehearing, as the same appears on file and of record in my office.

In testimony whereof I have hereunto affixed the seal of my office. Done at Frankfort, Ky., this 13th day of May, A. D. 1897.

ABRAM ADDAMS,

[SEAL.] *Clerk Kentucky Court of Appeals.*

Exhibit "B" heretofore referred to, is as follows:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 1st day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting.

DEPOSIT BANK OF FRANKFORT, Appellant,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff of Franklin County, Appellees.

Be it remembered that heretofore, to wit, on the 16th day of July, A. D. 1894, the appellants by their counsel filed in the office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

37 Be it remembered that on the 22nd day of December, 1893, the plaintiff filed the following petition herein, to wit:

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff of Franklin County, Ky., Defendants. } Petition in Equity.

The plaintiff, The Deposit Bank of Frankfort, says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3rd, 1863, and organized and constituted as such corporation under the corporate name of "Deposit Bank of Frankfort," and doing business in the city of Frankfort under the authority of said act and the several amendments thereto. By the terms of said act the plaintiff, The Deposit Bank of Frankfort, was authorized to transact the business of a bank for the period of twenty years from March 3rd, 1863. It says that "by an act entitled, 'An act to amend the charter of the Deposit Bank of Frankfort,' approved March 8th, 1871, it is provided 'that the tax or bonus now paid by said bank (meaning plaintiff) in future shall be in full for all taxation—but this shall not apply to the city tax on real estate owned by it.'" The tax, or bonus, above referred to, was the 50c. on each $100 worth of its capital stock then required by the general law to be paid by all banks in Kentucky.

It further says that by an act of the General Assembly approved

February 23rd, 1882, entitled, "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to said bank under the said act of March, 1863, as amended by act of March 18th, 1871, were extended and continued in force for the period of twenty years from the 23rd day of February, 1882.

Plaintiff alleges that it has not owned, nor has it had in its possession, either in its own right or as agent for any one else, any real estate or any other tangible property which is or was assessible under the law in kind or specie, for any purpose whatever, either State or county, for either of the years 1893 or 1894 inclusive, except office furniture, worth $500.00, which it has assessed with the assessor.

Plaintiff further says that it continued to pay annually to the State of Kentucky fifty cents on each one hundred dollars' worth of its capital stock in lieu of all tax and bonus against the plaintiff until the act of the legislature, approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," which act is known as the "Hewitt act," went into effect.

38 The plaintiff says that the first section of the second article of that act has the following provision, to wit:

"That shares of stock in State and national banks, and other institutions of loan and discount and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The next section of the act gives to the auditor of the State power to investigate the books of these corporations and pronounces penalties upon the officers managing them for refusal to allow the investigation of their books. The said act then makes it the duty of the cashier of every incorporated bank whose stocks are reported in said act to report on the first day of July of each year said amount of stock and how the same is invested and pay to the treasurer of the State the amount of tax due from the bank.

Section 4 then proceeds as follows, to wit:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive or release all rights under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock

shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

Plaintiff further says that by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a called meeting thereof, held at the said bank on the — day of July, 1887, it did give its consent to the levying of said tax of seventy-five cents on each share of its capital stock equal to one hundred dollars in value, and agree to pay same, together with the same tax as is assessed on real estate, upon so much of its sur-
39 plus, etc., as exceeds an amount equal to ten per cent. of its capital stock, as in said act provided; and further agreed to waive and release all rights under its charter to a different mode or smaller rate of taxation. Which consent and agreement to and with the State of Kentucky was evidenced by writing under seal of plaintiff, and delivered by plaintiff to the governor of this Commonwealth on the — day of July, 1887.

Plaintiff says that it has annually, since the above-recited act became a law, through its cashier, reported under oath on the first day of July of each year, to the auditor of public accounts, the true amount of its capital stock, surplus, undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and annually paid in July of each year since the said act went into force, up to and including July, 1892, into the treasury of the Commonwealth the whole amount of tax due from respondent, as required by the said act.

By all of which the plaintiff alleges that it has and holds a valid contract under the provisions of the Hewitt act with the Commonwealth of Kentucky, which is irrepealable during its corporate existence, by the terms of which this plaintiff, on its compliance with the conditions imposed on it by the said contract, and which are hereinbefore set out, including the payment of seventy-five cents on each one hundred dollars' worth of its capital stock, and excess of over ten per cent. of its surplus, &c., to the auditor on or before July 1st of each year, is exempt from all and any other taxation, either for county or municipal purposes.

Plaintiff further says that the defendants, Franklin County and John W. Gaines, who was then sheriff of said county, instituted proceedings in the Franklin county court on the — day of ——, 1883, to compel this plaintiff to pay taxes on its capital stock, notes, bills, choses in action, to Franklin county, which proceedings were heard by the said court, which adjudged the plaintiff's property to be liable for said taxation; but plaintiff alleges that by a suit filed in the common pleas court of Franklin county, September 6, 1883, in which this plaintiff was plaintiff and the said Franklin county and Gaines, sheriff, were defendants, the collection of said taxes in favor of said county was enjoined by judgment of the common pleas court of Franklin county, in which the said suit was filed, upon the ground that the property of this plaintiff was not liable for common taxation by reason of the exemption contained in its said charter, as amended as hereinbefore

set out; said judgment was rendered at the May term, 1884, of said court, and an appeal was prosecuted by the said defendants from that judgment in the said court of appeals, in which court of appeals the judgment aforesaid of the said common pleas court was affirmed on June 5, 1888; see opinion in 87th Kentucky Reports, page 375 *et sequitur;* and plaintiff here pleads and relies upon the said judgment in bar of any liability upon it for county taxation. All the papers referred to in this suit are on file in the clerk's office of this court, and are here referred to as parts hereof.

The plaintiff avers that the legislature of Kentucky, in violation of said contract and of its duty, and against the will and consent of the plaintiff, passed an act which became a law November 11, 1892, without the approval of the governor, by the terms of which it attemped to repeal the above-recited Hewitt act, and impose on the plaintiff a liability for both county and municipal taxes. But plaintiff is advised and avers that said last-named act, in so far as it attempts to repeal said Hewitt act and to impose any liability upon plaintiff for county and municipal taxes, is an impairment of plaintiff's aforesaid contract under said Hewitt act, and is utterly void and of no effect, being in conflict with the constitution of Kentucky, and of section 10, article 1 of the Constitution of the United States, which prohibits the enactment of laws by any State impairing the obligations of contracts.

Plaintiff avers that on the first day of July, 1893, under protest, and without waiving any of its rights under the contract hereinbefore set out, this plaintiff did make and deliver to the auditor of public accounts of this State, a statement verified by its president, and upon the form or blank provided by the auditor for that purpose, giving all the facts required to be stated and shown by section 2 of article 3 of said act of November 11, 1892, and tendered to the said auditor on the first day of July, 1893, at his office in Frankfort, Ky., the sum of $705.42, being the amount of taxes due from plaintiff for the year 1893, at 75 cents on the $100.00 worth of its capital stock, and the tax due from the surplus and undivided surplus, undivided profits and undivided accumulations in excess of ten per cent. of its capital stock, as required by said Hewitt act, but the said tender was refused by the said auditor, and thereupon, but under protest, plaintiff paid to said auditor, on said date, $464.29, the State tax claimed to be due from the plaintiff under the aforesaid act of November 11, 1892.

Notwithstanding all the facts hereinbefore alleged the State board of valuation and appraisement, created by said act of November 11th, 1892, has made a pretended assessment of the alleged franchise of this plaintiff for the year 1893 at the sum of $109,246.31 and has certified the same to the county clerk of Franklin county, and said county has listed the same with the defendant R. D. Armstrong, sheriff of said county, who now has the same in his hands, and who has threatened to levy on plaintiff's property and to sell the same to raise $619.05, which he claims is the amount of tax due from plaintiff to said county upon its

alleged franchise for the year 1893, and unless prevented will sell same to satisfy the said alleged taxes.

Plaintiff avers that none of its property is subject to or liable for taxation for county purposes, in any manner or form; that said board has no right, authority or jurisdiction to make said alleged assessment of the value of plaintiff's franchise for taxation for
41 county or other purposes; that said alleged assessment is made up and consists of the capital stock of plaintiff and its surplus and no other or different property, and is an attempt to tax plaintiff's capital stock and surplus in violation of plaintiff's aforesaid contract under the Hewitt act, which declares that upon the acceptance by plaintiff of the terms and conditions of said act, hereinbefore set out, "such bank and its" shares of stock shall be exempt from all other taxation whatsoever "so long as said tax shall be paid during the corporate existence of said bank."

Plaintiff alleges that it has no remedy at law adequate for its protection against the wrongs hereinbefore set out and complained of; that it would sustain great and irreparable injury from a levy or a sale of its property by said sheriff to satisfy said taxes; and will sustain irreparable injury unless the said levy or sale be immediately enjoined and restrained; that no previous injunction herein has been asked of or applied for or refused by this court or any circuit judge.

Wherefore plaintiff prays that the defendant, R. D. Armstrong, sheriff, be enjoined and restrained from making any levy on plaintiff's property, and from subjecting any property of plaintiff to sale under said tax-list to satisfy any taxes alleged or claimed to be due to Franklin county on any property of this plaintiff; and that defendant Franklin County be enjoined and restrained from assessing or collecting, and from attempting to assess or collect in any manner, any tax whatever upon plaintiff's property or franchise for county purposes hereafter during plaintiff's corporate existence under its said charter; and it prays for costs, and for all other proper relief.

FRANK CHINN,
For Plaintiff.

B. Milam says he is president of the Deposit Bank of Frankfort, and that he believes the foregoing statements are true.

B. C. MILAM.

Sworn to and subscribed before me this 22d day of December, 1893.

C. E. JAMES,
D. C., F. C. C.

Thereupon, the plaintiff filed the following injunction bond herein, to wit:

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff of Franklin County, Defendants.
} Injunction Bond.

We undertake that the plaintiff, The Deposit Bank of Frankfort, Ky., shall pay to the defendants, Franklin County, and R. D.
42 Armstrong, sheriff of Franklin county, the damages, not exceeding thirteen hundred dollars, which they, or either of them, may sustain if it be finally decided that the injunction ought not to have been granted.

Witness our hands this 22d day of December, 1893.

B. C. MILAM, *President.*
B. C. MILAM.

Thereupon the following injunction order was granted, as follows, to wit:

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff, Defendants.
} Order of Injunction.

This day came the plaintiff by attorney and made application for an order of injunction, and it appearing that the judge of this court is absent from Franklin county, and the undersigned, clerk of this court, being satisfied that great and irreparable injury and damage will result to the plaintiff if the injunction prayed for in this action be not immediately granted, an injunction is granted and will be issued by the clerk of this court, agreeably to the prayer of the petition herein, upon the execution by the plaintiff of a bond before said clerk with good security to the effect that the plaintiff will pay to the defendants such damages as they may sustain, not exceeding $1,300, if it be decided that the injunction ought not to have been granted.

December 22d, 1893.

THOS. B. FORD, *C. F. C. C.*

Thereupon the following injunction was issued as follows, to wit:

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT
versus
FRANKFORT COUNTY, KENTUCKY, &c.
} Order of Injunction.

The Commonwealth of Kentucky to Franklin County, Kentucky, and R. D. Armstrong, sheriff of Franklin county, Kentucky:

You and each of you are hereby enjoined and restrained from making any levy on plaintiff's property and from subjecting any

property of plaintiff to sale under said tax-list to satisfy any taxes alleged or claimed to be due to Franklin county, or any property of this plaintiff; and that defendant, Franklin County, be enjoined and restrained from assessing or collecting and from attempt-
43 ing to assess or collect in any manner, any tax whatever upon plaintiff's property or franchise for county purposes, hereafter, during plaintiff's corporate existence under its said charter.

Attest: THOS. B. FORD, *C. F. C. C.*,
By C. E. JAMES, *D. C.*

December 22, 1893.

Endorsed.

Executed by delivering a true copy of the within injunction to B. G. Williams, judge of Franklin county, and R. D. Armstrong, sheriff of Franklin county, this 22d day of December, 1893.

W. S. DEHONEY, *C. of F. Co.*

Thereupon the following summons was issued, as follows, to wit:

Equity Summons.

The Commonwealth of Kentucky to the coroner of Franklin county, Greeting:

You are commanded to summon Franklin County, Ky., and R. D. Armstrong, sheriff of Franklin county, Ky., to answer, on the first day of next January term of the Franklin circuit court, a petition filed against them in said court by Deposit Bank of Frankfort, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next January term of said court.

Witness, Thos. B. Ford, clerk of the said court, this 22d day of December, 1893.

THOS. F. FORD, *Clerk*,
By C. E. JAMES, *D. C.*

Endorsed.

Executed by delivering a true copy of the within summons to B. G. Williams, presiding judge of Franklin county, *of* R. D. Armstrong, sheriff of Franklin county.

W. S. DEHONEY, *C. of F. Co.*

Executed by delivering a true copy of the within summons and injunction to R. D. Armstrong, sheriff of Franklin county, and B. G. Williams, judge of Franklin county, this 22d day of December, 1893.

W. S. DEHONEY, *C. of F. Co.*

44 Afterwards, at a court held on the 27th day of January, 1894, the following judgment was rendered herein, to wit:

DEPOSIT BANK OF FRANKFORT
vs.
R. D. ARMSTRONG, ETC. } Judgment.

The plaintiff filed its amended petition herein, to which the defendants demurred; said demurrer to the petition as amended was sustained, to which ruling the plaintiff excepts, and declining to amend further, the court filed an opinion herein, and it is adjudged that the plaintiff's petition be dismissed, and that defendants recover of plaintiff their costs herein.

To all of which plaintiff excepts, and prays an appeal to the court of appeals, which is granted.

Said amended petition is as follows, to wit:

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff,

The plaintiff amends its petition herein by adding thereto and alleging that before the institution of this action, to wit, on the — day of ——, 1893, the defendant, R. D. Armstrong, who was then the duly elected, qualified and acting sheriff of Franklin county, filed in the office of the clerk of the county court for Franklin county a report, stating that plaintiff had failed to list for taxation with the assessor of Franklin county for 1891 (the taxes to be paid in 1892) and for 1892 (the taxes to be paid in 1893) notes, money, choses in action and other property, all of the value of $99,001.87 for 1892 and of the value of $100,000 for 1891, which is the same property, the taxes on which are sought to be enjoined in this action; summons was issued on said information, commanding plaintiff to appear at the ensuing term of said county court and show cause, if any it could, why its property aforesaid should not be listed at the amounts aforesaid for taxation; that thereafter, to wit, on the — day of May, 1893, plaintiff appeared and filed its response, showing that it was not required by law to give in to the assessor its property for taxation and that it had reported to the auditor, as required by law; and said court held and adjudged that plaintiff was not delinquent as to any of its property or assets and dismissed the said proceedings at the cost of said county; that thereupon the County of Franklin as relator made and perfected an appeal to this court from said order, and the said appeal was heard at the September term, 1893, of this court, and a judgment was at said term ren-
45 dered, dismissing said proceedings at cost of said county, to which judgment said county excepted and prayed an appeal to the court of appeals, which was granted. And the plaintiffs in said proceedings, who *are* the defendants in this suit, *have* filed a transcript of the record of said proceedings in the clerk's office of the court of appeals and is in said court of appeals, prosecuting its said appeal. Wherefore plaintiff prays as in its petition.

FRANK CHINN,
For Plaintiff.

Said opinion of the court is as follows, to wit:

This is a suit to enjoin the collection of county taxes levied under the provisions of the new revenue act which became a law Nov. 11th, 1892.

The petition sets out at length the charter of the bank, the amendments thereto and the decisions of the court of appeals wherein it is held that the provisions of the original and amended charter, created and constituted an irrevocable contract from which the State could not withdraw or recede without the consent of the bank. That the bank had such a contract with the State from the time it was chartered in 1834 to the time it accepted the provisions of the revenue law of 1886 known as the Hewitt bill can hardly be questioned in the light of the adjudication touching the chartered rights and privileges of this and like institutions.

In 1887 the plaintiff accepted the provisions of the Hewitt law in the manner prescribed therein and it alleges that this acceptance made a contract with the State of the same binding force and validity although different in terms as the contract it had under its charter and that the effort of the State or any of its subdivisions to collect any other tax than that mentioned in the act of 1886, is in violation of the provisions of the constitution of the State and the United States. To the petition the defendant enters a general demurrer; it therefore devolves on this court to construe article 2 of the act of 1886 and in like manner pass upon the validity of the *of the* new revenue act of 1892. Section 1 of article 2 of the Hewitt bill provides that each share of stock equal to $100 shall be taxed 75c., and that all surplus exceeding 10 per cent. of the capital stock shall be assessed at the same rate as real estate is assessed and that the taxes on these shares and surplus shall be in full of all tax, State, county and municipal.

Section 4 of the same article provides how the banks "may give consent to the levying of said tax, and agree to pay the same as herein provided and to waive and release all rights under the acts of Congress and under the charters of the State banks to a different mode or smaller rate of taxation, and upon such agreement, and consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such a bank."

46 The language of these two sections is strong and seems to embody all the essential qualities necessary to constitute a valid contract between the banks and the State during the corporate existence of the banks accepting its provisions, and it is equally explicit in that only the tax on the shares of stock and the surplus therein defined shall be levied and collected.

It is contended however on the part of the defendant that sections 6 and 7 of the same article place certain limitations upon the provisions just above recited, and that the State intended to reserve and did reserve to itself the right and power to amend, repeal, modify, and enlarge the scope and meaning of the terms and conditions imposed by sections 1 and 4. Section 6 is that the act under

consideration shall be subject to the provisions of what is known as the act of 1856, the language of which is "that all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." Section 7 provides that in case any bank refuses to pay the tax imposed under this act ("Hewitt bill") it shall be taxed for State, county, and municipal purposes as the taxable property in the hands of individuals, and it also provides "that nothing herein contained shall be construed as exempting from taxation for county and municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

This is, indeed, a confused and contradictory statute; the language of one section indicates that in case the bank pays the tax it shall be exempt from all other taxation during the corporate existence of the bank, while another section provides that this exemption shall be only during the will and pleasure of the legislature. One section says that if the bank will pay the 75 cents tax on each $100.00 share of its stock and the tax on its surplus, it shall be exempt from all other tax whatsoever, while another section says its real estate "may be taxed for county and municipal purposes," yet its real estate is as much represented by its shares of stock as any other asset of the bank.

Much has been appropriately said about the times and circumstances surrounding the passage of the Hewitt bill; that it was an effort on the part of the State to adopt an uniform system of taxation for this class of property; that the State was sadly in need of the revenue which the increased tax of 25 cents per share of stock would yield; that the banks which had contract rights under their charters, were willing to surrender them and be placed on the same footing as those which had none, but that in accepting the provisions of the Hewitt bill they believed they were securing another contract of as binding force as the one surrendered,
47 and that the State cannot afford to practice bad faith in making promises she did not intend to keep.

It is further said with equal force that if the banks are compelled to pay taxes as required by the present revenue law the equality of taxation among banks will be destroyed, that certain county and municipal taxes will amount almost to the earnings of the capital stock of the banks in those localities—that bank capital receives but little if any benefit from county or municipal governments, while other classes of property receive many other benefits which the banks do not receive. On the other hand, this court cannot ignore the recent political history of the State which imposed upon the Legislature the necessity of enacting a law of which the plaintiff now complains.

When the new constitution was being discussed before the people for adoption or rejection none of its provisions were more clearly

defined or understood than those relating to taxation, and many bank officers and stockholders were earnest advocates for its adoption. And it is a fact that every banking community voted for the adoption of the new constitution, and those communities having the greatest number of banks gave therefor the largest majorities.

In view of these facts it can hardly be contended that the holders of bank stock, especially those who favored the adoption of the new constitution, believed that they held an irrevocable contract under the Hewitt bill.

But it is contended on the part of the plaintiff that section 6 of article 2 of the Hewitt bill was not intended to apply to sections 1 and 4 of the same article—that it has no more significance than if it were placed in article 1 or article 12. If such be the case, it ought to go a long ways towards maintaining the position that the terms of article 2 constituted a contract with the banks. In no other article of the bill, however, is reference made to the act of 1856, and in ascertaining the intention of the legislature, the courts will be governed not only by the language of the act, the position which one section thereof bears to the other—the purposes for which the law was adopted, and also by the history of the bill as contained in the journals kept by the two houses of the General Assembly. The journals of the senate and house of representatives show that the Hewitt bill, which contains twelve articles, was considered more or less article by article, and that article 2 was considered by each house as if it constituted a separate act in itself. Efforts were made to exempt this article from the act of 1856, and without success. Failing in this, provision was attempted to be made that the act of 1856 should not apply to the provisions of article 2 until after the expiration of ten years, and this amendment was likewise defeated. The position of section 6 in article 2, together with the history of its enactment as shown by the journal- of the two houses, clearly indicate the legislative intent.

48 After the passage of the Hewitt bill the plaintiff had the option to accept or reject its provisions. It elected to surrender its contract under its charter and accept those provisions and having so elected this court is of the opinion that it cannot now be heard to say that the repeal of the Hewitt bill restored it to its original status under its charter.

It is ordered that the demurrer to the plaintiff's petition as amended be sustained, to which ruling of the court the plaintiff excepts, and the plaintiff being given leave, but declining to plead further, it is ordered that the petition be dismissed and that the defendants recover their costs herein expended, and to all of which the plaintiff objects and excepts and prays an appeal to the court of appeals, which is granted.

STATE OF KENTUCKY, }
Franklin County, } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, do certify that the foregoing 23 pages contain a true, perfect and complete

transcript of all the pleadings, orders and proceedings, in the case mentioned therein, taken from the records of my said office.

Given under my hand as clerk of the court aforesaid, this 23rd day of February, 1894.

THOS. B. FORD, *Clerk.*

Upon which transcript was endersed the following statement:

DEPOSIT BANK OF FRANKFORT, Appellant,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff, Appellees. } Statement.

The judgment appealed from was rendered on January 27, 1894, and may be found on page 15 of this record. Appeal granted below. No summons to issue.

FRANK CHINN,
For Appellant.

Afterwards, at a court of appeals, begun and held for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 25th day of October, A. D. 1894, the following order was entered:

DEPOSIT BANK OF FRANKFORT
versus } Franklin. (3 Cases.)
FRANKLIN COUNTY, &C.

Ordered that the foregoing cases be continued for oral argument.

49 Afterwards, at a court of appeals, held as aforesaid on the 5th day of March, A. D. 1895, the following order was entered:

DEPOSIT BANK OF FRANKFORT
versus } Franklin. (3 Cases.)
FRANKLIN COUNTY, &C.

By agreement of all of the parties and on their motion, it is ordered that these seventeen cases be heard together, and said causes coming — to be heard were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties, and cities, and laid over until tomorrow for further hearing.

Afterwards, at a court of appeals held as aforesaid on the 12th day of March, 1895, the following order was entered.

These causes again coming on to be heard, were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid on the 1st day of June, 1895, the following order was entered:

DEPOSIT BANK OF FRNKFORT, Appellant,
versus
FRANKLIN COUNTY, &c., Appellee.
} Appeal from Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is, therefore, considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein; which is ordered to be certified to said court.

It is further considered that the appellant recover of the appellees its costs herein expended.

Judges Lewis, Paynter and Guffy dissenting.

Dissenting opinion by Paynter.

Exhibit "C" is in the words and figures as follows, to wit:

Franklin Circuit Court.

FEBRUARY 1, 1896.

DEPOSIT BANK OF FRANKFORT
versus
FRANKLIN COUNTY, &c.
} Judgment.

The plaintiff having heretofore filed a notice accepted by the defendants' attorney, together with the mandate and opinion of the court of appeals in this action, and the defendants by their attorneys waiving the filing of said mandate in the clerk's office as required by law, and consenting to the submission of the case for judgment at this time, it is now ordered and adjudged in accordance with
50 the mandate and opinion of said court in this action, that article 2, of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886 (General Statutes, chap. 92, art. 2.), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11, 1892 (art. 3, chap. 103, acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except its real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had, and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which

was granted in this cause at the commencement of the action be, and the same is now, hereby made perpetual, and the defendants, and each of them, are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise or property of the plaintiff, except upon its real estate.

And it is further adjudged that the plaintiff recover of the defendants its costs in this action expended.

To all of which the County of Franklin excepts and prays an appeal to the court of appeals, which is granted.

A copy.

Attest:

THOS. B. FORD,
Clerk Franklin Circuit Court.

Exhibit "D," heretofore referred to, is in the words and figures following, to wit:

Franklin Circuit Court, January Term, 1896.

Pleas before Hon. James E. Cantrill, judge.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
versus
THE DEPOSIT BANK OF FRANKFORT, Defendant.
} Petition in Equity.

Filed August 22, 1894.

Plaintiffs state that Frankfort is a city of the third class and that plaintiffs are a body politic and corporate, with power to sue
51 and be sued, contract, &c.; defendant is a bank and corporation organized under the laws of the State of Kentucky; such was the status and characters of the said parties hereto in 1891, and has been ever since said date.

The defendant is indebted to the plaintiff in the sum of $4,243.10 taxes, and $299.31 penalty and interest on the '93 and '94 tax at the rate of 10 per cent. per annum from the time the same became due until the present date, said interest amounting at this date to $——. In each of the years 1892, '93 and '94 the board of councilmen of the city of Frankfort levied a tax for city purposes upon all the taxable property of the city, as follows: For 1892, $1.25 per hundred dollars; for 1893, $1.30 per hundred dollars; 1894, $1.40 per hundred dollars. In each of said years the taxable property of defendant within said city was regularly and legally assessed for taxation for city purposes as follows: 1892, notes, money, choses in action and other property of the value of $100,000; 1893, franchise valued at $109,246.31; 1894, franchise valued at $112,278.91, the total tax being $4,243.10.

The assessment for 1892 was made by the tax collector of the city of Frankfort pursuant to section 123 of the city charter, the assessments for 1893 and 1894 were made by the State board of assessment, pursuant to article 3 of the General Revenue Law, each

of said assessments were regularly certified as required by law to the tax collector of the city of Frankfort and returned by him, no property found from which to make the said taxes, penalties, or interest. The tax for 1893 became due July 1, 1893; that for 1894 became due July 1, 1894; no part of said taxes, penalty or interest has been paid, though legally demanded by the tax collector.

Wherefore plaintiff prays that they recover of defendant the sum of $4,243.10 taxes, $299.31 penalty, and interest upon $1,421.20, "1893 tax," from July 1, 1893, until paid, and upon $1,571.90, "1894 tax," from July 1, 1894, until paid at the rate of 10 per cent. per annum and for an attachment against the property of defendant. Plaintiff prays for costs and all proper relief.

HUGH RODMAN,
City Attorney.
W. H. JULIAN,
Attorneys.

Ira Julian, mayor, says he believes the foregoing statements to be true.

IRA JULIAN, *Mayor.*

Sworn to and subscribed before me this the 22nd day of August, 1894.

C. E. JAMES,
D. C. F. C. C.

52 *Equity Summons.*

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon the Deposit Bank of Frankfort to answer, on the first day of next September term of Franklin circuit court, a petition in equity filed against it in said court by the board of councilmen of city of Frankfort, and warn it that upon failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next September term of said court.

Witness, Thos. B. Ford, clerk of the said court, this 22nd day of August, 1894.

THOS. B. FORD, *Clerk,*
By C. E. JAMES, *D. C.*

Endorsed:

Executed on Ben. Milam, president of Deposit bank, by delivering him a copy of the within summons this August 22nd, 1894.

R. D. ARMSTRONG, *S. F. C.*

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *vs.* DEPOSIT BANK OF FRANKFORT, Defendant. } Defendant's Demurrer to the Petition.

Filed September 20, 1894.

The defendant demurs to the plaintiff's petition herein because the same does not state facts sufficient to constitute a cause of action.

FRANK CHINN,
For Defendant.

Franklin Circuit Court, September 27, 1894.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT *versus* DEPOSIT BANK OF FRANKFORT. } Order.

The demurrer to the petition being heard, said demurrer is sustained as to the taxes claimed for 1892, and as to all penalties and interest claimed on taxes for 1893 and 1894, and leave is given plaintiff to amend its petition as to said taxes for 1892 and penalties and interest for taxes of 1893 and 1894, but plaintiff declining to amend, but electing to stand by its petition, the said petition is dismissed so far as it seeks to claim any taxes from defendant
53 for 1892, or any penalties or interest on any taxes for 1893 and 1884, to all of which plaintiff excepts.

And said demurrer is overruled as to the taxes claimed for 1893 and 1894, to which defendant excepts.

And thereupon defendant filed its answer.

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff, *vs.* DEPOSIT BANK OF FRANKFORT, Defendant. } Answer of Defendant.

Filed September 27, 1894.

Par. 1. The defendant, Deposit Bank of Frankfort denies that it is indebted to the plaintiff, Board of Councilmen of the City of Frankfort, in the sum of $4,243.10 taxes, or $299.31 penalty, or in any part of either of said sums alleged as taxes and penalties; denies that it is indebted for interest on the 1893 or 1894 alleged tax at the rate of ten per cent. per annum from the time the same became due until the present date, or at any other rate, or for any other time, and denies that any such alleged interest amounts to $— or any other sum; denies that in each or either of said years 1893 or 1894 this defendant was the owner of any property which

was or is assessable or taxable by the city, and denies that any property of defendant was regularly or legally, or at all, assessed for taxation for city purposes at $100,000 for 1892, or $— its franchise for 1893 at $109,246.31, or its franchise for 1894 at $112,278.91, and denies that the alleged total tax amounts to $4,243.10, as alleged; denies that any of defendant's property was subject or liable for city taxes for 1892, and denies that the tax collector of the city had any right or authority to assess any of defendant's property, or that he did assess it for taxation for 1892; denies that the alleged assessments for 1893 or 1894, or either of them, *was* certified, as required by law, to the city tax collector; and denies that the said alleged taxes or assessments were returned by the tax collector No property found to make said taxes, penalties or interest; denies that the alleged tax for 1893 became due July 1, 1893, or at any other time, or that for 1894 became due July 1, 1894, or at any other time.

Par. 2. Further answering, the defendant says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3, 1863, under which act this defendant was duly organized and constituted as such corporation under its said corporate name, "Deposit Bank of Frankfort," and begun the business of a bank, as authorized by its said charter, 1868,
54 and has since then been continuously engaged in said business under the authority of said act and of the amendments thereof, which are hereinafter set out.

By the terms of said act this defendant was authorized to transact the general business of a bank for a period of twenty years from March 3, 1863.

Said act was amended by an act of said assembly, entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 8, 1871, which amendment provides "that the tax or bonus now paid by said bank (meaning this defendant) in future shall be in full of all taxation. But this shall not apply to the city tax on real estate owned by it." The tax or bonus above referred to, was the fifty cents on each one hundred dollars' worth of its capital stock then paid by the defendant under the laws of the State in force at that date.

By another act of said General Assembly, approved February 23, 1882, entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to defendant by said act of March, 1863, as amended by the act of March 17, 1871, were extended and continued in force for the period of twenty years from March 3, 1882.

Defendant has not owned nor has it had in its possession either in its own right or as agent for any one else, any real estate or any other tangible property, which is or was assessable in kind for taxation for either of the years 1892, 1893 or 1894, for any purpose whatever, either State, county or municipal.

Defendant avers that it continued to pay annually to the State of Kentucky fifty cents on each one hundred dollars' worth of its

capital stock in lieu of all tax or bonus against defendant until the act of the said General Assembly, approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," went to effect. The first section of the second article of that act has this provision:

"That shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required to be taxed by law on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition pay upon each one hundred dollars of so much of their surplus, undivided profits or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The next section of said act gives to the auditor of the State power to investigate the books of the corporation described in the section above quoted, and pronounces penalties upon the officers managing them for refusal to allow investigation of their books for the purposes of assessment. The said act then makes it the duty of the cashier of every incorporated bank whose stocks are taxed by said act to report on the first day of July, each year, the amount of stock and how the same is invested, and pay to the treasurer of the State the amount of tax due from the bank. Section four of said act reads as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in the interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive or release all rights under acts of Congress, or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank, and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

Defendant avers that by its proper corporate authority and with the consent of a majority in interest of a quorum of its stockholders, at a called meeting thereof, held at the said bank on the — day of July, 1887, it did give its consent to the levying of said tax of 75c. on each share of its capital stock equal to one hundred dollars in value and agreed to pay same together with the same tax as is assessed on real estate upon so much of its surplus, &c., as exceeds an amount equal to 10 per cent. of its capital stock, as in said act provided and further agreed to waive and release all rights under its charter to a different mode or smaller rate of taxation. Which consent to and with the State of Kentucky was evidenced by writ-

ing executed by the defendant under its corporate seal, and delivered by defendant to the governor of this Commonwealth on the — day of July, 1887.

Defendant avers that it has annually since the above-recited act became a law, through its cashier, reported under oath on the first day of July of each year, up to and including July, 1892, to the auditor of public accounts the true amount of its capital stock, surplus, undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and has annually, up to and including July, 1892, paid into the treasury of the Commonwealth the whole of the tax due from defendant, as required by said act. On the first days of July, 1893 and 1894, plaintiff tendered and offered to make the aforesaid report to the auditor, and to pay the full amount of tax required by said act for the years 1893 and 1894, to wit, 75c. on the hundred dollars'
56 worth of its capital stock, and upon so much of its surplus, undivided profits or undivided accumulations as exceeded an amount equal to 10 per cent. of its capital stock, the same rate of taxation that was assessed upon real estate for those years, but the said auditor refused to accept the said report and the said payments, upon the ground that he had then no authority to accept the same, claiming that the act of May 17th, 1886, had been repealed by the act of the legislature of Kentucky, which became a law without the approval of the governor, on the 11th day of November, 1892.

Defendant avers that the said act of November 11, 1892, was passed without the consent and against the will of the defendant and in so far as it attempts to repeal the defendant's said contract under the act of May 17, 1886, and impose upon defendant a liability for county and municipal taxation, is an attempt to impair the obligations of the defendant's aforesaid contract under the act of May 17, 1886, and is utterly void and of no effect, being in violation of the constitution of Kentucky, and in violation also of section 10, article 1, of the Constitution of the United States, which prohibits the enactment of laws by any State impairing the obligations of contracts.

Defendant avers that it has complied with all the terms and conditions required of it by the aforesaid act of May 17, 1886, and that it has by the terms of said act, a contract with the State of Kentucky, which is irrepealable by the said State, during the corporate existence of this defendant, and which contract provides, that upon the acceptance by defendant of the terms and conditions of said act, this defendant "and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence" of this defendant.

And defendant avers that in the suit of this defendant against Franklin county heretofore decided by this honorable court it was decided that the defendant's charter, as amended, constituted an irrevocable contract between this defendant and the State of Kentucky, by the terms of which this defendant was required to pay annually to the treasurer of Kentucky fifty cents on each hundred

dollars' worth of its capital stock, in full of all tax or bonus, and that this defendant nor its capital stock could be made liable for any other tax or bonus. Which decision was appealed to the court of appeals of Kentucky, and affirmed by said court. (See opinion in 87 Kentucky Reports, p. 375.) The papers and proceedings in said suit are here referred to as parts hereof, together with the mandate and opinion of the court of appeals on file therewith.

By the terms of the act of November 11, 1892, above referred to, it is provided that all banks and other corporations, besides the taxes to the State treasury therein provided for, should also pay to the counties and cities in which they may be situated or doing business, taxes not only on all their tangible property located in such counties and cities, but also on the "franchise" of such corporations, by which term is meant all the other property and assets of the corporations; that said county and municipal taxation shall be at the same rate at which other property is assessed or taxed.

57

Defendant avers that the property attempted to be subjected to municipal taxation in this suit, is all intangible property, and was reported by defendant to the State board of assessment and valuation, and was by said board estimated and included in said board's assessments and valuation of this defendant's franchise for the years 1893 and 1894.

Defendant alleges that notwithstanding it was compelled to and did pay to the treasurer of Kentucky, on the first day of July, 1892, the full amount of tax due from it to the State under the terms of its said contract with the State, known as the Hewitt bill, the plaintiff is demanding in this suit from defendant taxes for the year 1892 upon the same property upon which defendant paid taxes for that year to the State. And is in addition claiming taxes upon the alleged assessment and valuation of defendant's franchise, the county of Franklin is claiming against the defendant taxes for county purposes for the years 1893 and 1894, which said sums claimed for local taxes, when added to the amount paid by defendant to the State of Kentucky for each of those years will make an amount largely in excess of the amount that could be claimed of this defendant under the said act of May –7, 1886.

Defendant avers the State board of assessment and valuation had no power or authority to make any assessment or valuation of defendant's franchise, and that the plaintiff has no right or authority to demand, collect or receive any taxes from defendant or any penalty or interest for non-payment of any taxes.

Wherefore defendant prays that the petition be dismissed; that the defendant's contract under the Hewitt bill be sustained and declared valid and binding by the court; that the plaintiff be enjoined and restrained from assessing or attempting to assess, and from collecting or attempting to collect from defendant any tax upon defendant's property or franchise, except upon any real estate defendant may hereafter acquire if any; and it prays for costs and for all other proper relief.

FRANK CHINN,
For Defendant.

B. Milam says he is president of the Deposit Bank of Frankfort and he believes the statements in the foregoing answer contained are true.

B. C. MILAM,
President Deposit Bank of Frankfort.

Sworn to before me by B. Milam, this 20th day of September, 1894.

U. KEENAN,
Notary Public.

58 Franklin Circuit Court, February 1st, 1896.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
versus
DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the county of Franklin, &c., were defendants, and in the other the Commonwealth, for the use of said county, was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases: and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case: it is now ordered and adjudged that article 2 of the act of the General Assembly entitled, "An act to amend the revenue laws of Commonwealth of Kentucky," approved May 17th, 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assesed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11th, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the defendant's property, rights of property or franchise except its said real estate, are in violation of and repug-

nant to the Federal Constitution and void; that the board of valuation and assessment, provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action, be, and the same is, now hereby granted, and the defendants be, and each of them
59 *are* perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate; and it is further adjudged that the defendant recover of the plaintiff its costs in this action expended. To all which the Board of Councilmen of the City of Frankfort, except and pray an appeal to the court of appeals, which is granted.

Franklin County Court.

I, Thos. B. Ford, clerk of the said court, do certify that the foregoing 18 pages contain a true, perfect and complete transcript of all the pleadings, orders and proceedings, in the case mentioned therein, taken from the records of my said office.

Witness my hand as clerk aforesaid, this the 15th day of May, 1897.

THOMAS B. FORD,
Clerk Franklin Circuit Court.

Fee $5.00.

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And on the same day, to wit, on May 12th, 1897, the following subpœna in chancery was issued from the clerk's office of the United States circuit court for the district of Kentucky, at Frankfort, upon the filing therein of the foregoing bill of complaint, viz:

The United States of America to the marshal of the Kentucky district, Greeting:

You are hereby commanded to summon Samuel H. Stone, G. W. Long, Charles Finley, County of Franklin and the Board of Councilmen of the City of Frankfort, to appear before our circuit court of the United States of America, of the district of Kentucky, at the Federal court hall, in the city of Frankfort, on the first Monday in June next, to answer a bill in equity exhibited against them in our said

court by Deposit Bank of Frankfort, and this they shall in nowise omit, under the penalty of four hundred dollars, and have then there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court in Frankfort, this 12th day of May, A. D. 1897, and in the 121st year of our Independence.

Attest:

W. G. CHAPMAN, *C. C. C., K. D.*,
By CHAS. N. WIARD, *Deputy.*

MEMORANDUM.—The said defendants are required to enter their appearance in the clerk's office of said court, on or before the
60 first Monday in June, 1897, otherwise the said bill will be taken *pro confesso.*

W. G. CHAPMAN, *Clerk,*
By CHAS. N. WIARD, *D. C.*

And on a day following, to wit, on the 17th day of May, 1897, said subpœna in chancery was returned and filed with the following return endorsed thereon, viz:

Executed on Samuel H. Stone, G. W. Long, Chas. Finley, by delivering to each of them a copy of the within. Executed on County of Franklin by delivering a copy of the within to Ben Williams, county judge. Executed on Board of Councilmen of City of Frankfort by delivering a copy of the within to Ira Julian, mayor of city of Frankfort, all of Frankfort, Ky., this May 15, 1897.

JAMES BLACKBURN, *Marshal,*
Per L. J. DUDLEY, *D. M.*

Fees, $10.

And on a day following, to wit, on May 28th, 1897, the following notice of motion for interlocutory injunction was filed herein, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.

The defendants, City of Frankfort and The County of Franklin, will take notice that the complainant in the above-entitled cause will on Friday, May 28, 1897, at the Federal court room in Nashville, Tennessee, about the hour of 10 a. m., or when the court shall convene, move the court to grant an interlocutory injunction against you from proceeding to collect any taxes upon any valuation by the board of valuation and assessment, for the years mentioned in the bill of complaint; said injunction to restrain you pending this suit and until a final decree can be had; and to be in such terms as the court may direct.

FRANK CHINN,
Counsel for Complainant.

Service of above notice is hereby accepted, May 18, 1897.

IRA JULIAN, *Mayor.*
IRA JULIAN,
Attorney for Franklin County.
B. G. WILLIAMS,
County Judge of Franklin County.

61 And on the same day, to wit, on May 28th 1897, the following plea was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT
against
SAMUEL H. STONE, G. W. LONG, CHARLES FINLEY, COUNTY OF Franklin, and The Board of Councilmen of the City of Frankfort.

The plea of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort, complainant.

These defendants (Board of Councilmen of the City of Frankfort and Franklin County), by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do plead thereto and for plea say: That this court has no jurisdiction of the matters or things set forth and alleged in the said bill; and humbly crave the judgment of the honorable court whether or not they ought to be compelled to make any further or other answer to the bill.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
IRA AND W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

And on the same day, to wit, on May 28th, 1897, the following demurrer was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT
against
SAMUEL H. STONE, BOARD OF COUNCILMEN OF THE City of Frankfort, County of Franklin, and Others. } In Equity.

The demurrer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort, complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth :

That it appeareth by the complainant's own showing by the said bill, that it is not entitled to the relief prayed for by the bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants doth demur thereto;
62 and pray the judgment of this honorable court, whether or not they shall be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed with their reasonable cost in this behalf sustained.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
IRA AND W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

I hereby certify that the foregoing points in my opinion are well taken, and sustained by the law.

IRA JULIAN,
Mayor of the City of Frankfort, Ky.

And on the same day, to wit, on May 28th, 1897, the following demurrer was filed herein by the defendants Stone, Finley and Long, viz :

In the Circuit Court of the United States, for the Sixth Circuit, District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
versus
SAMUEL H. STONE, ETC., Defendants. } No. 275.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Deposit Bank of Frankfort, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants Samuel H. Stone auditor; Charles Finley, secretary of state, and George W. Long treasurer of the State of Kentucky, in the foregoing demurrer, that, in my opinion the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

63 And on the same day, to wit, on May 28th, 1897, the following answer was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT *versus* SAMUEL H. STONE, BOARD OF COUNCILMEN OF THE City of Frankfort, The County of Franklin, and Others.	In Equity.

Answer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort.

In answer to the said bill, without waiving demurrer (plea) to the jurisdiction or the general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort and County of Franklin say, as follows:

'Tis true that, by the settled course of the decisions of the court of appeals of Kentucky, the meaning of the provisions of complainant's charter as to taxation, have been fixed and determined; but not as indicated by complainant's bill herein.

It has been by said decisions fixed and determined that the complainant's charter as to taxation is not and was never an irrevocable contract. The only decision ever rendered by the Kentucky court of appeals, construing the said Deposit bank's charter exemption from taxation is that written and delivered by Judge Bennett, of date June 5, 1888, in case of Commonwealth and Franklin County *vs.* Deposit Bank of Frankfort, referred to in the bill. That decision held that the charter of the Deposit Bank of Frankfort never at any time constituted an irrevocable contract, and that the property of said bank could be taxed according to the legislative will (subject only to the State constitution).

Opinions of the same court, in numerous other cases, by necessary implication, are to the same effect.

The charter of the said Deposit bank, having been originally granted in 1863, for the period of twenty years, same was renewed by act of February 23, 1882, which renewing act *provides* "that the legislature retains the right to alter, amend or repeal the charter and all amendments thereto of said bank." (See Acts 1881–'2, vol. 1, p. 495.)

'Tis under and by virtue of this renewing act that the said Deposit bank now exists and has existed ever since 1883.

As to the judgment of the Franklin circuit court, entered on February 1, 1896, in case of Deposit Bank of Frankfort *vs.* Franklin County, &c., set out in the bill, same is erroneous; an appeal therefrom was prayed and granted and the appeal will be duly prosecuted.

As to judgment of the Franklin circuit court, entered on February 1, 1896, in case of Board of Councilmen of the City of Frankfort *vs.* Deposit Bank of Frankfort, set out in the bill, same is erro-

neous; an appeal therefrom was prayed and granted, and the
64 appeal will be duly prosecuted. This last-named case has never been before the Kentucky court of appeals, and these defendants deny that they or either of them ever agreed that same should be determined or affected by the decision of any other case or cases.

The recital in said judgment, as to any such agreement, is unfounded, is unsupported by either pleading or evidence, and was entered without knowledge or consent of these defendants, or either — them.

These defendants deny that it has ever been fully or finally or at all adjudicated; that complainant is protected by contract from taxation under local levies imposed by these defendants or either of them. These defendants deny that it has ever been fully, or finally or at all adjudicated, that article two (2) of the Hewitt bill ever constituted an irrevocable contract between the State of Kentucky and the complainant, Deposit Bank.

These defendants deny that Samuel H. Stone, Charles Finley, and George W. Long are threatening to or will value the franchise of complainant, or are threatening to or will certify the valuation of said franchise to any county clerk, otherwise than in accordance with the revenue act of November 11, 1892 (cited in the bill herein) as construed by the court of last resort of the State. These defendants deny that said valuation and certification would be illegal, or violative of any contract between complainant and the State, or would cast a cloud upon complainant's franchise, or would cause a multiplicity of suits to be brought against complainant, or would damage complainant in a way that could not be repaired or estimated at common law. These defendants deny that complainant has no remedy at law for the wrongs complained of. Under the laws of Kentucky, complainant may pay the taxes in controversy under protest, and afterwards, in a single suit at law, have its rights adjudicated and enforced. These defendants allege that each of these defendants is solvent and amply able to reimburse complainant for any loss it may, in any event sustain, by reason of the wrongs alleged in the bill.

These defendants deny that they, or either of them, will collect or attempt to collect of complainant, any tax otherwise than in accordance with the said revenue law of 1892, as construed by the court of last resort of the State, or will subject complainant to the harassment of many suits, or will cast a cloud over its franchise of property, or will attempt to enforce any penalty against complainant otherwise than as provided by law.

These defendants allege that, to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers, from executing the State constitution and the present revenue law of the State, as construed by the court of last resort of the State.

These defendants allege that, to grant the injunction prayed for would be (in effect and in fact) to enjoin proceedings in the State

courts for collection of the taxes in controversy, contrary to
65 section 720 of the Revised Statutes of the United States.

The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant, for mandamus to compel the State board of assessment to value and apportion complainant's franchise, and the auditor (Samuel H. Stone), to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to collection of the taxes now in controversy herein between these defendants and complainant.

Besides, complainant's bill itself sets forth the two cases of Deposit Bank of Frankfort *vs.* Franklin County, etc., and Board of Councilmen of the City of Frankfort *vs.* Deposit Bank of Frankfort, which are now pending, and will be prosecuted to judgment by the court of appeals of Kentucky and by the Supreme Court of the United States, if the said prosecution be not prevented by the injunction prayed for herein. Each of the said three cases, now pending in the State courts, involves the question of whether or not article two (2) of the Hewitt bill constitutes an irrevocable contract, and consequently involves the right of these defendants to all of the taxes in controversy herein.

These defendants submit that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and pray that the said bill be dismissed with cost.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
IRA & W. H. JULIAN,
For Defendants, Board of Councilmen of the City of Frankfort and Franklin County.

And on the same day, to wit, on May 28th, 1897, the following order was made and entered herein, viz:

United States Circuit Court for the Sixth Circuit, District of Kentucky, at Frankfort.

THE DEPOSIT BANK OF FRANKFORT
versus
SAMUEL H. STONE, ETC.

Now this day came the complainant by Frank Chinn, counsel, and filed notices herein duly served, and thereupon moved the court to grant an interlocutory injunction against Samuel H. Stone, Geo. W. Long and Chas. Finley, enjoining and restraining them from making any assessment or valuation of franchises or intangible property of the complainant under the act of November 11, 1892. And against the defendants, The Board of Councilmen of the City of Frankfort and said County of Franklin, from attempting to collect any taxes thereon.

And the said Board of Councilmen of the City of Frankfort and Franklin County appeared by Ira Julian and J. H. Polgroves,
66 counsel, and objected to the said motion. And the same having come on to be heard was argued and submitted, and the court, not being advised, takes time.

And thereupon at the same time came the defendants Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their demurrers to the bill of complaint; and also came the Board of Councilmen of the City of Frankfort and the County of Franklin, by Ira Julian and J. H. Polgroves, and filed herein their demurrers to the said bill of complaint, and by stipulation, without waiving the same, their answers.

And the said cause, having come on to be heard upon the said demurrers and argued by counsel, was submitted, and the court, not being advised, takes time.

WM. H. TAFT,
Circuit Judge.

May 28, 1897.

67 On a day following, to wit, on the 5th day of July, 1897, the following entry was made herein at rules, viz:

DEPOSIT BANK OF FRANKFORT
vs.
S. H. STONE ET AL.

This day came the complainant, The Deposit Bank of Frankfort, by Frank Chinn, Esq., its counsel, and filed its replication to the joint answer of the Board of Councilmen of the City of Frankfort and Franklin County.

Said replication is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendant.

Replication of the Complainant to the Joint Answer of the Board of Councilmen of the City of Frankfort and Franklin County.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable

court shall direct, and humbly prays as in and by its said bill it hath already prayed.

FRANK CHINN,
Solicitor for Complainant.

68 And on a day following, to wit, on the 9th day of May, 1898, the following order was made and entered herein, viz:

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

Came this day the complainants in the above-styled causes, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainants in said several cases also filed herein notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions, and also came the City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties, and, the court being advised, it is now ordered, adjudged, and decreed that the several defendants in the above-styled cases are enjoined and restrained as follows: The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainants or any of them for the years 1895, 1896, 1897, and 1898 or any of them.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

(Signed) WM. H. TAFT,
Circuit Judge.

Said supplemental bill filed herein on May 9th, 1898, was and is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
S. H. STONE ET AL., Defendants.
No. 275. Supplemental Bill.

69 The Deposit Bank of Frankfort for supplemental bill herein and reiterating all the averments in its original bill of complaint contained to have the same effect as if set out in full herein, and relying upon the same alleges that the defendants Sam'l H. Stone, Charles Finley, and George W. Long are threatening

and, unless restrained by this honorable court, will proceed to value the franchise of the complainant under the act of November, 1892, for the year 1898, and will certify such value to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such valuation, certification, and assessment thereunder will be illegal and in violation of the complainant's contract in the original bill of complaint set out, and unless restrained by this honorable court the defendant County of Franklin and Board of Councilmen of the City of Frankfort will attempt to levy and collect taxes based upon the apportionment of valuation found by the said board of valuation and assessment for the year 1898, in addition to the years 1894, 1895, 1896, and 1897, described in the said bill of complaint.

The premises considered the complainant prays that the said Samuel H. Stone, Charles Finley, and George W. Long be perpetually enjoined and restrained from assessing the value of the complainant's capital stock for the year 1898 or for any other year, and that the defendants Samuel H. Stone be enjoined from *any* certifying such valuation to the said county and board of councilmen, and that the said county and board of councilmen of the city of Frankfort be enjoined and restrained from endeavoring to collect any taxes upon such valuation for the year 1898; and it prays as in its original bill and for all proper relief.

FRANK CHINN,
Solicitor for Complainant.

Affiant B. Milam says he is president of the complainant, Deposit Bank of Frankfort; that the facts stated in the foregoing supplemental bill, in so far as stated from his personal knowledge, are true, and so far as stated from information, he believes them to be true.

BENJ. C. MILAM.

70 Subscribed and sworn to before me this 7th day of May, 1898, by Benjamin Milam.

W. G. CHAPMAN,
Cl'k U. S. Cir. Ct.

Said notice of motion filed herein on May 9th, 1898, is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
S. H. STONE ET AL., Defendants.
} No. 275. Notice.

The defendants to the above-entitled bill of complaint will take notice that on Monday, May 9th, 1898, the complainant will move, before the Honorable W. H. Taft, circuit judge, at his chambers or

court-room, in the Federal building, at Cincinnati, Ohio, about the hour of two p. m., to file herein an amended and supplemental bill of complaint, and for an order of injunction or restraint against the defendants in accordance therewith.

Respectfully, DEPOSIT BANK OF FRANKFORT,
By FRANK CHINN, *Its Solicitor.*

Service of above notice is accepted May 7th, 1898.
IRA & W. H. JULIAN,
Att'y for Franklin County and City of Frankfort.
W. S. TAYLOR,
Attorney General of Kentucky.

On a day following, to wit, on the 25th day of June, 1898, the following order was made and entered herein, viz:

DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE ET AL.

71 The court being sufficiently advised, files its opinion herein.

It is therefore adjudged, ordered, and decreed as follows:

First. That the demurrer of the defendants Board of Councilmen of the City of Frankfort and Franklin County and of the defendants Samuel H. Stone, G. W. Long, and Charles Finley be, and the said demurrers are hereby, overruled; to which the said defendants each except.

Second. The plea of defendants Board of Councilmen of the City of Frankfort and Franklin County to the bill of complaint is overruled; to which the said defendants except.

Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants, Board of Councilmen of the City of Frankfort and Franklin County. The defendants County of Franklin and City of Frankfort offered to file an amended answer; to which complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order.

And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to wit:

Exhibit "A," being the record of the proceedings in the case of Deposit Bank of Frankfort against Franklin County and John W. Gaines, sheriff.

Exhibit "B," being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin County and R. D. Armstrong, sheriff.

Exhibit "C," being judgment of Franklin circuit court, entered February 1st, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

Exhibit "D," being record of the proceedings in the case of Board

of Councilmen of the City of Frankfort against Deposit Bank of Franklin.

The defendant The County of Franklin read on the hearing its answer, and the defendant Board of Councilmen of the City of Frankfort read on the hearing the record of the proceedings in
72 the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, &c., and also read its answer.

And it is now adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and George W. Long be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11th, 1892, for the years 1895, 1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Franklin county or to any officer of the board of councilmen of the city of Frankfort or the county of Franklin; and the defendants County of Franklin and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuations; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

It is further adjudged, ordered, and decreed that by reason of the several pleas of *res adjudicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11th, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property,
73 or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article 2 of the said act approved May 17th, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

And came defendants and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed

the appeal, and orders the assignment of errors to be filed and fixes the appeal bond at one thousand dollars.

June 25th, 1898.

(Signed) WM. H. TAFT,
Circuit Judge.

Said opinion, filed herein on June 25th, 1898, is in words and figures as follows, viz:

74 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, CITY of Louisville, County of Franklin, and The Board of Councilmen of the City of Frankfort, Defendants. } No. 6555.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

This is a bill in equity filed by the Bank of Kentucky, a corporation organized under the laws of Kentucky, to restrain the assessment and collection of certain taxes for the benefit of the defendants The City of Louisville, The County of Franklin and The City of Frankfort. Samuel H. Stone is the auditor of public accounts for the State of Kentucky, Charles Finley is the secretary of state, and George W. Long, is the State treasurer; and these three officers, also made defendants herein, constitute the State board of valuation and assessment. The bill avers that the complainant has an irrevocable contract with the State of Kentucky, by which taxes are limited to a certain amount per share upon its stock, and the usual local taxes on its real estate, but that the revenue act of the legislature of Kentucky passed November 11, 1892, impairs that contract and is in violation of the Constitution of the United States.

The case made by the bill is as follows:

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky approved February 2, 1834. The term of its corporate existence was fixed at thirty years from the date of its incorporation. It was authorized to do a banking business and to issue bank notes; it was directed to keep its principal office of discount and deposit in the city of Louisville and to locate a branch at Frankfort, the seat of the government, to aid and manage the fiscal affairs of the State. The State was
75 given a voice in the control of the bank by a provision that the government of the Commonwealth should appoint three of the bank's directors.

By the fifteenth section of the original charter, it was provided that the bank should pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which should be in full of all tax and bonus, provided that the legislature might increase or diminish the same;

but that at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank. By an act of February 12, 1836, the tax was increased to 50 cents a share. By the act of February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from October 1, 1864, but this extension was declared to be granted on certain conditions. The extension was duly accepted by complainants.

On March 18, 1886, an act called the Hewitt act was passed to make taxation equal and uniform. It provided that all State and national banks should pay into the State treasury seventy-five cents on each share of their capital stock and should in addition, pay into said treasury on their surplus, undivided profit and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as that assessed on real property; and that the said taxation should be in full of all tax—State, county and municipal—except that the real estate and buildings, owned and used by the banks in conducting their business should not be exempted from taxation for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed.

The fourth section of the act provided that each of the banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, might give its consent to the levying of said tax, and agree to pay the same and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation, which consent and agreement to and with the State of Kentucky should be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth before the next meeting of the legislature; and said agreement and consent being delivered and in consideration thereof, such bank and its
76 shares of stock should be exempt from all other taxation whatsoever, so long as said taxation should be paid, during the corporate existence of the bank.

On June 25, 1887, within the proper time, at a stockholders' meeting by a vote of the stockholders, the complainants gave their consent to the levying of said tax, and to the waiver and release of all right under their charter to a different mode and a lower rate of taxation, and this consent was duly certified by the governor of the Commonwealth. Since 1887 the complainants have paid this tax under the so-called Hewitt act.

On November 11, 1892, the legislature of Kentucky, under a constitution adopted in 1891, passed an act dealing with the assessment of certain corporations, among others, banks. The act provided that every incorporated bank should, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise might be exercised. The auditor, treasurer and secretary of state are by said act constituted

a board of valuation and assessment for fixing the value of said franchise. The board is required to apportion the value of the franchise among the several taxing jurisdictions entitled to a share of such tax, and for such apportionment the auditor of State is required, at the expiration of thirty days, to certify to the county clerks of the counties where any portion of the corporate franchise of such banks shall be liable to local taxation the amount thereof liable for county or State taxes; and the county clerk is required to certify the same to the collecting officer of the county and city for collection. If a bank fails to pay its taxes, penalties and interest after thirty days' notice, it is to be deemed guilty of a misdemeanor and upon conviction is to be fined $50 for each day during which the tax remains unpaid—to be recovered by indictment or by civil action—of which the Franklin circuit court shall have jurisdiction. The bill avers that the amount of tax which the complainant would have to pay to the board of valuation and assessment over and above what it has to pay under the Hewitt law would be more than $20,000 per annum.

The complainant avers that the defendants are conclusively estopped by previous litigation to contend in this suit that the complainant has not an irrevocable contract with the State limiting its taxes to those fixed in the Hewitt act; that on February 28, 1894, the complainant filed in the circuit court of Franklin county,
77 that being a court of general jurisdiction, its petition against the county court of Franklin and R. D. Armstrong, sheriff of said county, setting forth the contracts between complainant and the State in regard to taxes under its original charter, and under the Hewitt law, claiming that no taxes could be collected from the complainant except under the Hewitt law during its charter life, and further that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of its contracts aforesaid; that the prayer of the petition was that the court should establish the contracts and should enjoin Franklin county and Armstrong, its sheriff, from attempting to collect any taxes contrary to said contracts; that a decree was entered upon this petition in the Franklin circuit court, adjudging that the act of November 11, 1892, did not violate any contract between the complainant and the State, and the petition for injunction was denied; that the complainant thereupon appealed from the decree to the court of appeals of Kentucky, which court reversed the judgment of the lower court and remanded it to the circuit court of Franklin county for judgment in conformity to its opinion; that the circuit court entered the following judgment on January 21, 1896, which is still in full force and effect:

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (Gen-

eral Statutes, chapter 92, article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and the act of November 11, 1892 (article 3, chapter 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and
78 has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now, made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be, and each of them *are*, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property of the plaintiff, except taxes upon its real estate in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended;"

that a similar suit was filed in the same court by the complainant against the Board of Councilmen of the City of Frankfort to enjoin it from attempting to collect municipal taxes on the apportioned valuation of the franchise certified to the city by the board of valuation and assessment, setting forth exactly the same objection to the validity of the tax; that the court entered a decree for the defendants, and an appeal was taken to the court of appeals, which reversed the decree of the circuit court and directed that a new decree be entered in conformity with the opinion transmitted; that thereupon the Franklin circuit court entered a judgment enjoining the city of Frankfort in exactly the same terms as that already set forth above in the case against the county court of Franklin; that in February, 1894, the city of Louisville, claiming to act under authority given it by an act of the Kentucky legislature affecting the government of cities of the first class, of which the city of Louisville was the only one, passed an ordinance requiring the banks of the city of Louisville to pay to the city an annual tax of 4 per cent. upon their annual gross earnings; that the complain-

ant failed to pay the tax and thereupon, under the act referred to, a warrant was sued out in a criminal prosecution against the complainant in the city court of Louisville; that the complainant then, in the manner provided by law, filed its petition in the Jefferson circuit court for a writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in apt terms its incorporation, its original charter, the extensions thereof, the passage of the Hewitt law, the contract entered into in conformity therewith, and claiming the benefit of its said contractual relations with the State; that the petition alleged that the said ordinance of the city of Louisville was void because impairing the obligation of the complainant's con-
79 tract, and any authority given to the city of Louisville to pass such ordinance was likewise void for the same reason, and prayed that the judge might be prohibited from taking jurisdiction of the proceeding against the complainant for a violation of the ordinance; that issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville; that the city of Louisville, though not a party in name, in that court, was, in reality, the party defendant and appeared by counsel; that the court found the issues in favor of the complainant, entered a judgment accordingly, and, thereupon, the defendant, The City of Louisville, caused an appeal to be taken in its name from the judgment to the court of appeals of Kentucky, in which court the cause was argued by counsel for the city of Louisville and for the Commonwealth of Kentucky; that the court of appeals affirmed the judgment of the Jefferson county circuit court, and sent a mandate of affirmance to the court of original jurisdiction, where it was duly entered; that the averment of the petition in that case upon which issue was joined and which presented the only point for adjudication was as follows:

"The plaintiff states that the said act granting a charter to cities of the first class, and the said ordinance passed in pursuance thereof, are both unconstitutional and void, in that they impair the obligation of the contract between the plaintiff and the Commonwealth of Kentucky, as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the revenue law of May 17, 1886, and are a violation of the Constitution of the United States, and especially the section thereof, providing that no State shall pass any law impairing the obligation of a contract.

The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance as aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter, and the several acts extending and continuing the same, which were accepted and acted upon by said bank, constituted a contract between the State on the one part and the bank and its stockholders on the other part, continuing during the legal existence of the corporation and the State, never had, and has not now, the right to repeal or annul said agreement or the rights conferred by said charter, limiting the right of the State to impose a tax on said bank without the consent of said bank.

The plaintiff further states that it did give its consent to said act of May 17, 1886, and did, upon the considerations therein recited, waive and release its right under its charter to a different mode or a smaller rate of taxation than is therein provided. Said consent and waiver was made on the belief that the said act was in-
80 tended to put in operation a permanent legislative policy governing the taxation of all banks then existing, which would accept its provisions, to endure at least during the corporate existence of all said assenting banks. The plaintiff submits that such is the true construction of said act, and that said act and its acceptance constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments."

That the petition was demurred to, the demurrer was overruled, and judgment given for plaintiff, and the police judge was prohibited from proceeding with the criminal prosecution against complainant.

The suits of the Bank of Kentucky against the Franklin county court, against the board of councilmen of the city of Frankfort, and against the judge of the police court of the city of Louisville, were argued and heard at the same time by the court of appeals of Kentucky, and were decided by that court in one opinion, filed June 1, 1895, and reported as the bank-tax cases, 97 Ky. Rep., 590. A majority of the court of appeals held that the complainants here had an irrevocable contract with the State, and all its agencies, by virtue of its charter and the extensions thereof, and its due acceptance of the provisions of the Hewitt act and that the act of 1892 impaired the obligation of that contract in violation of the Constitution of the United States, and was, therefore, null and void.

The 19th clause of the bill in the case at bar is as follows:

"The complainant says that the defendants, Samuel H. Stone, Charles Finley and George W. Long, are threatening and unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896 and 1897 and certify such value to the county clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville and to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such assessments will be illegal; in violation of the complainant's contract, as has been heretofore in causes between the complainant and the said several defendants adjudged and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise; cause a multiplicity of suits to be brought against complainant and damage it in a way that cannot be repaired or estimated at the common law; and from these threatened wrongs the complainant has no remedy at the common law, but its only remedy is by a bill in equity; and unless restrained by this honorable
81 court, the defendants, The City of Louisville, The County of Franklin and The Board of Councilmen of the City of Frankfort, will attempt to levy and collect taxes based upon the apportion-

ment of the valuation found by said board of valuation and assessment, and will subject the complainant to the embarrassment of many suits, and cast a cloud upon its franchises and property and an effort will be made to enforce penalties against this complainant, as hereinbefore set out."

It further appears that after the decision in the bank-tax cases, 97 Ky., 590, the personnel of the court of appeals changed somewhat, and when a new series of bank-tax cases, presenting the same question, came to that court, a different conclusion was reached. A majority of the court overruled the prior decision, rendered in 1895 and held that the banks, by accepting the provisions of the Hewitt act, did not acquire any contract rights with the State with reference to the mode or right of taxation and that the act of November 11th, 1892, was valid. *Deposit Bank v. Daviess County*, 39 S. W. R., 1030.

The defendants, The Franklin County Court, and The Board of Councilmen of the City of Frankfort, have filed a general demurrer to the bill. The defendants, Stone, Finley and Long, and The City of Louisville, have filed a demurrer, first, to the jurisdiction, and second, for want of equity. By stipulation of counsel for the complainant, defendants were also permitted to file answers without waiving demurrer. The only averment of the answer that is material, is as follows:

"These defendants allege that to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers from executing the State constitution and the present revenue law of the State as construed by the court of last resort of the State. These defendants allege that to grant the injunction prayed for would be (in effect and in fact) to enjoin all proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the State board of assessment to value and apportion complainant's franchise and the auditor to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to collection of the taxes now in controversy herein between these defendants and the complainant."

The cause came on for hearing upon the demurrer to the bill, and upon a motion for a preliminary injunction.

82 TAFT, circuit judge, delivered the opinion of the court:

The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids a State to pass a law impairing the obligation of a contract. The case is, therefore, one arising under the Constitution of the United States and as it

involves more than $2,000 it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of the court? It is well settled that in the Federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void and independently of every other consideration. See *Rich v. Braxton*, 158 U. S., 375, 405. It must appear from the special circumstances averred that there is no adequate remedy at law and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. *Ogden City v. Armstrong*, 168 U. S., 224, 236; *Pacific Express Co. v. Seibert*, 142 U. S., 339; *Allen v. Pullman's Palace Car Co.*, 139 U. S., 658, 661; *Shelton v. Platt*, 139 U. S., 591; *Union Pacific R'y Co. v. Cheyenne*, 113 U. S., 516, 525; *Hannewinkle v. Georgetown*, 15 Wall., 547; *Dows v. Chicago*, 11 Wall., 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may under the duress of the threatened trespass, pay the taxes alleged to be illegal and then sue the city of Louisville, the county of Frankfort, and the city of Frankfort to recover them back. *Railroad Company v. Commissioners*, 98 U. S., 541. It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy as there was in Tennessee in the case of *Shelton v. Platt*. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint, they may resort to a simple suit at law for them. In that case, the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate, but under the pro-
83 visions of the revenue law of Nov., 1892, we do not think it is. By that law the bank on failing to pay the taxes assessed, according to its provisions within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent. and to a fine of fifty dollars a day for every day of the delinquency to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay fifty dollars a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant because by the terms of the act they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk which is absent in an action in equity. The remedy at law is, therefore, entirely

inadequate. *Smyth v. Ames*, 169 U. S., 466, 518; *Pacific Company v. Seibert*, 44 Fed. Rep., 315. It is no answer to say that the payment of the tax and the action to recover it back constitutes an adequate remedy because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer by not distraining may wholly deprive the tax-payer of this remedy. Indeed, the counsel for the city of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity, upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 210, 215; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S., 806, 811. And the application of the rule depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall., 74, 79.

The practice of the State courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity jurisdiction in the Federal courts in such cases; for it is settled that if
84 a case "in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction." *Smyth v. D. Ames*, 169 U. S., 466, 516. But it is worthy of note that the court of appeals of Kentucky has held that in the absence of a statute allowing an action to recover back from the State taxes illegally collected, the remedy by injunction is the only adequate one. In *Gates v. Barnett*, 79 Ky., 295, 296, the court in a suit to enjoin a distraint upon certain tobacco for the collection of taxes said:

"The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this State that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon the ground of the inadequacy of the remedy at law. The officer acting in good faith and under color of right is justified by his process, and is not liable as a trespasser; and as a suit would not lie against the State directly, the only complete remedy is by injunction."

It is by no means clear that distraints or threatened distraints against a bank in view of the character of its business may not involve such serious detriment to its business and incidentally to the public, as to justify equitable intervention. In the case of *Lenaure County Savings Bank v. The City of Adrian*, 66 Mich., 273, 276, a levy upon, and seizure of the bank furniture and fixtures was in progress when an injunction was issued.

Mr. Justice Campbell, speaking for the court, said:

"No point was made in the pleadings or on the argument against the jurisdiction of equity in this case. As the bank was not liable to taxation at all on its personal property and the levy was made in such a way as to directly interfere with its business, the case comes within the analogies of the cases represented by *Osborn v. Bank of U. S.*, 9 Wheat, 738, from which it cannot be readily distinguished. The court below does not appear to have doubted the jurisdiction, although deciding in favor of defendants on the merits."

In *Union Pacific Railway Co. v. Cheyenne*, 113 U. S., 516, 525, Mr. Justice Bradley said:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed, have been frequently sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must
85 be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied."

The interference with the business of a bank and the injury to its credit caused by a distress against its personal property would seem to be a mischief equally hard to be remedied by a mere suit to recover the money back when thus collected.

If it were necessary we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it? In *Osborn v. Bank of United States*, 9 Wheat, 738, 742, Chief Justice Marshall said: "The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege." See also *Morris Canal and Banking Co. v. Jersey City*, 1 Beasley, 227; High on Injunction, sec. 530. In addition to the suits for future taxes there is also danger of harrassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract it may have equitable relief.

The second question in the case is that raised by the averment of former adjudication. The case of *New Orleans v. Citizens' Bank*,

167 U. S., 371, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' bank, in New Orleans, was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the district court of New Orleans to enjoin the collection of a tax
86 against it, on the ground that it had by legislative contract, exemption from the same. The district court sustained the claim, and enjoined the collection of the tax. A second suit, brought to enjoin another year's taxes, resulted in a similar judgment. Some years later the city of New Orleans having attempted to collect a tax, for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the circuit court of the United States for the eastern district of Louisiana, to enjoin the officers of the State and the city from proceeding to collect the tax and set forth the former adjudication as a conclusive estoppel upon the defendants as to the point of the previous litigation, namely, that there was a contract between the State and the bank, forbidding such taxation. The causes of action were not the same in the case brought in the Federal court and the cases adjudged in the State courts, because they involved taxes for different years, but the thing adjudged, to wit, the existence and binding effect of the contract for the exemption from the particular taxation was the same. The Supreme Court of the United States in this case held that the city of New Orleans and the State taxing authorities were conclusively estopped by the judgments in the State courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation and held that the contract having been thus established, the bank was entitled to relief from a violation of that contract by any acts of the State officials acting under the authority of State legislation. It had, theretofore, been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a State or any agency of the State for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court, in a most elaborate opinion, said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore, *res judicata*, cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the
87 elemental rule, stated in the text books and enforced by many decisions of this court." * * *

"It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were

for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case before us there can be no question, from the statement of facts and an examination of the records in previous cases as set forth therein, that the question which was adjudged in them was the identical question presented in the same way and for the same purpose as in the case at bar, to wit: whether there was a contract between the bank and the State which forbade the imposition of higher taxes than those imposed under the Hewitt act. It was distinctly adjudged, in behalf of the complainant against Franklin county and the city of Frankfort, by the court of appeals by the decision rendered in 1895, and by a mandate issued from that court to the Franklin circuit court, that such a contract in fact existed and rendered null and void the provisions of the revenue act of November 11th, 1892, under which the defendants now seek to impose taxes upon the complainant.

It is vigorously pressed upon us, however, that the judgment in the prohibition suit cannot be relied upon by the complainant bank to establish the existence of a contract of exemption between it and the city of Louisville, because there is nothing in the record to show that the issue made by the demurrer to the petition in that suit was the existence of such an exemption and its violation. Neither the mandate of the court of appeals nor the judgment of the Jefferson court states the ground for holding the ordinance void. It is said that some thirty days before the decision of the prohibition case by the court of appeals, that court, in *Levi v. City of Louisville*, 97 Ky., 394, held that the city of Louisville had no power under the constitution to substitute a license tax for *ad valorem* tax on personal property, and that this ruling must have led to overruling the demurrer to the petition in the prohibition suit, because it necessarily rendered the license tax upon the banks void. The Levi case was a suit by an owner of real estate to enjoin the collection of an *ad valorem* tax on his land on the ground that the city had not imposed such a tax on personalty, but had substituted therefor a license tax upon it,
88 and so had discriminated in favor of personal property and against realty. The court of appeals held that it was the duty of the city to impose an *ad valorem* tax on personalty, and that it could only impose a license tax on a business in addition to an *ad valorem* tax on property. We confess we cannot see how this decision would have determined the question at issue between the complainant bank and the city of Louisville, in the prohibition suit. There was nothing in the petition for prohibition to show that the license tax was a substitute for an *ad valorem* tax upon the personal property of the bank. There was nothing to show that the city of Louisville had not, under the revenue act of 1892 assessed an *ad valorem* tax on the bank's personalty. The license tax was graduated by a percentage, not of the bank's personal property, but of the bank's gross receipts, and did not, therefore, purport to

be a taxation on its personal property. The petition was not, therefore, demurrable under the Levi case. When we further consider that the sole ground stated in the petition for a prohibition was that the license tax was void, because it impaired the bank's contract of exemption and so violated the Constitution of the United States, and we find that this was the sole ground considered by the court of appeals in its opinion, we can have no doubt what was the point adjudged.

The case of *New Orleans v. The Citizens' Bank*, 167 U. S., 371, is relied on to support the contention that a judgment that a license tax violated the bank's contract of exemption cannot be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the New Orleans case, the language of the exemption was, "The capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter." It was held that a judgment holding this to be a valid exemption and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract so as to exempt capital and business property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock and
89 upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that "*such bank and its shares of stock* shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, *a fortiori* does it prevent a direct tax upon its property, tangible and intangible? The tax imposed by the revenue act of 1892 was called a franchise tax, but it has been held, both by the Supreme Court of the United States and of the court of appeals of Kentucky to be in fact nothing but an *ad valorem* property tax. *Henderson Bridge Company v. Kentucky*, 166 U. S., 150; *Adams Express Co. v. Kentucky*, 166 U. S., 171; *Henderson Bridge Company v. Commonwealth*, 99 Ky., 623.

Nor can there be any doubt that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin County, The City of Frankfort and The City of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated

value of the franchise and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by the prior litigation, certainly the agencies acting for them under the law are equally bound. In this light the board of valuation and assessment is in respect to the former judgments privy to the city of Louisville and county of Franklin and the city of Frankfort. There is no dispute that the county of Franklin and the city of Frankfort were parties to the respective suits pleaded as former adjudications. The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its
90 jurisdiction, because proceeding under a void law. To that writ of prohibition, the city of Louisville was not formally made a party in the Jefferson circuit court, but the litigation before the Jefferson circuit court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson circuit court to the court of appeals, the appellants were The City of Louisville and The Judge of the Police Court. By this means the city of Louisville formally made itself a party to the record and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution it might have been attached for contempt. Bacon's Abridgement, prohibition M. It is urged that the litigation was really a criminal litigation and that a judgment in a criminal case cannot be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil and the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. *Armstrong v. Taylor County Court*, 15 W. Va., 190; *Walton v. Greenwood*, 60 Me., 356. However this may be, the city of Louisville, admitting its interest, did appear as appellant and so made itself a party to the whole litigation, and was so treated by the court of appeals of Kentucky. As the parties to this litigation are the same as those in the former suits except the board of assessment which is in privity with the other defendants and as the point adjudged is exactly the same, we can see no escape from the conclusion that the defendants here are estopped from asserting that the complainant has not a contract exempting it from any other taxation than that provided in the

Hewitt law, and, therefore, that the act of November 11, 1892, is an infringement of that contract and impairs its obligation in violation of the Constitution of the United States.

It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does not arise under the laws or Constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation,
91 the obligation of which the city of Louisville, the city of Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State are seeking to impair. The defendants deny the existence of such a contract and we must determine whether, as between the parties such a contract exists. It appears that as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties, but it does not free the court from the obligation to enforce the Constitution of the United States, in favor of the complainant by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of *New Orleans v. Citizens' Bank*, 167 U. S., 371, which presented precisely this aspect was begun in the circuit court of the United States and was carried to the Supreme Court of the United States and the jurisdiction by the circuit court was not even questioned.

It is argued that the Federal courts, in considering the question whether a State law impairs the obligation of a contract, will not accept as conclusive the construction which the supreme court of the State has put upon its constitution or laws in determining the existence of a contract and its violation. This is true and is settled by a long line of authorities. *Shelby Co. v. Union Bank*, 161 U. S., 149; *Mobile & Ohio R. R. Co. v. Tennessee*, 153 U. S., 492, '3; *Bryan v. The Board of Education*, 151 U. S., 650; *L. & N. R. R. Co. v. Palmes*, 109 U. S., 256; *Douglas v. Kentucky*, 168 U. S., 488, 502, and cases cited. But the rule has application only where the judgment of the State court is under direct review or in cases in which the opinion of the State court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the State court between the same parties is pleaded or is offered in evidence in a subsequent suit in a Federal court as *res judicata* binding the parties. The State court is as much bound by the Constitution of the United States as a Federal court and is vested with as complete jurisdiction in causes otherwise within its cognizance to decide between the parties before it whether a statute of the State impairs the obligation of a contract. *Robb v. Connolly*, 111 U. S., 624, 637. Such decision embodied in a judgment unreversed is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State decisions, and its obligations to respect the bar of *res*
92 *judicata* as between the parties, is quite clearly made in *Douglas v. Kentucky*, 168 U. S., 488, 503, although not expressly

commented on. In that case, after maintaining in the strongest terms the obligation of the Supreme Court to exercise an independent judgment in determining the existence of a contract and its impairment, and after declining to follow a prior decision of the State court upon the subject, the court considered as a distinct matter the question whether the point had not been formerly adjudged in a State court between the same parties, and pointed out with much care that the point of the former adjudication was not the same as that then before the court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of *res judicata* has no application in the Federal courts when the former adjudication is that of a State court upon a question arising under the Federal Constitution.

One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a State court by the city of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration and is pending, and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the State court. We do not think so. It is settled that the pendency of a suit in a State court is no bar to a suit upon the same subject-matter in this court. *City of North Muskegon v. Clark*, 22 U. S. App., 522, and cases therein cited. The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. We do not enjoin any suit at all, by our order; all we do enjoin is the certification of the taxes. That does not require the defendants to disobey an order of any other court or restrain their prosecution of a suit therein.

The demurrer to the bill must therefore be overruled and the preliminary injunction prayed for must issue.

93 Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6568.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE and Others and THE CITY of Louisville, Defendants. } No. 6567.

Before Harlan, circuit judge, and Taft and Lurton, circuit judges.

Heard on demurrer to the bill and motion for preliminary injunction.

The Bank of Commerce is a State bank of Kentucky, organized under a statute of that State, approved February 10, 1865. It is

situated in Louisville, and when the Hewitt act was passed to amend the revenue laws of the Commonwealth of Kentucky, May 17, 1886, it duly accepted the terms of that act before the meeting of the next legislature of Kentucky. One of the grounds relied upon in the bill was that of *res judicata*. The averments of the bill upon this point were contained in paragraphs 4 and 5 of the bill, as follows:

"Paragraph 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator, and of every other bank and trust company in the city of Louisville, a tax equal to 4 per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville, in behalf of the city, against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of
94 Louisville, including your orator, upon the other, that pending the litigation which, by the agreement, was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

"First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the Hewitt bill. This sum, it was provided, should be an actual payment, and not be repaid under any circumstances, but its payment was not in any manner or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

"Second. In addition to making the above payments, the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum, which, added to said payment, would equal 4 per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations, agreeing to repay the same with interest at 4 per centum per annum; and, if it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

"Third. It was agreed that the banks or companies selected to

test the questions involved would each lend the sinking fund a sum equal to 4 per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

"Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such action as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them, or any of them, for doing business without license.

"The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked "A."

The Exhibit "A," referred to is as follows:

"SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist
95 the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement, whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies, who will be subject to the payment of the license fees, if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the Hewitt bill. This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved shall each lend the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum

per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This agreement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right- and liabilities of the parties in the premises and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

96 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville:

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of said board and the mayor of the city of Louisville on one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphreys & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit: Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit: Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had

accepted the provisions of the Hewitt bill, would fall in class B, named above.

Third. In pursuance of that agreement the sinking fund commissioners, caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof
97 under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners, of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved.

C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Louisville.

A true copy.
Attest:

HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN."

So much of the certified transcript of the judgment in the proceedings in prohibition as is of importance has been set forth in the report of the case of the Louisville Banking Company against the same defendants.

TAFT, circuit judge, delivered the opinion of the court:

In the case of the *Bank of Kentucky v. Stone*, just decided, we have held that by the judgment of the court of appeals and of the Jef-

ferson circuit court in the prohibition suits, the city of Louisville was estopped to deny as against the parties to that judgment, that they had an irrevocable contract of exemption from any greater burden of taxation than that imposed in the Hewitt act. The complainant in the case now before us was not a party to the record in either of the three prohibition suits, but it claims the benefit of the judgment therein as a privy to the parties. This privity is said to arise from an agreement between the city of Louisville on the one part and certain banks of Louisville, including the complainant, on the other, by which it was stipulated that the controversies between all the banks and the city should abide the event in test suits to be instituted by three banks selected to represent three classes.

Two questions are presented for our consideration:

98 First. Was the contract described in the bill and attached to it as an exhibit, the contract of the city of Louisville?

Second. If so, did the contract bring the complainant into such relation to the prohibition judgment and the parties thereto that it may claim the benefit of the estoppel of that judgment?

First. The averment of the bill is that the contract set forth was signed by the president of the sinking fund and by the attorney for the city under the authority and direction of the mayor and board of sinking fund commissioners and by the counsel who represented the banks in said litigations. The bill further recites that the agreement was made between the city of Louisville and its sinking fund commissioners and the banks and trust companies including the complainant. Upon demurrer to the bill, these averments would doubtless be sufficient to show that the contract which was made was the contract of the city of Louisville. But the case is pending also upon the motion for a preliminary injunction; and upon that motion it is proper for us to consider the answer of the city of Louisville, which by stipulation, was permitted to be filed without the withdrawal of the demurrer. The answer contains this averment:

"This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked 'A,' was signed by the attorney for the city of Louisville, under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville and said alleged agreement or contract set forth in said copy marked 'A' is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled 'An act for the government of cities of the first class' ap-

proved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to
99 execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations or covenants or either of them, contained in said alleged agreement or contract at the time, in the manner or under the circumstances alleged in complainant's bill or otherwise."

Upon a motion for preliminary injunction, therefore, the issue is raised whether those who signed the contract on behalf of the city of Louisville were authorized to bind it thereto. We are of opinion that the city attorney was vested with ample authority to bind the city of Louisville to the contract mentioned in so far as it affected the complainant herein. By section 2902 of the Revised Statutes of Kentucky it is provided that "there shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

The foregoing section makes this officer the retained attorney of the city in every suit brought against it. The question at issue between the banks and the city of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the city attorney and the commissioners of the sinking fund whose duty it was to receive the money for the benefit of the city that they intended to resist the collection of the tax by litigation. It was the duty of the city attorney under the statute above set forth to take charge of the litigation thus about to be brought. It was his duty as the attorney of the city to save, so far as he could without prejudice to the city's interest, costs which might be accumulated should suits to the number of twenty be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of a stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere

step in the management of the litigation and was entirely
100 under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the city attorney and the attorneys for the banks of this character would have been as clearly part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the city attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation and the authorities fully sustain this conclusion.

In *North Missouri R. R. Co. v. Stevens*, 36 Mo., 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that as the same facts arose in all the cases they would abide by the judgment that should be rendered in one of them and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement and that it was void. The court sustained the agreement as within the authority of the attorney. It said:

"The arrangement in this case is not a compromise according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of thing to be recovered; it comes nearer within the general management of the case."

In *Ohlquest v. Farwell & Co.*, 71 Iowa, 231, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client or waive any cause of action or de-
101 fense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of

their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial."

See also *Eidon v. Finnegan*, 48 Mo., 33; *Gilmore v. American Central Ins. Co.*, 67 Cal., 366.

In Thompson on Trials, 1st vol., section 195, the author says:

"Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys in virtue of their general retainers, to stipulate that only one shall be tried and that the others shall abide the result of that one."

We think therefore, that in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In *Patton v. Caldwell*, reported in 1st Dallas, 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties and therefore, not admissible; upon which an agreement of all the underwriters to be bound by one verdict was proven.

McKean, chief justice, said:

"The defendant had no opportunity of cross-examining, upon the former trial; and the answer is, that he, with the
102 rest of the underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel.

Whether this agreement was made in person or by a broker mutually employed is equally binding on the parties; and, under the agreement all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement; yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire that all such agreements may be entered on the records of the court."

The court then held that the verdict thus offered was not conclusive. As this latter proposition, however, is in conflict with the rule laid down by the Supreme Court of the United States in a recent

case of *South Pacific R. R. Co. v. United States*, 168 U. S., 1, that part of the decision cannot be regarded as authority here.

In *Brown, Russell & Russell v. Sprague*, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

Mr. Freeman, in his work on Judgments, says, section 174:

"Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. * * * The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein is conclusive for and against him to the same extent as if he were the nominal as well as
103 the real party to the action. * * * Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party and for the protection of his own interests."

These principles are sustained by the cases cited by that learned author. See *Cole v. Favorite*, 69 Ills., 457; *Wood v. Ensell*, 63 Mo., 193; *Executors of Tate v. Hunter*, 3 Strobhart, 136–140; *Palmer v. Hayes*, 112 Ind., 289; *Gill v. United States*, 7 Court of Claims, 522, 526. See also Herman on Estoppel, section 139.

In Greenleaf on Evidence, vol. 1, section 523, the principle is stated as follows:

"But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim, under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with them in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclu-

sive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him shall p roduce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him."

In the case of *Rapelye & Purdy v. Prince & Prince*, 4 Hill, 119, Mr. Justice Bronson, speaking for the supreme court of New York, said:

"When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party."

In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits which were conducted were openly conducted in the interest of all the parties to the agreement with the knowledge and by the consent of the city of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have been
104 so bound. Had the result gone the other way and a judgment been rendered in favor of the city of Louisville in the cases referred to, it cannot admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the sinking fund commissioners for the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city and a formal judgment was not taken. It is just that inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit. This conclusion necessarily leads to the result that the demurrer to the bill must be overruled and the motion for a preliminary injunction allowed.

105 Circuit Court of the United States, District of Kentucky.

LOUISVILLE TRUST COMPANY
vs.
SAMUEL H. STONE and Others. } No. 6583.

LOUISVILLE TRUST COMPANY
vs.
CITY OF LOUISVILLE. } No. 6584.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
SAMUEL H. STONE and Others. } No. 6581.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
CITY OF LOUISVILLE. } No. 6582.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The Louisville Trust Company and the Fidelity Trust & Safety Vault Company were parties to the agreement made between the banks of Louisville and the city attorney, by which the question of the liability of the banks of Louisville under the license ordinance of the city of Louisville was carried by three test cases to the court of appeals. By that agreement these trust companies were included within the clause represented by the Louisville Banking Company, as a bank of the State, organized since the act of 1856.

The trust companies were organized under charters, each of which contained the following clause: "But nothing herein shall
106 be construed to permit said company to discount paper or to engage in the business of banking." By subsequent amendments some additional powers were given which are usually exercised by banks, but there was no amendment to the charter of either permitting it to engage in the business of regular or general banking. The power to qualify and act in various trust or fiduciary capacities constituted the chief object in the organization of these companies. Section 5 of the amended charter of the Louisville Trust Company contains the following:

"For purposes of taxation, this company shall be classed and treated as one of the banks of this State, and shall be subject to and pay the same rate of taxes, to same parties, at the same time, in same manner and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this State."

In the case of the *Louisville Trust Co. v. City of Louisville*, 30 S. W. R., 991, Judge Grace, in the course of his opinion, expressed the view that this was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, and that this was the only ground upon which it could be excused from taxation under the old constitution. It has been held by the court of appeals of Kentucky that it was competent to ex-

empt banks, under that constitution, because they did render public services. It is thus apparent that the question whether the trust companies had an irrevocable contract under the Hewitt act, was not the same as that presented with respect to the banks. The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question, can only exist where the two cases involve the same questions of law and fact. Otherwise, the attorney might conclude his client's rights by an event having no relevant relation to the merits of the controversy in which he is acting as attorney. Hence, it follows that the contract of the city attorney on behalf of the city of Louisville, in so far as it attempted to make the taxation of the trust companies depend upon the judgments in the three test cases of the banks, was beyond his authority, and that the trust companies cannot rely on those judgments as *res judicata*.

Indeed, the same conclusion may be reached irrespective of the city attorney's authority. The point adjudged in the three cases was, that banks accepting the Hewitt act had an irrevocable tax exemption. The point at issue here concerns the tax exemption of the trust companies. This is a different question, as we
107 have seen, and is not foreclosed, therefore, by the judgment in favor of the banks. The indispensable element in a successful plea of *res judicata* is that the point adjudged and the point at issue shall be the same.

If the complainants cannot rely on the bar of the prior adjudication, we must of course reach the same conclusion upon the question of irrevocable contract on its merits that we have reached in the case of the Northern Bank of Kentucky.

The motion for preliminary injunction must, therefore, be denied, the demurrers to the bills sustained and the bills dismissed.

108 Circuit Court of the United States, District of Kentucky.

FIRST NATIONAL BANK
vs.
SAMUEL H. STONE and Others. } No. 6575.

FIRST NATIONAL BANK
vs.
CITY OF LOUISVILLE. } No. 6576.

AMERICAN NATIONAL BANK
vs.
SAMUEL H. STONE and Others. } No. 6569.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The First national bank was organized in October, 1863, under the national banking laws and its charter rights were extended September 6, 1882. It did not formally accept the Hewitt act in accordance with the terms of that act. The averment of the bill

upon this point is: "Your orator shows that from the first day of July, 1887, although it was not by the United States banking acts bound to submit to taxation under the 'Hewitt bill,' it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said 'Hewitt bill,' and the said State through its proper officers received and appropriated said taxes paid by your orator as aforesaid. Your orator has no real estate and never had. In the way above stated, your orator accepted the provisions of the 'Hewitt bill.'"

The American national bank was organized after the passage of the Hewitt act, so that it could not accept that act in accordance with its provisions. The averment of its bill upon this point is: "Your orator shows that from the first day of July, 1890, although it was not by the United States banking acts bound to submit to taxation under the Hewitt bill it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said Hewitt bill, and the said State through its proper officers received and appropriated said taxes paid by your orator as aforesaid. Your orator has since its organization paid to the city taxes on the building in which it does business. In the way above stated your orator accepted the provisions of the Hewitt bill."

Each of the bills in the above-entitled causes contained these averments: "Your orator respectfully shows to the court that the existing laws of the State of Kentucky do not provide for taxing the shares of your orator as permitted by the act of Congress, but attempt to subject to taxation its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress. And your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

"Your orator further shows and submits to the court that by reason of the formal contract entered into by all the other banks and trust companies in the city of Louisville, and by reason of the former adjudication in favor of said banks and trust companies establishing the validity of said contracts, they will escape local taxation, except on the houses owned by them, respectively, in which they respectively do business, and your orator, coming as it does into direct competition with said institutions, will be driven out of business if subjected to local taxation; wherefore it respectfully insists it is protected by the acts of Congress against such unjust discrimination."

The first question is whether the revenue act of November, 1892, taxes the national banks in a way inconsistent with the permission given by Congress.

Section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by
110 authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent according to its value, as other real property is taxed."

The State derives its power to tax national banks from this section. The question is whether the provision for taxation of banks under the revenue act of November, 1892, is a violation of this section. The provisions of that act are that all banks shall be taxed upon their real property, and personal property and also taxed upon their franchises to be assessed by subtracting the value of the tangible property from the value of the capital stock of the company. It is argued that the State has no right to tax the franchises conferred by the Government of the United States. But it has been decided in the cases of *Henderson Bridge Co. v. Kentucky*, 166 U. S., 150, and *Adams Express Company v. Kentucky*, 166 U. S., 171, that the word franchise in the revenue act of 1892 was not employed in a technical sense, and that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies, possessing no franchise, should be valued as an entirety, that the value of the tangible property should be deducted, and that the value of the intangible property thus ascertained should be taxed under these provisions. It will be seen therefore that the taxation upon all banks is nothing but a tax upon the value of its capital stock. There is no discrimination whatever against national banks in favor of State banks because they are all subject to the same rule of taxation. The Supreme Court of the United States has given section 5219 a very liberal construction in sustaining State taxation of national banks if not inconsistent with the purpose of Congress to prevent a discrimination in favor of State banks as against national banks. Mr. Justice Miller in delivering the opinion of the court in the case of *Davenport Bank v. Davenport Board of Equalization*, 123 U. S., 83, said:

111 "It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the

system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of State taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress."

See also *Mercantile Bank v. New York*, 121 U. S., 138, and *Bank of Redemption v. Boston*, 125 U. S., 60; *Palmer v. McMahon*, 133 U. S., 660.

It is contended however that the definition given to the term capital stock used in the revenue act of 1892 includes more than the sum of the value of the shares of the capital stock of a corporation. It is true that in the case referred to, *Henderson Bridge Co. v. Kentucky*, 17 Ky. L. Rept., 390, the court of appeals held that it was proper for the board of valuation and assessment to fix a valuation of the capital stock of the Henderson Bridge Company at more than the market value of the sum of the shares of the capital stock. In that company, the shares of capital stock aggregated $1,000,000, the market value of which was 90 cents on the dollar. It had a mortgage upon its property to secure a bonded indebtedness of $2,000,000. In reaching the amount of the capital stock of the bridge company the board added the market value of the shares of the capital stock to the value of the mortgaged property, taking it for granted that that would show the real amount of property, tangible and intangible, owned by the company. This mode of assessing the capital stock was held to be proper under the law. In such a case of course the assessment for taxation would be more than the value of the shares of the capital stock. There could be no such result, however, in the application of the law to national banks, because they are not permitted to issue bonds and do not hold property under mortgage. It is not averred in the bill and it does not appear that the assessment of valuation for taxation against these complainant banks exceeds the market value of their shares of capital stock. However the law may operate, therefore,
112 upon that class of corporations which have bonded indebtedness, it certainly does not in the case of the national banks tax anything more than the equivalent in value of the shares of the capital stock. If it does so, there ought to be some averment to show this. *Supervisors v. Stanley*, 105 U. S., 311. The bill contains no such statement.

Another objection to the operation of the revenue act upon the complainants is, that certain of the State banks and national banks are now, by reason of the previous litigation, enabled to escape all taxation except that provided under the Hewitt act, and that this is a discrimination against them in violation of section 5219, above quoted.

In *Lionberger v. Rouse*, 9 Wall., 468, the fact that a State could not

collect a tax past a certain amount in the two banks of issue, which it had at that time, was held no bar to the collection of the tax on the shares of the national banks for a greater amount. In this case Mr. Justice Davis, who delivered the opinion of the court, concluded as follows:

"Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the national banking act than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

In the former litigation certain banks have been declared to be free from taxation by reason of a contract of exemption. By subsequent decisions in the same court—if that be a material question in that court—the former ruling was declared erroneous. But by the doctrine of *res judicata* the particular banks engaged in the prior litigation are able to rely upon it as a bar to the enforcement of the law of 1892. That law, by its terms, applied to all banks equally. In so far as the State has had the power to do so, therefore, it has made the taxation of all banks equal. We do not think that the exceptions to the operation of the law, produced by the accident of litigation, can make the discrimination arising between the parties to the litigation, and those who were not parties, a discrimination within the inhibition of section 5219 of the national banking act.

The motions for preliminary injunction will be denied, the demurrers to the bills will be sustained, and the bills dismissed.

113 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE NORTHern Bank of Kentucky
vs.
SAMUEL H. STONE and Others, CITY OF LEXINGTON, County of Fayette, City of Paris, County of Bourbon, and The City of Covington. } No. 6585.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

The bill in this case averred that the complainant bank was a corporation originally organized by an act of the General Assembly of Kentucky, approved Feb. 20, 1835, to do a general banking business. Its corporate life was made to terminate May 1, 1865. The act of Feb. 15, 1858, continued the charter privileges of the complainant in full force for twenty years from May 1, 1865, upon its acceptance of certain conditions to which the complainant duly consented. An act approved February 6, 1882, provided that the charter rights and privileges of the complainant should continue and extend in full force for twenty years from and after May 1, 1885; reserved to the General Assembly the right to alter, change, amend or repeal the act, and the charter and amendments thereto; and re

quired that before the act should go into effect it should be approved and accepted by a majority in interest of the stockholders. The act was never accepted or approved by the stockholders. Thereafter another act was passed, approved March 6, 1884, providing that the chartered rights and privileges of the complainant should be extended in full force for twenty years from and after the first of May, 1885, and that the act should go into effect when it should be approved by the stockholders of the bank and notice of the approval given to the governor of the Commonwealth. It did not contain the clause reserving to the legislature the power of repeal. It was duly accepted. The 15th section of the original charter of the complainant required the cashier to pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank
114 which should be in full of all tax or bonus; provided, that the legislature might increase or diminish the same, but at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank. By an act of 1836, the legislature increased the tax to fifty cents, and this the complainant paid each year down to July 1, 1886, when the Hewitt law was passed. The court of appeals of Kentucky as early as 1838 held that the language in the complainant's charter constituted a contract with the State, which was inviolable, and a limitation on the legislative power to tax the stock of the bank, or its property. *Johnson v. Commonwealth*, 7 Dana, 339. By a subsequent decision it was determined by the same court that the limitation included taxation by any of the municipal subdivisions of the State, and therefore prevented such municipal subdivisions from taxing the real estate of the bank, although situated within their boundaries. *Commonwealth and Greenup County v. Farmers' Bank*, 6 Bush, 127. The complainant duly accepted, within the required time, the benefit of the Hewitt act by filing a consent in writing under the seal of the bank with the governor of the Commonwealth; and paid the tax under the Hewitt act from that time down to July 1, 1893. Thereafter the auditor of the State refused to receive the tax under the Hewitt law, although tendered by the complainant. Upon the announcement of the decision of the court of appeals in 1895, payment was accepted from the bank for the amount due under the Hewitt law from 1893 to 1896. The principal office of the complainant is in the city of Lexington, in the county of Fayette. It has one branch in the city of Paris, in the county of Bourbon, and another in the city of Covington. The bill avers that the revenue act of 1892 violates the contract between it and the State in the charter and the amendments to the charter and the contract between it and the State under the Hewitt law.

The bill further avers that under the revenue act of 1892 the board of valuation and assessment certified to the authorities of the county of *Bourbon* the proportion of the franchises found to be taxable by the county of Bourbon in the year 1893; that thereupon the county of Bourbon caused to be placed in the hands of James McClure, sheriff of said county, and the collector of its revenue, the

tax bill made out accordingly; that on July 13, 1894, the complainant filed in the circuit court of Bourbon county—that being a court of general jurisdiction—its petition against the said county and sheriff, setting forth in said petition, in apt terms, the contract between it and the State in regard to taxation under the original charter and under the Hewitt law, claiming that no taxes
115 could be collected from the complainant except in pursuance thereof during its charter life, and that the act of November 11, 1892, was unconstitutional and void, as impairing the obligation of these contracts, and praying the court to establish these contracts and to enjoin the said Bourbon county and McClure, the sheriff, from attempting to collect any taxes contrary thereto; that issue having been joined upon the complainant's said suit, a judgment was rendered in the Bourbon circuit court to the effect that the act of November 11, 1892, did not violate any contract between the complainant and the State, and judgment was entered accordingly; that thereupon the complainant appealed from said judgment to the court of appeals of Kentucky; that in that court, its appeal having come on to be heard, was argued by counsel, among others, by the attorney general for the Commonwealth of Kentucky on behalf of the Commonwealth, who insisted upon the affirmance of the judgment; but the court adjudged that the judgment of the lower court was erroneous, and remanded the case to the Bourbon circuit court for a judgment in conformity to its opinion, in which opinion it was held that the Northern Bank of Kentucky had an irrevocable contract under the Hewitt act and its charter which prevented the authorities of the State or any of its municipal subdivisions from imposing any other tax than that prescribed in the Hewitt act. The bill concludes as follows:

"The premises considered, the complainant says it has been fully and finally adiudicated in proceedings between it and the said Bourbon county—which represented the Commonwealth, and in law all other municipalities deriving power from the Commonwealth—that complainant's contract is valid and enforcible, and that the complainant cannot be subjected to any greater rate of taxation than that agreed upon by it under the Hewitt law; if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for under the complainant's charter and amendments."

TAFT, circuit judge, delivered the opinion of the court:

Under the decision already rendered in the case of The Bank of Kentucky against Stone and others there can be no doubt that on the case made both in the bill and on the proof, the defendants, The Board of Valuation and Assessment and Bourbon County, are estopped by the former adjudication from asserting that the complainant bank is liable for any taxes to Bourbon county under the revenue act of 1892, because, as between the complainant and
116 that county, it was adjudicated that the complainant had an irrevocable contract with the Commonwealth by which all taxation against it should be limited to the tax provided in the

Hewitt act, and that the tax upon the franchise under the revenue act was a violation of such contract.

It is also contended on behalf of the complainant that the other defendants, Fayette County, The City of Lexington, The City of Covington, and The City of Paris, are equally bound by the adjudication against the county of Bourbon. We do not think that this contention can be sustained. The theory seems to be that, as the county of Bourbon is a municipal corporation under the State government, the State is bound by the adjudication against it, and therefore every other subdivision is bound. It seems to us that this would be extending the doctrine of *res judicata* further than any authority will justify. The argument is based upon the decision of the court of appeals of Kentucky in *Franklin County Court v. The Deposit Bank of Frankfort*, 87 Kentucky, 382. In that case, the Deposit Bank of Frankfort was seeking to enjoin the county court of Franklin county from levying a tax upon its property in addition to the tax of fifty cents a share upon its stock which its charter provided should be in full of all tax or bonus. It was held that this was a contract which prevented any additional tax in any form upon its property by the State. The court then continued:

"But it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they cannot levy and collect taxes without the authority of the State conferring that right upon them. So the absurdity is presented that the State contracts with the appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of all tax or bonus—this is the meaning of the language—and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee but may, notwithstanding, authorize all of its subdivisions, if the appellee's property were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract. Under such a contract between individuals a doubt could not exist. The State when she makes a contract, based upon a valuable consideration stands upon precisely the same footing."

117 This decision adjudged two things, first that the State had power by contract to impose a limitation upon the taxing power whether exercised by itself or by municipalities in which it might vest the same power, and second, that the language of the restriction in this case must be construed as intended to limit the whole power whether exercised by State or with the State's permission by municipalities. The argument of counsel assumes that as the county derives its power to tax from the State which is all that was decided in the case cited, it is, in levying taxes, the mere agent of the State and therefore a judgment against the county on a tax question is a judgment against the agent in re-

spect of the business of the principal and is binding upon the latter as a privy. Indeed the argument goes further. It assumes that a county is a part of the State government and therefore a judgment against the county is a judgment in fact against the State. This is applying the doctrines of agency and privity under circumstances to which they have but little application. The source of all political power including the power to tax is in the people of the State. By a constitution they create a State government and a legislature and confer upon the legislature power to organize local municipal governments and to give such governments the power to levy taxes in order to discharge their other appointed functions. The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest. Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some other State function, there is no relation between the one and the other of principal and agent as that relation is usually understood in the law. The State may through its legislative branch confer upon, and withdraw from the counties and cities power of taxation, but when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by an agent for a principal; it is by a quasi independent government for the benefit of the people within its limits. The legislature, if not restrained by the constitution may by contract with individuals limit its power either to levy taxes itself or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof either by the State or municipality. But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is con-
118 tending for the benefit of itself and its people, not for the State and its people. The taxes it proposes to collect are to be spent not for the State at large but for the convenience and benefit of the people within its limits. In seeking by suit to establish its right to tax, therefore, the city or county is not acting as agent for the State but for itself. Hence the judgment is not binding upon the State as principal.

The only other possible relation of privity of the State to the litigation must grow out of the fact that it involves the validity of a power granted by the State to the city or county; but this does not make the State privy to the judgment. In granting the power the State did not enter into an enforceable covenant of warranty with the counties and cities that the power as against every individual was valid. Certainly it cannot be claimed that the State could be vouched in by the county or city as a warrantor of the validity of the power, or by notice of the pendency of the suit could be bound conclusively by the subsequent judgment. If the contention of counsel for the complainant is sound, it must follow that the State and all its municipalities, great and small, would, by a judgment in favor of an individual or corporation against a village in

a remote county adjudging a limitation upon the taxing power of the State, be estopped to deny the limitation in any future litigation with the same individual or corporation, although no appeal may have been taken to a higher court and although neither the State nor the other municipalities may have had any notice whatever of the litigation or any right or opportunity to be heard upon the question decided. We do not decide, because it is not necessary to do so, whether a county or city would be privy to a judgment against the State adjudging a limitation upon the taxing power; but it suffices to say that the question is in some important respects different from the one we have been discussing.

The case of *People v. Holladay*, 93 Cal., 241, does not, it seems to us, support the contention of the complainant. In that case the question was of the title to certain property claimed to have been dedicated as a park. The lot was situated in the city of San Francisco and the city and county of San Francisco brought a suit in ejectment to recover possession of the tract from the defendant who had obstructed the use of the same by the public and excluded them therefrom. In this action the city and county were defeated and a judgment rendered, finding that the defendant was the owner of the undivided $\frac{19}{20}$ of land and his title thereto was quieted as against the city and county. Subsequently the attorney general on behalf of the people of the State on relation of one Bryant,
119 brought another suit raising the same question and seeking to oust the defendant from the possession of the same tract. It was held that the city and county of San Francisco had the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and in such action it was authorized to put in issue the alleged rights of the people to such easement; and the State was bound by the result of such litigation, if the same was not collusive. It is unnecessary for us to express an opinion upon the correctness of this decision because it can be easily distinguished from the case at bar. The city and county of San Francisco in the former litigation represented the same public which was represented by the State in the case before the court. The controversy was over the public use in the city of land claimed as a public square. It was obvious that the city, county and State were representing the same interest and the same right with respect to exactly the same subject-matter. In the present case the subject-matter of the former litigation was the taxes due from the complainant bank to Bourbon county—taxes which were to be expended by Bourbon county for county purposes and for the benefit of the people living in Bourbon county. The subject-matter of the present action which it is sought to conclude by the former action is the taxes due from the complainant bank to the city of Paris to be expended for the benefit of the people of that city, to the county of Fayette to be expended for the benefit of the people of Fayette, to the city of Lexington to be expended for the benefit of the people of Lexington, and to the city of Covington to be expended for the benefit of the people of the city of Covington. The rights of these various municipal corporations to

the taxes claimed grow out of the same revenue act of November, 1892, but the parties and the persons in interest are different.

We have not deemed it necessary to consider another serious objection which might be urged to the use of a decree against Bourbon county to bar the State and other counties, and that is that in the absence of power to enjoin the State in a suit, it would be difficult to justify the plea against the State of *res judicata* based on a decree of injunction against a municipality or State agency which does not enjoy the same immunity. To give the decree the effect would seem to violate the State's exemption from suit. It suffices, however, to place our decision on the ground first above stated.

120 The fact that the attorney general appeared on behalf of the Commonwealth in this litigation when it reached the court of appeals is not a circumstance which could be held to bind the Commonwealth and all of its agencies by the litigation. There were a great many tax cases pending before the court at the same time. In some of these cases, the Commonwealth was a party and the attorney general was therefore present to argue the question on its behalf in those cases. Even if this had not been the case, the case of *Carr v. The United States*, 98 U. S., 433, shows that the appearance of the attorney general on behalf of the counties could not bind the State. In the case referred to the point in controversy was over the title to land of the United States to certain lots in possession of its officers in San Francisco. The United States filed a bill to quiet title to the property. The defendant set up by way of estoppel certain judgments in ejectment rendered by the State court at the suit of his grantor against certain officers of the Government who as its agents, had possession of the lots. In those actions the United States district attorney and additional counsel employed by the Secretary of the Treasury appeared for the defendants and the question of title had been the same. It was held that the former judgment was not an estoppel against the United States. Mr. Justice Bradley in delivering the opinion of the court said:

"It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And in fact, he had no authority to waive these rights."

The attorney general of the State in these cases in appearing in the court of appeals of Kentucky for the county of Bourbon did not intend to waive any rights of the State, and, so far as appeared, he had no authority to do so.

Our conclusion therefore is that the complainant bank cannot in its controversy with the city of Lexington, Fayette county, the city of Paris and the city of Covington and with the board of valuation and assessment so far as concerns the apportionment and certification of the assessment by the board to *those* municipalities, rely upon

or derive any benefit from the decree in the complainant's favor against Bourbon county.

We are thus brought to the question whether, as between
121 the defendants just named and the Northern Bank of Kentucky, the latter has by virtue of its acceptance of the Hewitt act an irrevocable contract with the State of Kentucky, by which the taxes to be imposed during its corporate existence upon it shall be limited to those provided in the Hewitt act. A second and alternative question is presented by the bill of the bank and by the argument of its counsel. It is contended that even if the State had the right at any time to withdraw from the contract with the complainant bank entered into by the latter's acceptance of the Hewitt act, there must be restored to the complainant the tax limitation under its charter which it was enjoying when it accepted the terms of the Hewitt act.

The original charter of the bank granted in 1835, provided that it should pay into the treasury twenty-five cents a share of stock which should "be in full of all tax or bonus; provided that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each" share of stock. In 1836 the legislature increased the tax to 50 cents a share. In 1838 this was held by the court of appeals of Kentucky to be an irrevocable contract between the bank and the State preventing the State from taxing the property of the bank or its stock either against the bank or against its holders. (*Johnson v. Commonwealth*, 7 Dana, 339.) In 1869, it was held by the same court that the same contract in another charter prevented taxation of the bank by counties and cities. *Farmers' Bank v. Commonwealth*, 6 Bush., 127. These decisions never have been overruled. Manifestly if the limitation was continued in extensions of the charter, it was broad enough to prevent taxation by the counties and cities, defendants in this case, under the revenue act of 1892.

The original charter of the bank expired May 1, 1865. By an act approved February 15, 1858, the chartered privileges and rights of the president, directors and company of the Northern Bank of Kentucky were continued in force for twenty years from the first day of May, 1865. The extension was granted subject to certain restrictions on the powers of the bank not contained in the original charter and imposed on it the obligation to establish certain branches. In 1882, the legislature passed an act to extend the charter of the bank for twenty years from May 1, 1885. That act contained this clause:

"SECTION 3. The General Assembly of the Commonwealth of Kentucky hereby reserves to itself the right to alter, change, amend or repeal this act, and the charter and amendments thereto extending this act at its pleasure."

122 This act was not accepted by the bank in accordance with its terms. Two years later another act was passed which read as follows:

"SECTION 1. That the chartered rights and privileges of the President, Directors and Company of the Northern Bank of Kentucky

shall continue and be extended in full force for twenty years from and after the first day of May, one thousand and eight hundred and eighty-five.

"SECTION 2. That said bank, under the continuance and extension hereby granted, shall be subject to all the restrictions, limitations, penalties, conditions and duties, and be entitled to all the rights granted to and imposed upon it by the act of its incorporation, and the acts amendatory of or relating thereto.

"SECTION 3. Said bank may be known by, and sue and be sued, contract and be contracted with, by and under the name of the Northern Bank of Kentucky, as fully as by and under its present name.

"SECTION 4. This act shall go into effect when it shall be approved by the stockholders of said bank at their regular annual meeting, or at a called meeting ordered for that purpose by the president and directors of said board, at which called meeting a majority in interest of said stockholders shall be present. Notice of said approval shall be given by the president of the bank to the governor of this Commonwealth."

The question is whether this act is to be construed and read with the act of 1856, as a part of it. The act of 1856, read as follows:

"SECTION 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

"SECTION 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter, or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

"SECTION 3. That the provisions of this act shall only apply to charters and acts of incorporations to be granted hereafter; and that this act shall take effect from its passage."

The court of appeals of Kentucky, in the case of the *Franklin County Court v. Deposit Bank of Frankfort*, 87 Ky., 382 (June,
123 1888), held that the act of 1856 did not apply to subsequent acts extending charters granted before its passage, and that the exemption from further taxation was as inviolable under the extended charter as it was during the life of the original charter. But in the case of *Deposit Bank of Owensboro v. Daviess County*, 39 S. W. R., 1050 (March, 1897), a majority of the court of appeals expressly overruled the decision in *Franklin County Court v. Deposit Bank*, and held that the act of 1856 must be read into all charter extensions granted after its passage, whether the original charter was granted before the act of 1856 or not. It was said that the last ruling was *obiter dictum*, and unnecessary in deciding the case

before the court. But this is by no means clear. In the latter case the question involved the construction of the Hewitt act. In all discussions of that act it had been supposed to be a material preliminary step to determine whether there were any banks which would surrender an irrevocable tax exemption privilege in accepting the terms of the Hewitt act. We think we must, therefore, treat the two decisions above cited as conflicting; and, in any event, it is for us now to exercise an independent judgment in the matter.

In the earlier decision the court of appeals held that the extension related back to the date of the original charter, and that therefore the act of 1856 did not apply, because, by its third section, its application was limited "to charters and acts of incorporations to be granted" thereafter. It was further held that even if the act of 1856 would apply to extensions of old charters, it did not do so here, because the various provisions of the extension act of 1872 manifested an intention of the legislature so clear as to be "plainly expressed" that the act of 1856 should not apply. We cannot concur in the view that the act of 1856 did not apply to subsequent extensions of old charters. The purpose of such a reservation act is too clear to be misunderstood. It was to prevent the granting of corporate powers, franchises or privileges in such a way as to be beyond the control and regulation of the legislature, unless the legislature "plainly expressed" its purpose to reserve the power to alter, amend or repeal. The reason for the act was the inconvenience experienced from the irrevocable charters theretofore granted. Is it to be supposed that the legislature, in the act of 1856, intended to allow those charters, which had led to the enactment of the law, to be extended without being affected by its restrictive provisions? The first section of the act applies "to *all* charters and grants of or to corporations *or amendments* thereof, and *all other* statutes." The third section limits the application
124 of the act "to charters and acts of incorporations to be granted hereafter." We think that this extension was a grant to a corporation or an act of incorporation granted after the act of 1856. It seems to us a strained and narrow construction to carry back its date by relation to the time of the original charter. In some senses it is true that the extension merely carries on the same old corporation, giving it additional life, but within the purpose of the act of 1856 to prevent the granting of irrevocable exemptions, the giving of additional life to such an immunity was a new grant—a new charter. It is our duty to give effect to this act so as to avoid the evil aimed at by the legislature, and no refined reasoning as to the question whether an extension is the lengthening of an old life, or the granting of a new one, ought to blind us to the palpable intention of the legislature to prevent, except by express words, the future granting of irrevocable powers, privileges or exceptions. It is well settled by the Supreme Court of the United States that tax exemptions are not favored, and are to be given the strictest construction (*Ohio Life Insurance & Trust Company v. Debolt*, 15 How., 435); and it may well follow, as a corollary to these principles, that laws passed

by the legislature to prevent irrevocable tax exemptions are to be liberally construed.

The next question is whether there is anything in the act of extension to justify us in holding that there is an intention "plainly expressed" in it to make the rights and privileges therein extended irrevocable. The act of extension under consideration in the case of *Franklin County v. Deposit Bank, supra*, was the first act of extension, which was quite elaborate and contained many new conditions; but the one we have to consider is a simple extension without new conditions, except that it shall be formally accepted by the bank. We are unable to perceive any plain expression of the intention of the legislature to make the rights and privileges granted irrevocable. They are granted for twenty years, and without the rule of construction enjoined in the act of 1856, this would be held to imply an intention that they should not be subject to amendment or repeal during that period. But the act of 1856 was passed for the precise purpose of avoiding the usual implication and of requiring affirmative language to sustain the claim that rights and privileges granted for any length of time could not be revoked before its expiration. *Griffin v. Kentucky Ins. Co.*, 3 Bush., 592; *Cumberland & Ohio Rai'road Co. v. Barren County Court*, 10 Bush., 609. We find no such affirmative language in this act. We cannot attach the significance
125 that counsel do to the passage of two acts, extending the charter of the Northern bank, the one containing an express reservation, and the other enacted two years later omitting it. Each act must be construed as it stands, and in the absence of something affirmative in the latter act itself to exclude the act of 1856, it is to be treated as part thereof. This conclusion makes it unnecessary for us to consider the soundness of the proposition that, upon repeal of the Hewitt act, those who had surrendered exemptions were entitled to a restoration of them.

We come, then, to the question: Did the Hewitt act confer on the banks accepting it a contractual immunity from taxation incapable of repeal during their corporate existence? The first section of the article of the Hewitt act provided that shares of stock in State and national banks, and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock should be taxed seventy-five cents a share, and upon all surplus over and above 10 per cent. on their capital stock the same rate of taxation as was assessed upon real estate which, it was declared, should be in full of all tax, State, county and municipal. The fourth and remaining sections of the article we give below:

"SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and de-

livered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

"SECTION 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: Provided, they pay the tax provided in section 1 from the passage of this act.

"SECTION 6. This act shall be subject to the provisions of section 8, chapter 68 of the General Statutes.

"SECTION 7. If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its sur-
126 plus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes—State, county and municipal—shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 8, chapter 68 of the General Statutes, referred to in section 6, *was the above act of 1856.*

But for the respect we feel for the judgment of the majority of the court of appeals, deciding the bank-tax cases, 97 Ky., 591, and the very able opinion of Chief Justice Pryor in support of that judgment, we should have thought that there could be no doubt of the necessary construction of the article of the Hewitt act, above quoted. The act of 1856 is incorporated in the article of the Hewitt act above quoted, not merely by a rule of construction enjoined by a preceding legislature, and presumably accepted by the legislature passing the Hewitt act, but the latter legislature has expressly and affirmatively adopted it *as part of the article.*

It is said, however, that the sixth section was not intended to apply at all to the contract of limited tax exemption contained in the fourth section, but that its purpose is to be found in, and limited to, the desire of the legislature to secure to itself the right to repeal the act before the acceptance of its terms by the banks. The suggestion seems to us utterly inadequate to explain the insertion of the section in the act. All the banks were required to accept the act before the next meeting of the legislature, so that the right to repeal must, in this view, have been limited to the short time remaining of the pending session of the legislature, and the interval when the legislature was not in session. With submission, a construction limiting the reservation clause to so inconsequential a purpose is unreasonable. Since the decision by the Supreme Court in *State*

Bank v. Knoop, 16 How., 369, in 1853, that a State might restrict its taxing power over a corporation by charter provisions in the nature of a contract which was irrevocable, the main object of the clause reserving power in the legislature to alter or repeal charters and acts of incorporation has been to render tax exemption revocable, and it is to miss wholly the significance of such a clause to hold that it has no application to a tax limitation, *when it is*
127 *expressly made part of the act declaring such limitation.* It would be extremely difficult for a court, bound to follow the decisions of the Supreme Court of the United States, to hold that a clause of an act expressly reserving in the legislature the right to amend or repeal it does not apply to tax exemptions conferred by the same act. In *Tomlinson v. Jessup*, 15 Wall., 454, an act of South Carolina provided that every charter or incorporation granted or renewed should, at all times, be subject to amendment, alteration or repeal, unless the granting or renewing act should, in express terms, provide otherwise. The question was, whether this applied to a tax exemption of the property of a company which was in terms to last during the continuance of the existing charter. The Supreme Court held that it did. Mr. Justice Field said, in delivering the opinion of the court:

"There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has, nevertheless, been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. * * * In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation, the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State. Rights acquired by third parties and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different foot-

ing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reserva-
128 tion to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

The "reservation" clause has been applied to tax-exemption privileges in accordance with the doctrine above declared in *Railroad Company v. Georgia*, 98 U. S., 359, and *Hoge v. Railroad*, 99 U. S., 348.

The court of appeals of Kentucky in the bank-tax cases relied much on the case of *New Jersey v. Yard*, 95 U. S., 104. In that case the question was whether a tax exemption was subject to repeal under a general reservation act. The railroad company which was claiming the exemption had been organized in 1835 before the passage of the reservation act. A supplement was passed expressly reserving the power of repeal. A second supplement without any reservation was passed. This second supplement related to a tax controversy and provided for a settlement of it by written acceptance by the railroad company. It was held that the general reservation act did not apply to a limited tax exemption granted to the company in this supplement. The court pointed out that general acts of reservation passed by one legislature are binding on a subsequent legislature only so far as it chooses to conform to them, and that it is a question in every case whether the legislature making a contract intends the former reservation act to become by implication a part of the contract. In the case before the court it was held that the provision for specific rate of taxation was inconsistent with such an implication because there was a fair adjustment of a subject of dispute for a valuable consideration on both sides, because the contract assumed the shape of a formal written contract, and because of the scope of the words of the contract, which were that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof." Were it not for the sixth section of the Hewitt act, the case would have a most important bearing in considering whether the legislature passing the Hewitt act intended that the act of 1856 should be incorporated by implication in the Hewitt act. But that which was a matter of inference and argument in *New Jersey v. Yard*, is in the case before us determined by the express declaration of the legislature passing the Hewitt act. Those circumstances and that language of the act under consideration which were regarded in the Yard case as inconsistent with an implication that the general reservation act should be read into it, cannot
129 prevail against the express direction by the legislature that the reservation act must be applied to it. It is as the Supreme Court declares it to be, only a question of legislative intention, and when the intention is expressly declared there is no room for implication.

The fourth section of the Hewitt act, construed in the light of the reserved power of repeal in the sixth section, was a proposal to the

banks that they should pay a certain tax and no more during their corporate existence unless the legislature should see fit sooner to withdraw from the agreement. The question is asked why the old banks should surrender their charter right to a lower tax assessment for the rate fixed under the Hewitt act if it is true that the legislature could withdraw from it at pleasure. It is a sufficient answer to say that they had in fact no irrevocable exemption to surrender, and though they claimed it, and had then the decision of a State circuit court upholding the claim, it was so doubtful that they preferred to accept a somewhat higher rate of taxation by the State alone than to run the risk of being subjected to the much heavier taxation, both State and local, imposed by the seventh section of the Hewitt act upon banks which should not accept the proposal of the fourth section.

Having concluded that the act of 1856 must be applied to the fourth section, the question remained whether the tax exemption, after acceptance by the banks, was a "right previously vested" within the proviso of that act. If so it cannot be impaired. The court of appeals held that it was such a right. We cannot concur in this view. It seems to us that the legislature in this proviso was merely expressing in words the limitation that always exists upon the reserved power of amendment or repeal of corporate charters. A legislature cannot by amendment or repeal of a charter deprive the member of a corporation of the property or contract rights it has acquired by the exercise of its corporate powers. *Commonwealth v. Essex Co.*, 13 Gray, 239; *Miller v. State*, 15 Wall, 478; *Sage v. Dillard*, 15 B. Mon., 349; *Holyoke Company v. Lyman*, 15 Wall., 478. It cannot annul contracts made by the corporation with third persons in the exercise of its lawful franchises. It cannot undo that which is done. It cannot say that that does not exist which does in fact exist. It cannot recall an executed grant of property. But it can revoke for the future anything in the charter of a promissory character, whether it is contractual or merely gratuitous. In *Greenwood v. Freight Co.*, 105 U. S., 13, 19, the question was of the effect of the repeal of an act conferring a charter upon a street railway
130 company that had built its track in the streets. Mr. Justice Miller, speaking for the court, said:

"If the essence of the grant of the charter be to operate a railroad and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter and which could not be exercised by unincorporated private persons under the general laws of the State is abrogated by the repeal of the law which granted these special rights."

See also *State v. Miller*, 21 Barb.; *Zabriskie v. H. & N. R. R. Co.*, 18 N. J. Eq., 175; *Oldtown v. Lincoln R. R. Co. v. Veazie*, 39 Me., 571; *Hathorn v. Calef*, 2 Wall., 10–24; *Commonwealth v. Essex Co.*, 13 Gray, 239. The limited tax exemption under the Hewitt act was a contract between the bank and the State. The reserved right to repeal made the contract one which the State could revoke at pleas-

ure. The court of appeals in the bank-tax cases relied on the *Commissioners of the Sinking Fund v. Green & Barren River Navigation Co.*, 79 Ky., 73. It that case it was decided that the legislature could not, under the act of 1856, take from the navigation company, without making compensation therefor, the right it had acquired under a contract with the State to take for a term of years tolls from vessels navigating the Green and Barren rivers in consideration of its agreement, then fully performed, to put in repair and maintain at its own expense the line of navigation. It may be hard to reconcile this case with *Greenwood v. The Freight Company*, but it can be distinguished from the case at bar. In the case cited the court treated the right which the State proposed to exercise as a reserved right of rescission and held that it could only be exercised on condition that the grantee of the State should receive compensation for the money advanced to improve the property of the State the use of which he was not permitted to enjoy. In the case at bar, the banks surrendered nothing of value to the State for the limited tax exemption of the Hewitt act, and the power of revocation was not in any view, therefore, trammelled by conditions.

In view of our conclusion that the complainant has not established, as against any of the defendants, except Bourbon County, the existence of an irrevocable contract of tax exemption, either by *res judicata* or on the merits, and as this issue thus presented and decided is the only one upon which complainant, a corporate citizen of Kentucky, can ask a Federal court for relief, we do not pass upon or decide the question raised by complainant under the
131 State decisions whether prior decisions of the court of appeals, though now overruled, prevent the collection of taxes accruing during those years when the prior decisions holding them uncollectible and void remained unreversed.

For the reasons given the order of the court will be that the motion for an injunction against Bourbon County and the certification of the assessment to it by the board of valuation is granted and to this extent the demurrers to the bills are overruled. But as to the certifications of the assessment to the other municipalities the demurrers are sustained and the bill dismissed.

132 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky
vs.
CITY OF LOUISVILLE. } No. 6556.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The bill filed herein presents the same questions as those already considered in the case of the *Bank of Kentucky v. Samuel H. Stone, etc.*, but it relates to the taxes for 1893–'94, which were certified down by the State board of valuation and assessment to the city of

Louisville for collection. We do not think that the questions differ in any respect from those already considered, and must, therefore, hold that the city of Louisville is estopped by the former judgment between the Bank of Kentucky and it, in which it was held by the court of appeals of Kentucky that the Bank of Kentucky had an irrevocable contract under the Hewitt act for the exemption of the property and franchise of the Bank of Kentucky from any other taxation than as therein imposed; and, therefore, that the bank is entitled to the preliminary injunction against the collection by the city of Louisville and its agents of the taxes provided in the revenue act of November, 1892.

The demurrer to the bill is overruled, and the motion for an injunction granted.

133 Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING COMPANY
vs.
CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

This case presents the same questions as are presented in the case of the *Louisville Banking Co. v. Samuel H. Stone, etc.*, already disposed of, but involves the taxes for 1893 and 1894. The taxes for 1895, 1896, 1897 and 1898 were involved in the prior case.

The order will be that the preliminary injunction prayed for shall issue, and that the demurrers to the bills be overruled.

134 Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING CO.
vs.
SAMUEL H. STONE, ETC. } No. 6561.

LOUISVILLE BANKING CO.
vs.
CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases present substantially the same questions as those already passed upon in the case of the Bank of Kentucky against the same defendants. The complainant company was a corporation organized after the act of 1856, but before the Hewitt act. It duly accepted the provisions of the Hewitt act. After the passage of the revenue act of November, 1892, and the adoption of the ordinance by the city of Louisville imposing a license upon the gross receipts of banks doing business within its limits, a warrant was sued out by the city of Louisville in its police court against the Louisville

Banking Company for a failure to pay the license. This bank filed a petition for a writ of prohibition in the circuit court of Jefferson county against R. H. Thompson, the police judge, averring that the ordinance of the city of Louisville was void as impairing an obligation of the complainant's contract with the State under the Hewitt act, and that any authority given to the city of Louisville to pass such ordinance by the revenue act of November, 1892, was likewise void as impairing the obligation of the contract. The petition prayed that the police judge might be prohibited from taking jurisdiction of the proceeding against complainant for a violation of the ordinance. Issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville. The city of Louisville, though not a party in name,
135 was, in reality, the party defendant, and appeared by counsel. Indeed, the proceedings were taken for the purpose of testing the validity of the license ordinance by agreement between the city attorney and the complainant bank. The Jefferson circuit court found the issues in favor of the defendant and entered a decree dismissing the petition. Thereupon the complainant banking company caused an appeal to be taken in its name from the judgment of the Jefferson circuit court to the court of appeals, and to that appeal it made the city of Louisville and R. H. Thompson, the police judge, parties. In the court of appeals the cause was argued by the counsel for the city of Louisville. The court of appeals reversed the judgment of the Jefferson county circuit court, and in its opinion held that the ordinance of the city of Louisville was void, for the reason that the Louisville Banking Company had an irrevocable contract with the Commonwealth upon its due acceptance of the terms of the Hewitt act, limiting the amount of taxes to which it was subject to those imposed by that act during its corporate existence.

For the reasons already stated in the case of the Bank of Kentucky against the same defendants, we think it conclusively established, as between the parties by a former adjudication, that the complainant had an irrevocable contract under the Hewitt act with the Commonwealth of Kentucky, by which no greater taxes than therein provided could be imposed upon it by the Commonwealth or under its authority.

For the reasons stated in the same opinion, we think the complainant entitled to equitable relief to prevent a violation of that contract by the taxes assessed under the revenue act of 1892. An order for a preliminary injunction, therefore, must issue in these cases, and the demurrers to the bills must be overruled.

136 Circuit Court of the United States, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY
vs.
SAMUEL H. STONE and Others.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

This case is controlled by the points already decided. The Farmers' bank, in prior adjudications with the county of Franklin, the city of Frankfort and the city of Henderson, was conclusively adjudged to have an irrevocable contract under the Hewitt act, exempting it from any taxation in excess of that provided therein. There was no such adjudication, however, between the Farmers' bank and either Scott county or Henderson county. It therefore follows, from what has already been decided, that as to Scott county and Henderson county, the demurrers to the bill should be sustained, and the bill must be dismissed; while as to the other defendants, the demurrers will be overruled and the motions for a preliminary injunction granted.

137 Circuit Court of the United States, District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE and Others. } No. 275.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

In an injunction suit brought by the Deposit Bank of Frankfort against the County of Franklin, in the Franklin circuit court, to prevent the collection of any taxes under the revenue act of 1892, in excess of those imposed by the Hewitt act, it was expressly adjudged on appeal by the court of appeals that the bank had, by its due acceptance of the terms of the Hewitt act, an irrevocable contract of exemption from taxation in excess of that imposed in the Hewitt act, and that the revenue act of 1892 violated this contract. In a similar injunction suit brought by the bank against the city of Frankfort, a decree, in all respect- similar, was entered on the same ground. In accordance with our decision, in the case of Bank of Kentucky against Stone, just decided, we must, therefore, grant the motion for a preliminary injunction, and overrule the demurrer to the bill.

138 Circuit Court of the United States, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, and The City of Louisville, Defendants. } No. 6573.

THIRD NATIONAL BANK, Complainant,
vs.
THE CITY OF LOUISVILLE, Defendants. } No. 6574.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases present the same question which arose in the case of the Louisville Banking Company against the same defendants already decided. The suit against the City of Louisville relates to the taxes under the revenue act of 1892, for the years 1893 and 1894, and the suit against Stone and others and the City of Louisville relates to the taxes for 1895, 1896, 1897 and 1898. In the prohibition suit brought by the Third National Bank against The Judge of the Police Court, to which the City of Louisville became a party on appeal, it was held by the court of appeals of Kentucky that the Third national bank, by its formal acceptance of the provisions of the Hewitt act, had acquired a contract right irrevocable by the State exempting it from all taxes except those provided under the Hewitt act, and that the license tax imposed by the city of Louisville under a statute of the State was, therefore, a violation of the contract, and void under the Constitution of the United States.

The demurrer to the bills are therefore overruled, and the motions for preliminary injunction against the defendants are granted.

139 Circuit Court of the United States, District of Kentucky.

LOUISVILLE CITY NATIONAL BANK
vs.
SAMUEL H STONE and Others. } No. 6565.

LOUISVILLE CITY NATIONAL BANK
vs.
CITY OF LOUISVILLE. } No. 6566.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases are controlled by the case of Bank of Commerce against City of Louisville. On the principle of privity and *res judicata* laid down in that case, we grant the motion for a preliminary injunction and overrule the demurrer to the bill.

140 Said replication to the answer of defendants, filed herein on June 25th, 1898, is as follows, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.
No. 275. Replication.

The replication of Deposit Bank of Frankfort, complainant, to the answers of Board of Councilmen of the City of Frankfort and County of Franklin, defendants.

This repliant, saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill *as* he has already prayed.

____ ____,
Complainant's Solicitor.

Said supplemental answer tendered by defendants herein on June 25th, 1898, and made a part of this record is in the following words and figures, viz:

Circuit Court of the United States for the Sixth District of Kentucky.

DEPOSIT BANK OF FRANKFORT
vs.
141 SAMUEL H. STONE, CHARLES FINLEY, G. W. Long, City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort.
In Equity.

Supplemental answer of the above-named Board of Councilmen of the City of Frankfort, one of the defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort.

Reiterating its original answer to the said bill, and without waiving demurrer to the jurisdiction or its general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort, for supplement to its original answer to the said bill, says as follows:

On January 14th, 1898, the Board of Councilmen of the City of Frankfort filed in the clerk's office of the Kentucky court of appeals a

certified copy of the judgment of the Franklin circuit court rendered on February 1st, 1896, in the case of The Board of Councilmen of the City of Frankfort against The Deposit Bank of Frankfort (set forth on pages 58, '9 of the printed record herein and relied upon by complainant bank as conclusive of this defendant's rights herein), and prayed an appeal from said judgment to the court of appeals of Kentucky, which appeal was granted and process thereon to Franklin county was issued by the clerk of said court of appeals on January 14th, 1898, which process (summons) was duly executed by the sheriff of Franklin county upon complainant bank on January 14th, 1898. By said summons the complainant bank was duly notified of the pendency of said appeal and was thereby warned to appear before said court of appeals at its then approaching April term (1898) and show cause why said judgment of the Franklin circuit court should not be reversed for errors therein contained. Said appeal is now pending in the Kentucky court of appeals, and will be duly prosecuted to decision in said court by this defendant; the same will stand for hearing in said court of appeals at its next September term.

A certified copy of the said proceedings in the Kentucky court of appeals for reversal and vacation of said judgment is attached hereto and filed herewith as part hereof. Further answering, this defendant says the said judgment was and is void because
142 same is not supported by the pleadings. It purports to be a judgment for injunction when there was no suit for injunction. Besides, same leaves the case undisposed of and pending in the Franklin circuit court.

This defendant, Board of Councilmen of the City of Frankfort, submits that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and prays that this bill be dismissed with costs.

IRA & W. H. JULIAN,
Att'ys for City of Frankfort.

T. HITER CROCKETT, *City Att'y.*

The undersigned, W. S. Dehoney, says that he is the duly elected and qualified and acting mayor of the city of Frankfort, Ky., and that the statements of the foregoing supplemental answer of the Board of Councilmen of said city are true.

W. S. DEHONEY, *Mayor.*

Subscribed and sworn to before me by W. S. Dehoney, mayor of the city of Frankfort, on this 21st day of June, 1898.

GUY H. BRIGGS.
Ex. Franklin Co.

Said exhibit tendered with supplemental answer of the Board of Councilmen of the City of Frankfort is in words and figures as follows, viz:

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable judges of the court of appeals of Kentucky.

Court of Appeals of Kentucky

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellants,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.

Be it remembered that heretofore, to wit, on the 14th day of January, 1898, the appellants filed in the clerk's office of said court a copy of a judgment which is in words and figures following:

143 Filed Feb'y 1st, 1896.

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Pl't'ff,
vs.
DEPOSIT BANK OF FRANKFORT, Def't. } Judgment.

It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant, by their respective attorneys, that this action should stand upon the answer filed by the defendant until the decision by the court of appeals in the two cases appealed from this court, in one of which the def't bank was plaintiff and The County of Franklin, &c., were defendants, and in the other the Commonwealth for the use of said county was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case, it is now ordered and adjudged that art. 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886 (Gen. Statutes, chap 92, art. 2), and the acceptance of the provisions thereof by defendant, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and

municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of Nov. 11th, 1892 (art. 3, chap. 103, Acts
144 1891–'2–'3), in so far as they are intended to provide for any assessment or taxation of the defendant's property, right of property, or franchise, except its said real estate are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of Nov. 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action be, and the same is now hereby, granted, and the defendants and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate; and it is further adjudged that the defendant recover of the plaintiff its costs in this action expended.

To all of which the Board of Councilmen of the City of Frankfort except, and pray an appeal to the court of appeals, which is granted.

A copy.

Attest:

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

(Upon the filing of said copy of judgment the appellants, by counsel, endorsed thereon the following statement, to wit:)

Court of Appeals, Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant, *vs.* DEPOSIT BANK OF FRANKFORT, Appellee.	Application for Appeal.

The foregoing judgment of the Franklin circuit court was rendered on February the 1st, 1896.

The Board of Councilmen of the City of Frankfort now comes and prays the clerk of the court of appeals for an appeal from said judgment to the court of appeals.

W. H. JULIAN,
Att'y for Appellant.
T. H CROCKETT, *City Att'y.*

145 (Whereupon an appeal was granted in accordance with said statement and the following summons issued:)

Summons on Appeal.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

We command you to summon Deposit Bank of Frankfort to appear before the judges of the court of appeals of Kentucky, at the

capitol, in Frankfort, on the first day of their next April term, to show cause, if any it can, why a judgment obtained by it in the Franklin circuit court against Board of Councilmen of City of Frankfort, at its Jan'y term, 1896, should not be reversed for the errors therein contained, as we from its complaint are informed; and have then and there this writ.

Witness A. Addams, clerk of our said court, at the capitol aforesaid, this 14th day of January, 1898.

A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

(Here is the officer's return on the foregoing summons:)

Executed on the Deposit Bank of Frankfort by delivering to B. C. Milem, president of said bank, a true copy of the within summons January the 15th, 1898.

B. F. SUTER, *S. F. C.*,
By P. C. TOWLES, *D. S.*

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, do certify that the foregoing is a full and complete transcript of the proceedings had upon copy of judgment in the case wherein The Board of Councilmen of the City of Frankfort are appellants and The Deposit Bank of Frankfort is appellee, as shown by the records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this the 10th day of June, A. D. 1898.

[SEAL.] ABRAM ADDAMS,
Clerk Ky. Court of Appeals.

146 Said petition for appeal and assignment of errors, filed herein on June 25th, 1898, is in words and figures as follows, viz:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT, Kentucky, Complainant, *vs.* SAMUEL H. STONE ET AL., Defendants.	Petition for Appeal and Assignment of Errors.

The defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer of the Commonwealth of Kentucky, The Board of Councilmen of the City of Frankfort, Kentucky, and The County of Franklin, conceiving themselves aggrieved by the decree made and entered on the 25th day of June, 1898, in the above-entitled cause, do hereby appeal from the said order and decree to the United States Supreme Court for the rea-

sons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that the transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

And the said defendants further say that said decree is erroneous and against the just rights of said defendants for the following reasons:

First. Because the court erred in overruling the demurrers of each of said defendants to the complainant's petition.

Second. Because the court erred in overruling the plea of the Board of Councilmen of the City of Frankfort, the County of Franklin, to the jurisdiction herein.

Third. Because the court erred in refusing to permit defendant The Board of Councilmen of the City of Frankfort to file the amended answer offered by them herein on the 25th day of June, 1898.

Fourth. Because the court erred (after deciding that complainant did not have any irrevocable contract under and by virtue of article 2 of the act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May the 17th, 1886) in adjudging and decreeing, nevertheless, that by reason of the several
147 pleas of *res judicata* relied on by complainant in its bill the complainant has established a contract with the Commonwealth of Kentucky under the provisions of the act aforesaid.

Fifth. Because the court erred in enjoining and restraining the defendants Samuel H. Stone, auditor; Charles Finley, and George W. Long from proceeding to value the franchise of the complainant under the act of November the 11th, 1892, for the years 1895, 1896, 1897, and 1898 and for all subsequent years until the expiration of complainant's charter, and also erred in enjoining and restraining the County of Franklin and the Board of Councilmen of the City of Frankfort from endeavoring to collect any tax upon any valuation from the complainant, and also erred in adjudging that complainant, by making payment of taxes to the State only in accordance with the Hewitt law, is discharged in full from all taxes, and also erred in adjudging that the present constitution of Kentucky and the act of November the 11th, 1892, in so far as intended to provide or do provide for any assessment or taxation of complainant's property, rights of property, or franchise except under said Hewitt bill, are repugnant to the Federal Constitution and void.

Wherefore the defendants pray that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of defendants' answers herein.

W. S. TAYLOR, *Att'y Gen'l for Ky.*
T. HITER CROCKET, *City Att'y.*
IRA AND W. H. JULIAN, *Attorneys.*
JAS. H. POLSGROVE,
Co. Att'y, Franklin Co.

And on a day following, to wit, on the 22nd day of July, 1898, an appeal bond was filed herein, which was and is in words and figures as follows, viz:

148 *Appeal Bond.*

Know all men by these presents that Samuel H. Stone auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky; the Board of Councilmen of the City of Frankfort, Kentucky, and Franklin County, Kentucky, as principals, and J. S. Darnell, as surety, are held and firmly bound unto the Deposit Bank of Frankfort in the sum of one thousand ($1,000.00) dollars; the payment of which, well and truly to be made, they bind themselves, their successors, administrators and executors, jointly and severally, by the presents.

Done this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky; the Board of Councilmen of the City of Frankfort, Kentucky, and Franklin County, Kentucky, have prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the circuit court of the United States for the district of Kentucky in the case of The Deposit Bank of Frankfort, complainant, *vs.* Samuel H. Stone *et al.*, defendants, numbered 275 on the docket of said court:

Now, therefore, the condition of this obligation is such that if the said Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky; the Board of Councilmen of the City of Frankfort, Kentucky, and Franklin county, Kentucky, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAM'L H. STONE, *Auditor*, [SEAL.]
By W. H. JULIAN, *Att'y.*
CHAS. FINLEY, *Secret'y of State*, [SEAL.]
By W. H. JULIAN, *Att'y.*
GEO. W. LONG, *Treasurer*, [SEAL.]
By W. H. JULIAN, *Att'y.*
FRANKLIN COUNTY, [SEAL.]
By J. D. MOORE, *Judge.*
CITY OF FRANKFORT, [SEAL.]
By W. S. DEHONEY, *Mayor.*
J. S. DARNELL. [SEAL.]

Sealed and delivered and taken and acknowledged this 20th day of July, 1898, before me—

W. G. CHAPMAN,
Cl'k U. S. Cir. Court, Dist. of Ky., at Frankfort,
By CHAS. N. WIARD, *D. C.*

Approved by—
JOHN W. BARR,
Judge *U. S. Dist. Judge.*

149 Attached to the foregoing bond is the following affidavit of surety, viz:

UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

J. S. Darnell, a surety on the annexed bond, being duly sworn, deposes and says that he resides at Frankfort, Kentucky, in the county of Franklin, in said district; that he is a freeholder in the State of Kentucky; that he is worth the sum of two thousand ($2,000.00) dollars over and above all his just debts and liabilities in property subject to execution and sale, and that his property consists of real and personal property.

J. S. DARNELL.

Subscribed and sworn to before me by J. S. Darnell this July 20th, 1898.

W. G. CHAPMAN,
Cl'k U. S. Cir. Court, Dist. of Ky., at Frankfort,
By CHAS. N. WIARD, *D. C.*

And on the same day, to wit, on July 22nd, 1898, the following stipulation was filed herein, viz:

U. S. Circuit Court for the District of Kentucky.

THE DEPOSIT BANK OF KENTUCKY, Complainant,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Ky., and Franklin County, Defendants. } Stipulation.

Citation on the appeal herein is waived, and it is agreed that the clerk in making the transcript for appeal herein may compare the printed record (used in this cause in the application for injunction before Judge Taft) with the record on file in his office and use said printed record, corrected where it is not the same as the original, and that the clerk may also use the printed opinion of Judge Taft herein without making special copy in the transcript for appeal.

Witness our hands this 13th day of July, 1898.

IRA AND W. H. JULIAN,
Att'ys for Defendants.
FRANK CHINN,
For Deposit Bank.

150 UNITED STATES OF AMERICA, } sct:
District of Kentucky, }

I, Walter G. Chapman, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at Frankfort, do hereby certify that the foregoing 149 pages contain a full and true transcript of the record of the proceedings had in this court in the suit wherein The Deposit Bank of Frankfort was the plaintiff and Samuel H. Stone, auditor, &c., were the defendants,

except the opinion of Judges Pryor & Paynter, included in "Exhibit B" filed with the bill of complaint, as the same appear from the records and files of my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office, this July 21st, A. D. 1898.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

WALTER G. CHAPMAN, *Clerk*,
By CHAS. N. WIARD, *D. C.*

Endorsed on cover: Case No. 16,972. Kentucky C. C. U. S. Term No., 387. Samuel H. Stone, auditor; Charles Finley, secretary of state, & G. W. Long, treasurer, of the Commonwealth of Kentucky, *et al.*, appellants, *vs.* The Deposit Bank of Frankfort. Filed September 1st, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 358.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND C. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, CITY OF LOUISVILLE, ET AL., APPELLANTS,

vs.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1898.

(16,941.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 356.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND G. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY; CITY OF LOUISVILLE, ET AL., APPELLANTS,

vs.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on February 21, 1898.

Present: Honorable John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainant,
versus
S. H. STONE, &c., Defendants. } 6555.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, President, Directors, and Company of the Bank of Kentucky, by its counsel, Humphrey & Davie, and filed in the clerk's office of our said court their bill of complaint against the above-named defendants, S. H. Stone, etc., which bill of complaint and exhibits are in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The President, Directors, and Company of the Bank of Kentucky bring this their bill of complaint against Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, County of Franklin, and the Board of Councilmen of the City of Frankfort; and thereupon the complainant says:

I.

The complainant is a corporation duly created by and organized under the laws of the State of Kentucky, and a citizen of said State.

2 II.

The defendant, Samuel H. Stone, is the auditor of public accounts of the State of Kentucky. The defendant, Charles Finley, is the secretary of state of the State of Kentucky. The defendant, George W. Long, is the treasurer of the State of Kentucky. The defendant, The City of Louisville, is a municipal corporation duly created by and organized under the laws of the State of Kentucky. The County of Franklin is a municipal corporation duly created by and organized under the laws of the State of Kentucky. The Board of Councilmen of the City of Frankfort is a municipal corporation duly created by and organized under the laws of the State of Kentucky.

III.

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky, approved February 2, 1834. By this act it was given full power and authority to acquire, hold, possess, and enjoy all such real estate, goods, effects, and chattels as should be convenient for the transac-

tion of its business, and which might be conveyed to it as surety for any debt. It was directed that it should have and keep its principal office of discount and deposit in the city of Louisville, and that it might have offices of discount and deposit in other parts of the State. Its business was declared to be that of loaning money, discounting promissory notes and bills and dealing in exchange; and it was given authority to issue bills or bank notes, payable to the bearer, on demand, at any of its offices of discount and deposit, but not of less denomination than five dollars. It was given the general powers of a banking corporation. It was provided that it should locate a branch at the seat of government, to aid in the management of the fiscal affairs of the State.

It was provided that the State of Kentucky should subscribe to its capital stock, and that the governor of the Commonwealth should annually nominate, and, with the advice and consent of the senate, appoint three directors on the part of the Commonwealth, who should hold their office until their successors should be duly appointed and qualified. The said corporation was duly organized under the terms of the said act of incorporation, and its corporate life has ever since continued; and it has performed all of the duties imposed upon it by its act of incorporation and the amendments thereto, and the laws of the land. It duly established and has ever since maintained a branch at Frankfort, and has fully performed all its duties as fiscal agent of the State.

IV.

By its original charter, which, as aforesaid, was approved February 22, 1834, it was provided that the complainant should continue a body politic and corporate until the 1st day of October, 1864.

By an act of the General Assembly of Kentucky, approved February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from the 1st of October, 1864; but this extension was declared to be sub-
3 ject to certain restrictions, among others (1) that the bank should be subject to all the restrictions, limitations, penalties, conditions, and duties imposed upon it by this act of incorporation and the acts amendatory thereto; (2) that the legislature should at all times have the power to prohibit the issue of bank notes under the denomination of five dollars; and after 1875, of notes under the denomination of ten dollars; (3) that the stockholders should, within one year from the 10th of May, 1858, by a vote of a majority given at a stated or called meeting, determine whether they would accept the proposed extension; and the said bank accepting the provisions of the act, was required to notify the governor of the Commonwealth of the acceptance, by the certificate of the president and directors of such bank, and when such notice was thus given, the act was to be considered in full force and effect.

There were other provisions in this act of extension not necessary to be here mentioned, but the complainant fully complied with all of them, and, among other things, complied with the requirement

of the acceptance of the act by its stockholders, and of the certificate of the president and directors of such fact.

By another act approved February 1, 1872, it was provided that the complainant was authorized and empowered to purchase, from commissioners of the sinking fund, the stock of the bank owned by the State; and that from and after the purchase of this stock the right of the State of Kentucky to appoint and retain directors in said bank should cease.

This stock was purchased as provided in this act.

It was further provided that its charter should be and thereby was extended twenty-five years.

The complainant complied with all of the provisions of this act of February 1, 1872, and so it is that its charter life will not expire until October 1, 1909.

V.

By the 15th section of its original charter it was provided as follows:

"SECTION 15. It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1836, and on the 1st day of July in each succeeding year, during the continuance of this charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax and bonus, provided that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

By an act approved February 12, 1836, entitled, "An act to increase the revenue," the legislature exercised the right reserved in the above section, and imposed a tax of fifty cents on each share of stock of the complainant—a taxation then largely in excess of the ordinary rate of taxation paid by other moneyed capital or property in the State of Kentucky.

By the act approved February 1, 1872, it was provided that the bank should annually, on the first day of January, pay into the treasury, to go into the revenue proper, a tax of fifty cents
4 on each share of one hundred dollars of its increased capital stock, which should be in full of all tax and bonus on such increased capital stock.

The complainant says, however, that its stock as it now exists, is very much less than that originally authorized by its charter. The original amount authorized was $5,000,000, whereas its present capital stock is only $1,650,000.

The complainant paid, each year, the tax thus levied upon it, down to July 1, 1886, from which time it has paid a different amount, as will be hereinafter explained.

VI.

The complainant says that by the settled course of decision of the highest court of this State, the meaning of these provisions in its charter has been fixed and determined; that on November 1,

1838, it was determined by the court of appeals of Kentucky (which is the highest court of said State) that this language prevented the Commonwealth from taxing the stockholders of the bank, and constituted a contract with the State which was inviolable, and a limitation on the legislative power to tax the stock of the bank or its property; that by a decision rendered by the said court of appeals on the 24th of November, 1869, it was determined that this language meant to include taxation by any of the municipal subdivisions of the State, and prevented such municipal subdivisions from taxing the real estate of the bank, although situated within their boundaries.

By a decision rendered by the same court on June 5, 1888, it was determined (confirming the judgment of the Franklin circuit court) that the said 15th section as aforesaid constituted a contract between the complainant and the State, by which the State would not tax the complainant at a greater rate than fifty cents on each one hundred dollars of stock; that this included all taxation of all kinds—State, county, and municipal—and upon all kinds of property of the said bank.

VII.

On March 18, 1876, there was approved an act of the legislature of Kentucky, entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court."

By the second section of this act it was made the duty of the chief officer of any bank doing business or owning property in the county to list with the assessor all the property of the bank.

By the third section of the act it was provided that all the property thus listed and assessed should be subject to an equal and uniform rate of taxation.

Under this act the Franklin county court, being the fiscal authority of the defendant, The County of Franklin, attempted to assess, for county taxation, the property and choses in action of the complainant situated in Franklin county, where was situated one of its branches. Thereupon the complainant filed a bill in equity in the circuit court of Franklin county against the said Franklin County Court, and prayed for an injunction against the said Franklin County Court, enjoining and restraining it from endeavoring to collect any tax on the basis of such assessment. In said suit the complainant set forth and claimed its contract with the State by virtue of the provisions of its charter as hereinbefore set out, and claimed that the same was inviolable, and that the act of 1876, so far as it attempted to repeal or impair the same, was unconstitutional and void. The said Franklin County Court, being duly brought before the court, the cause came on for hearing, and resulted in a judgment establishing the right of the complainant to relief upon the basis of its said contract, and enjoining the said Franklin County Court from endeavoring to enforce the said assessment.

About the same time the defendant, The Board of Councilmen of the City of Frankfort, caused certain real estate belonging to the

complainant, and situated in the city of Frankfort, to be assessed for taxation, and attempted to collect taxes thereon; whereupon the complainant filed a bill against the Board of Councilmen of the City of Frankfort, in said Franklin circuit court, making similar allegations to those above mentioned in reference to the suit against the Franklin County Court, and praying for an injunction against the Board of Councilmen of the City of Frankfort, restraining them from attempting to collect the said tax against the complainant's real estate.

And this cause coming on to be heard, judgment was rendered in this cause also; and thereupon the said Board of Councilmen of the City of Frankfort was perpetually enjoined and restrained from attempting to collect the said tax.

In both of these causes the contract between this complainant and the State of Kentucky, as hereinbefore set up, was fully pleaded and alleged, and relief was asked upon the basis thereof; and in each of the cases the court adjudged that the said contract was in existence and continued during the charter life of the said bank as extended; and rendered judgment accordingly.

Each of these defendants, The Franklin County Court and The Board of Councilmen of the City of Frankfort, prayed an appeal to the court of appeals from this judgment; and the causes coming on to be heard in the court of appeals, the judgment in each was affirmed by the said court of appeals, the said court holding that the 15th section of the complainant's charter was a contract by which the legislature could tax the complainant at the most 50 cents on each one hundred dollars of its stock; that this was in lieu of all other taxation of every kind—State, county, and municipal—upon the property of every kind of the said complainant; that the said contract existed not only during the original charter life of the complainant, but during the charter life of the complainant as extended by the two acts above referred to; and that neither of the said acts was repealable by the State of Kentucky, but both of them were beyond the power of the legislature to repeal, amend, or modify. The complainant pleads and relies on these judgments as conclusive upon defendants, and files a duly certified copy of the record in said causes.

6 VIII.

By an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually, on the 1st day of July of each year, make report of their condition to the auditor, and should pay into the State treasury 75 cents on each share of their capital stock, and should, in addition, pay into said treasury on their surplus, undivided profit, and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as the real property should be assessed; and it was distinctly provided by the act that the said taxation should be in full of all tax—State, county, and municipal—except that the real estate and buildings owned and used by the banks in conducting their business should

not be exempted from taxation for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed. As a condition to its operation upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. Each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as hereinafter provided, and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation; which consent and agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth; and said agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said taxation shall be paid, during the corporate existence of the bank."

The consent provided for by this act, and the notice to the governor, were further required to be given before the next meeting of the General Assembly, provided the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the complainant on June 25, 1897, a quorum of the stockholders and a majority thereof being present, such stockholders, and a majority in interest thereof, did give their consent to the levying of said tax, and to the waiver and release of all right under its charter to a different mode of and a lower rate of taxation; and said consent of the complainant to the waiver and release aforesaid, and the said agreement, was certified in writing, under the seal of the bank, by the proper corporate authority, to the governor of the Commonwealth, and delivered to him before the next meeting of the General Assembly after the passage of said act. The complainant files herewith as part hereof a duly certified copy of such resolution, consent, and agreement, marked "Exhibit A."

7 IX.

The complainant, through its cashier, made its report and paid into the State treasury, on July 1, 1886, the full tax required by the act described in the foregoing paragraph, and which is commonly known as the "Hewitt act;" and in conformity with said Hewitt act, has made its reports in proper form to the auditor of public accounts on the 1st day of July in each and every year up to this time; and until the year 1893, paid into the State treasury, on or about the 1st day of July of every year from 1886 the full tax required by the said Hewitt act, being seventy-five cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State upon its surplus, undivided profits, and accumulations in excess of ten per cent. of its capital stock. These reports continued to be made by the com-

plainant, but on July 1, 1893, the auditor refused to receive the tax under the Hewitt law, although the complainant tendered the same. He refused to receive it on the first of July, 1894, although the complainant again tendered the same. The complainant paid the same about the 1st of July, 1895, and on or about the first of July, 1896, and in the spring of 1896, at the request of the auditor, and after certain litigation hereinafter mentioned had been determined in its favor, paid to the auditor the difference between the amount paid by it on July 1, 1893, and July 1, 1894, and the amount which it tendered at these times and which was the amount due under the Hewitt law; so that it is now true that the complainant has every year, down to and including 1885, paid the full tax called for under its charter and from 1886 to 1896, the full tax called for under the Hewitt law. It has, also, during this period (1886 to 1896) paid in full to the municipalities where its banking-houses are situated the full county and municipal tax thereon.

The legislature of Kentucky passed an act which went into force on November 11, 1892. The third article of said act dealt with the assessment of certain corporations, among others, banks. By this act it is provided in substance that every incorporated bank shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. The auditor, treasurer, and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is provided that in order to determine the value of the franchise the banks shall each file reports on or before the 1st day of March in each year, which reports shall be made up to include the 31st day of the preceding December. These reports are to be verified by a chief officer of the bank, and show the following facts: The name and principal place of business of the bank; the amount of capital stock; number of shares; amount of stock paid up; nominal and real value thereof; highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; amount of surplus funds and undivided profits, and the value of all other assets; total amount of indebtedness as principal; amount of
8 gross or net earnings or income, including interest on investments and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State; and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized and directed to fix the value of the capital stock of the bank, and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the State or in the counties where situated; and the remainder thus found is to

be the value of the corporate franchise subject to taxation under the said act.

It is further provided that the said board shall apportion the value of such franchise among the several taxing jurisdiction- entitled to a share of such tax.

It is further provided that the auditor of the State, at the expiration of thirty days after the final determination of such values, shall certify to the county clerk of the counties where any portion of the corporate franchise of such banks shall be liable to local taxation, the amount thereof liable for county or State taxes; and such certificate is, by the county clerk, to be filed in his office, and by him certified to the collecting officer of the county and city for collection.

It is further provided that the taxes assessed by the State board of valuation and assessment shall be due and payable on July 1st succeeding such report.

It is further provided that in the event the banks fail to make such report and pay such tax a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; and any bank or trust company failing to pay its taxes, penalties, and interest after becoming delinquent, is to be deemed guilty of a misdemeanor, and upon conviction is to be fined for each day it remains unpaid; to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction.

X.

The complainant states that the amount of its capital stock on the 31st day of December, 1894, on the 31st day of December, 1895, and on the 31st of December, 1896, was $1,645,100, and its surplus upon each date more than $1,000,000; that the amount of the value of its capital stock as fixed by the board of valuation and assessment as of December 31, 1892, was $2,671,559.58, of which there was apportioned to the city of Louisville $2,476,559.58, and to the city of Frankfort and Franklin county about $190,000; that this was substantially the same valuation and apportionment as of December 31, 1893; and this would be substantially the same valuation and apportionment as of December 31, 1894, December 31, 1895, and December 31, 1896; that the tax rate in the city of Louisville for the year 1895 was $1.88; for 1896, $1.85; for 1897, $1.85;
9 that the tax rate for the county of Franklin for the year 1894 was 56⅔ cents; 1895, 56⅔ cents; 1896, 55 cents. The tax rate for 1897 has not yet been fixed, but will be approximately 55 cents. The city tax for the town of Frankfort was $1.45 for 1895; $1.45 for 1896. The tax rate for 1897 has not yet been fixed, but will be about the same.

So that the complainant says that the amount of taxes which it would have to pay under the board of valuation and assessment law, over and above what it would have to pay under the Hewitt law, would be more than $20,000 per annum.

XI.

Complainant says that this scheme of taxation violates the contract made between it and the State in its charter and the amendments thereto, and violates the contract made between it and the State under the Hewitt law, and is very largely in excess of the taxation provided for by its charter or by said Hewitt law; and the act of the legislature of Kentucky instituting such a method of taxation is violative of the Constitution of the United States, and particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract; and is void.

XII.

The said method of taxation is also violative of the constitution of the State of Kentucky, in this, that by the said constitution of the State of Kentucky it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes; in this, that the said law provided for an assessment of the capital stock of corporations, among others banks, by a State board of valuation and assessment, and provides for the certification of such value by the State board to counties and municipalities where any of such capital stock is situated or franchises employed; giving to said State board the right to apportion the same among the taxing districts, and providing that the corporations shall pay to such taxing districts local taxes thereon.

XIII.

The said law having been thus passed in 1892, the State board of valuation and assessment valued the capital stock of the complainant, and deducting therefrom the assessed value of its real estate (which is small in proportion) certified to the authorities of the defendant, The County of Franklin and The Board of Councilmen of The City of Frankfort, the proportion of such value found to be taxable by the county of Franklin and the city of Frankfort for the year 1893. The county of Franklin caused to be placed in the hands of R. D. Armstrong, the sheriff of said county and the collector of its revenue, the tax bill made out accordingly; and the board of councilmen of the city of Frankfort caused a tax bill to be made out upon such valuation for the collection of city taxes thereon.

10

XIV.

On the 28th day of February, 1894, the complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the county court of Franklin, and R. D. Armstrong, sheriff of said county, setting forth in said petion, in apt terms, the contract between it and the State in regard to taxation under its original charters and under the Hewitt law, and claiming the benefit of such contract, and claiming that no

taxes could be collected from the complainant except in pursuance thereof, during its charter life; and claiming that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of these contracts, and praying the court to establish these contracts and to enjoin the said Franklin county and R. D. Armstrong, sheriff, from attempting to collect any taxes contrary thereto.

Issue having been joined upon the complainant's said suit, a judgment was rendered in the Franklin circuit court, to the effect that the act of November 11, 1892, did not violate any contract between the complainant and the State; and judgment was entered accordingly.

Thereupon this complainant appealed from said judgment to the court of appeals of Kentucky. In that court, its appeal having come on to be heard, the court adjudged that the judgment of the lower court was erroneous; and remanded the case to the Franklin circuit court for judgment in conformity to its opinion.

Thereupon the said Franklin circuit court, on January 21, 1896, entered the following judgment, which has ever since and does now remain in full force and effect:

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and the act of November 11, 1892 (article 3, chapter 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal constitution and void; that the board of valuation and
11 assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff

of said county, be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

A duly certified copy of the record in said cause, as it appears in the court of appeals, is filed herewith as part thereof, marked "Exhibit B," and the complainant states that the said exhibit contains the whole proceedings in said cause except the decree made by the Franklin circuit court on January 21, 1896, the terms of which have been given above, and a duly certified copy whereof is filed herewith as part hereof, marked "Exhibit C."

XV.

The complainant further states that the said board of valuation and assessment, acting under the said law of November 11, 1892, having certified to the city of Frankfort, as set forth in a preceding paragraph, the amount of its proportion of the valuation of complainant's franchise, and the board of councilmen of the city of Frankfort attempting to collect municipal taxes thereon, the complainant, on the 2d day of October, 1894, filed in the Franklin circuit court, which is a court of general equity jurisdiction, its petition against the said board of council- of the city of Frankfort, setting forth its contract under its original charter and under the Hewitt law with the State, and relying upon the same, and setting forth the attempted violation thereof under the act of November 11, 1892, and praying judgment against the defendants, The Board of Councilmen of the City of Frankfort, etc., that the said contracts between the complainant and the State be adjudged of full force and effect, and the said act of November 11, 1892, declared unconstitutional and void, and the complainant's right to the establishment and enforcement of its contract during its charter life be established, decreed, and enforced.

Issue having been joined, the cause came on to be heard and resulted in a judgment of the Franklin circuit court that the said act of November 11, 1892, did not violate any contract between the complainant and the State, and adjudging that the complainant was not entitled to relief against the said tax.

And thereupon the complainant applied to the court of appeals of the State of Kentucky. The cause there came on to be heard and was argued by counsel for the board of councilmen of the city of Frankfort and also by the attorney general of the State, in-
12 sisting that the said contract did not exist and had not been violated. And thereupon the cause having come on for decision, the court of appeals rendered its opinion therein and issued a mandate directing that the judgment of the lower court should be reversed and a new judgment entered in conformity with the opinion transmitted.

And thereupon, the cause having been transmitted to the Franklin circuit court, came on for judgment on January 21, 1896; whereupon the following judgment was entered, being in words and figures as follows:

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes or in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and of the act of November 11, 1892 (article 3, chapter 108, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now hereby made perpetual, and the defendants be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

The complainant files herewith, as a part hereof, a duly certified copy of the proceedings in this cause, being the full record of the court of appeals, which contains the entire record of the cause except the decree of judgment entered upon the return of the cause, a copy of which is filed herewith as part hereof, marked "Exhibit D."

13 XVI.

The complainant further states that the defendant, The City of Louisville, claiming to act under authority given it by the legislature of Kentucky under an act providing for government of cities

of the first class (of which the city of Louisville is the only one), passed an ordinance which was approved February, 1894, requiring the banks located in the city of Louisville to pay to said city an annual tax of 4 per cent. upon their gross earnings. The gross earnings of complainant are about $200,000 annually, so that the said tax would have been $8,000. The complainant failed to pay said tax, and thereupon, under the provision of law, a warrant was sued out against the complainant in the city court of Louisville. The complainant thereupon, in the manner provided by law, filed its petition in the Jefferson circuit court for a writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in apt terms its incorporation, its original charter, the extensions thereof, the circumstances of the Hewitt law, the contract entered into in conformity therewith, and claiming the benefit of its said contractual relations with the State; alleged that the said ordinance of the city of Louisville was void as impairing the obligations of the complainant's contract, and any authority given to the city of Louisville to pass such ordinance was likewise void as impairing the obligation of a contract; and asking that the said judge be prohibited from taking jurisdiction under the complaint against the plaintiff for the violation of the said ordinance. Issue was joined on this petition, the defendant being in name The Judge of the Police Court of the City of Louisville, but being in reality The City of Louisville, and the City of Louisville appearing by counsel, the court found the issues in favor of this complainant, and entered a judgment accordingly, establishing the contract of the complainant and its terms and duration.

And thereupon the defendant, The City of Louisville, caused an appeal to be taken from said judgment to the court of appeals of Kentucky, where the cause coming on to be heard, was argued by counsel for the City of Louisville, and for the Commonwealth of Kentucky, both of whom urged that the said contract was not enforceable and had ceased to exist. But the court of appeals, having duly considered the controversy, confirmed the said judgment, and sent its mandate of affirmance to the court of original jurisdiction, where it was duly entered. A duly certified copy of the proceedings in the said cause is filed herewith as part hereof, marked "Exhibit E."

XVII.

The premises considered, the complainant says that it has been fully and finally adjudicated in proceedings between it and the defendants, The City of Louisville, County of Franklin, and The Board of Councilmen of the City of Frankfort, that complainant's contract is valid and enforceable, and that the complainant can be subjected to no greater rate of taxation than that agreed to by it under the Hewitt law, or, if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for under the complainant's charter and amendments.

14

XVIII.

The complainant has always been ready to pay and has paid all of the taxes due by it under the provisions of the Hewitt act, but if it should be determined that the State of Kentucky has the right to retire from that contract, then the complainant submits that it is entitled to be restored to its former position, and it will then be ready and willing to pay all taxes that may be exacted from it according to the terms of its charter and amendments.

XIX.

The complainant says that the defendants, Samuel H. Stone, Charles Finley, and George W. Long, are threatening and unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896, and 1897, and certify such value to the county clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville and to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such assessments will be illegal; in violation of the complainant's contract, as has been heretofore, in causes between the complainant and the said several defendants, adjudged, and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise; cause a multiplicity of suits to be brought against complainant, and damage it in a way that cannot be repaired or estimated at the common law; and from these threatened wrongs the complainant has no remedy at the common law, but its only remedy is by a bill in equity; and unless restrained by this honorable court the defendants, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the harassment of many suits, and cast a cloud upon its franchises and property, and an effort will be made to enforce penalties against this complainant, as hereinbefore set out.

XX.

The premises considered, complainant prays that the said Samuel H. Stone, Charles Finley, and George W. Long be perpetually enjoined and restrained from assessing the value of complainant's capital stock under the said act of November 11, 1892, for the years 1895, 1896, or 1897, or any other year, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said several municipalities, and that the said several municipalities, the city of Louisville, county of Franklin, and board of councilmen of the city of Frankfort, be enjoined and restrained

15 from endeavoring to collect any tax upon any such valuations; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as

hereinbefore set up, by making the payments under the Hewitt law or under its charter, no other or further taxes shall be exacted from it under any form or by any authority.

May it please your honors to grant unto your complainant a writ of subpœna, under proper authority, to be issued against the said Samuel H. Stone, Charles Finley, Geo. W. Long, the city of Louisville, county of Franklin, board of councilmen of the city of Frankfort, commanding each of them, under suitable penalty to be therein fixed, and upon a day therein named, to appear and answer to this bill of complaint, but not under oath, answer under oath being waived, and to stand to and abide by all orders and decrees that the court may enter in the premises; and your orator will ever pray for this and all other appropriate relief.

HUMPHREY & DAVIE,
For Complainant.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Oscar Fenley says that he is the vice-president of the complainant; that the facts stated herein, so far as stated from his personal knowledge, are true, and so far as stated from information, he believes to be true.

OSCAR FENLEY.

Subscribed and sworn to before me this 19th day of April, 1897.

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

16 The following is

EXHIBIT 1.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 5th day of June, 1884, Chief Justice Pryor and Judges Lewis, Holt, and Bennett.

THE FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Appellees.
} Appeal from Franklin.

Be it remembered that heretofore to wit: on the 16th day of July, A. D. 1884, the appellant by counsel filed in the clerk's office of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

STATE OF KENTUCKY:

Proceedings before the Honorable C. S. French, judge of the court of common pleas for Franklin county, at the court-house, in the city of Frankfort, on the 17th day of May, 1884.

Be it remembered that on the 6th day of September, 1883, the fol-ing petition was filed in the clerk's office of the court aforesaid:

Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, Plaintiff,
versus
JOHN W. GAINES, Sheriff of Franklin County, and FRANKLIN County, Defendants.

The plaintiff, "The President, Directors, and Company of the Bank of Kentucky," state- that by an act of the General Assembly of the Commonwealth of Kentucky, approved February 22, 1834, entitled An act to establish the Bank of Kentucky, it was incorporated, made, and is now a body politic and corporate, under the name and style of the President, Directors, and Company of the Bank of Kentucky, with all the privileges, franchises, and powers conferred upon it by said act and amendments thereto, and with its principal bank, place of business, and offices in the city of Louisville, county of Jefferson, and State of Kentucky. And by an act of the same body, approved February 15, 1858, entitled "An act to extend the charters of the Bank of Louisville, Bank of Kentucky, and Northern bank," its charter as amended and its charter privi-

17 leges, rights, and duties were extended and continued in force for the period of twenty years from the first (1st) day of October, 1864. And in said act are plainly expressed all of the rights, powers, and reservations retained by the said legislature; and the intent that the said charter should not be subject to amendment or repeal at the will of the legislature except to prohibit the issue of bank notes under the denomination of $5, and after 1875 of notes under the denomination of $10, and its having at any time in circulation a greater amount than the actual capital paid in, is therein plainly expressed. Said acts and all amendments thereto are referred to as parts hereof.

It says that soon after the adoption of said original act of incorporation, and in conformity with its terms and provisions, which were extended as aforesaid by the said act of 1858, it organized and established said bank, and as required established and has maintained a branch thereof at the seat of government, Frankfort, Ky., as the fiscal agent of and to aid in the management of the fiscal affairs of the State, which branch is known as and called the Branch Bank of Kentucky at Frankfort, Ky., and is managed by a board of directors and other officers appointed by plaintiff, under the direction and advice of its principal officers at Louisville, Ky., and which has been the fiscal agent of the State, and done and performed all and every service required of it as such. That all the property of

every description belonging or appertaining to its said Branch bank, at Frankfort, Ky., is the property of and belongs to this plaintiff. That for and during the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883 the amount of its capital stock assigned to, and which was capital stock of its said Branch bank, and all that was used by it in Franklin county, was and is $200,000, of which $10,000 was and is invested in real estate for a banking-house and the necessary office furniture for its business, and is of the value of $10,000, which real estate consists of a lot of ground on St. Clair street, in Frankfort, Ky., where its said Branch bank is now situated, and upon which it has erected a building containing the proper rooms or offices for conducting the business of its said Branch bank, and a residence for its cashier, the same being so arranged that the residence of its cashier and sleeping apartments for its clerks surround its banking-rooms and vault as well as may be, for the proper security, at night as well as day, to the money and property of said bank, and the State and other depositors therein, and being no more than sufficient for its business and for the purpose of furnishing such proper and adequate security, and said lot and building have been and are being used for no other purposes; and of which capital stock the sum of $100,000 was, for the years 1876 to 1879, inclusive, invested in United States Government bonds, held by its said Branch bank to meet the requirements of the State and other emergencies of its business, and which bonds were by law exempt from taxation for any purpose whatever. That it did not, in the years 1876 to 1883, inclusive, have or own, situated in Franklin county, any other real estate or tangible property assessable for taxation for any purpose in kind or specie, either in its own right or as agent for any one else. That all of its property, or all property owned or possessed by it in Franklin county in the years aforesaid (including said capital stock), consisted and
18 consists of the real estate and furniture aforesaid, required in the conduct of the business of its said Branch bank, of the United States Government bonds aforesaid, and of notes, bills, accounts, choses in action, and evidences of debt, and that the aggregate of the same has been during said years and is fully covered by its indebtedness to its stockholders, depositors, and other creditors, and that it has not held or owned or possessed in said years any balance whatever under the provisions of section 5, art. 1, chapter 92 of the General Statutes.

It further says that under and by virtue of its charter, extended and continued as aforesaid and by law and as part of the rights and privileges given and requirements demanded of it thereby and in consideration of its organization thereunder and of the establishment and management of its said principal bank and the said branch bank therein required, it was authorized and bound, by the cashier of its principal bank on the first day of July of each and every year during the continuance of its charter to pay to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, "which shall be in full of all tax or bonus." Plaintiff avers that it has pursuant to the terms and

requirements of said acts, on the first day of July in each year, including the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883, during the time it was so required by its charter, by the cashier of its principal bank, paid to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, which payments it avers were and are in full of all tax or bonus against it.

But plaintiff says that notwithstanding all the facts hereinbefore set out and stated, the defendant Franklin County, without authority of law, had made by the Franklin county court, or at least there was made by said court on the — day of ——, 1883, warrant or authority of law, an order directing the clerk of that court to issue a summons against The Bank of Kentucky, meaning this plaintiff, returnable on the first Monday in May, 1883, commanding it to appear in that court and list or show cause why it should not list its property in Franklin county for taxation for county purposes as required by law.

And thereafter, to wit, on the 16th day of April, 1883, the clerk of said court, notwithstanding no year or years was mentioned or stated in said order for which said bank should list or show cause for not listing its property, and no report whatever had been made to said clerk or said court of any delinquency of plaintiff or its said bank in listing its property for taxation for any year or years, issued and delivered to the sheriff of Franklin county a summons directing said sheriff to summons plaintiff to appear before the Franklin county court on Monday, May 7th, 1883, and list (or show cause why it should not list) all of its property situated in Franklin county for assessment and taxation for county purposes for the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883. This plaintiff appeared in said court in obedience to said summons and filed its demurrer in writing to the jurisdiction of said court and the same was overruled, and it thereupon filed its response and plea in which it denied that said county court had power or juaisdiction to assess or list, or to direct or order any one else to assess or list, its
19 or any of its property for purposes of county taxation or for any other purposes, and in which it set out in full and in detail all the facts hereinbefore set out and pleaded the same and the said payments of fifty cents on each one hundred dollars of stock held and paid for in its said bank to the treasurer of this Commonwealth in full of and as a protection against all other taxation as provided in the acts aforesaid.

But said court held said response and answer to be insufficient, and without hearing any evidence whatever, made and entered the following order in said proceeding, to wit:

Franklin County Court.

MONDAY, *May* 7, 1883.

COMMONWEALTH, for FRANKLIN COUNTY Court,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky.

Rule to List Property for Taxation.

The defendant filed a demurrer in writing to the summons and proceedings herein which is now overruled, to which the bank excepts, and the defendants then filed a response in writing, the verification of which was waived by the attorney for the county, and the county attorney then demurred to said response, and the demurrer filed by the attorney for the county to the response of the bank is sustained, to which the defendant also excepts; and it being admitted by the bank through its attorney that due demand had been made by the assessor of Franklin county of the president of defendant's Branch bank at Frankfort, Ky., to list the property of defendant's bank, situated in Franklin county, for taxation for county purposes for four years last past, and that he failed and refused to list any part of same with the assessor. There was no evidence heard, but the case was submitted upon the said admission, the facts stated in the response of defendant, and the sheriff's report of delinquents for said years. The clerk of this court is hereby ordered to assess and list for taxation for county purposes the property of said bank, situate in Franklin county, for the years aforesaid, viz: for the years 1876, 1877, 1878, and 1879, property of the value of one hundred thousand dollars ($100,000), to be taxed at the rate of the *ad valorem* county levy tax for each of said years respectively, and for the years 1880, 1881, 1882, and 1883, property of the value of two hundred thousand dollars ($200,000), to be taxed at the rate of the *ad valorem* county levy tax for each of said years respectively, and the clerk will certify the whole of said assessments to the sheriff of Franklin county for collection of the county taxes as above indicated. To all of which the defendant excepts.

The clerk of said county court on the 23d day of May, 1883, without any authority of law, assessed as against this plaintiff property for taxation for county purposes, professing to make said assessment pursuant to judgment of the Franklin county court theretofore rendered, as follows:

20

Value property, 1876, $100,000, 20 cents on $100, tax	$200 00
Value property, 1877, $100,000, 20 cents on $100, tax..	200 00
Value property, 1878, $100,000, 20 cents on $100, tax..	200 00
Value property, 1879, $100,000, 25 cents on $100, tax..	250 00
Value property, 1880, $200,000, 40 cents on $100, tax..	800 00
Value property, 1881, $200,000, 40 cents on $100, tax..	800 00
Value property, 1882, $200,000, 40 cents on $100, tax..	800 00
Value property, 1883, $200,000, 40 cents on $100, tax..	800 00
	$4,050 00

and has certified to the defendant J. W. Gaines, sheriff of Franklin county, said so-called list or assessment, amounting in all to $4,050, for collection, and said Gaines, sheriff as aforesaid, has levied the property of this plaintiff to make said illegal taxes, and, unless prevented, will sell the same to satisfy said alleged taxes. Certified copies of said order, summons, response, judgment, and tax-list, and of the entire record of said proceedings in said county court, together with the certificate of the clerk of said court to the effect that no report had been made by the sheriff of Franklin county, or any one else, reporting plaintiff as a delinquent tax-payer to Franklin county for the years 1876, 1877, 1878, 1879, 1880, 1882, 1883, or for either of said years, are filed herewith as part hereof.

Plaintiff here avers that none of its aforesaid property is subject or liable to taxation for county purposes in Franklin county for said years, or either of them; that said county court had no jurisdiction whatever to make any assessment or list of plaintiff's property for taxation for county purposes or to direct or order any one else to assess or list it; nor had said clerk any right or authority so to do.

Plaintiff avers that the aforesaid pretended assessment was made up and consists of the capital stock of the plaintiff assigned to its Branch bank at Frankfort, Ky., and no other or different property whatever, deducting from said stock for the years 1876 to 1879, inclusive, the amount thereof invested as aforesaid in Government bonds, and is an attempt to tax its said capital stock in violation of the provisions of its said charter and its contract with the Commonwealth, which declares that the payment to the treasurer of the State of fifty cents on each one hundred dollars of stock held and paid for in its bank shall be in full of all tax or bonus.

And it further alleges that said county court had no right or authority to assess, levy, or collect an *ad valorem* tax on any property of plaintiff at the rate of twenty cents on the one hundred dollars' worth for either of the years 1876, 1877, and 1878, or at the rate of twenty-five cents on the one hundred dollars' worth for the year 1879, or at the rate of forty cents on the one hundred dollars' worth for either of the years 1880, 1881, and 1882, or at the rate of forty-five cents on the one hundred dollars' worth for the year 1883, for county purposes.

Plaintiff says it has no remedy at law for its protection against the wrongs and injuries hereinbefore complained of and set out; that it would sustain great and irreparable injury from a sale of its property levied on by said sheriff as aforesaid; that no previous injunction has been granted, refused, or applied for.

21 Wherefore it prays that the defendant, John W. Gaines, sheriff as aforesaid, be enjoined and restrained from enforcing the levy made by him as aforesaid on plaintiff's property, and from subjecting any property of plaintiffs to sale under said illegal and alleged tax-list or to satisfy any taxes alleged or claimed to be due Franklin county on any of plaintiff's property; and that the defendant Franklin County be enjoined and restrained from assess-

ing or collecting or attempting to assess or collect hereafter any tax whatever on plaintiff's property for county purposes or any other.

D. W. LINDSEY,
Attorney for Plaintiff.

A. W. Dudley says he is the president of the Branch Bank of Kentucky at Frankfort, Ky., and the chief officer or agent of plaintiff now in this county, and that he believes the statements of the foregoing petition are true.

A. W. DUDLEY.

Subscribed and sworn to before me, by A. W. Dudley, this 1st day of September, 1883.

JOHN B. LINDSEY,
Notary Public, Franklin Co., Ky.

COMMONWEALTH, for FRANKLIN COUNTY,
versus
BRANCH BANK OF KENTUCKY AT FRANKFORT. } Injunction.

It is ordered that the summons issued against the Branch Bank of Kentucky at Frankfort be quashed, and it is further ordered that the clerk of this court do issue a summons against the Bank of Kentucky returnable on the first Monday in May next, commanding it to appear in this court and list or show cause why it shall not list its property in Franklin county for taxation for county purposes as required by law.

Commonwealth of Kentucky to the sheriff of Franklin county:

You are commanded to summons the Bank of Kentucky and its Branch Bank of Kentucky at Frankfort, doing business under the corporate name and style of the President, Directors, and Company of the Bank of Kentucky, to appear before the Franklin county court on Monday, May 7, 1883, and list (or show cause why it shall not list) all the property of said bank or of its branch of Frankfort, situate in Franklin county, for assessment and taxation — county purposes for the years 1876, 1877, 1878, 1879, 1880, 1882, and 1883, as required by the laws of this State, and warn it that upon failure to answer or list said property the same will be listed and twenty-five per cent. added to the value thereof as a penalty for such failure and refusal, and its chief officer or agent will be proceeded against for contempt.

Witness our hand this April 10, 1883.

JAS. G. CROCKETT,
Clerk Franklin Co. Court.

22 The following return was endorsed on the foregoing summons:

Executed on the Bank of Kentucky by delivering to Barret, the

president, a copy of the within notice, and on the Branch bank by delivering to A. Dudley, the president, a copy of the within notice. April 13, 1883.

J. W. GAINES, *S. F. C.*,
By W. HUGHES, *D. S.*

For demurrer of Bank of Kentucky to summon-, see page 7.

Franklin County Court.

In the Matter of a Summons against THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY to Assess Its Property Situated in Franklin County for County Taxations.

Response.

The President, Directors, and Company of the Bank of Kentucky, for response to the summons issued against it herein, says:

1st. It denies that this court has any jurisdiction or power to assess or list or to direct or order any one else to assess or list any of its property situated in this county or elsewhere for county taxation or for any other purpose.

2d. That by the acts of the General Assembly of the Commonwealth of Kentucky, entitled "An act to establish the Bank of Kentucky," approved February 22, 1834, and "An act to extend the charter of the Bank of Louisville, Bank of Kentucky, and Northern bank," approved February 15, 1858, and the amendments to said acts which are referred to as parts thereof, it was established and now is a corporation under the corporate name and style of "The President, Directors, and Company of the Bank of Kentucky," with all the franchises, privileges, and powers conferred upon it by said acts, and with its principal place of business and officers in the city of Louisville, county of Jefferson, and State of Kentucky: That by the terms of its said charter it was required to establish and maintain a branch of its bank at Frankfort, Kentucky, as the fiscal agent of the Commonwealth, and it did establish and has maintained said Branch bank at Frankfort, Ky., which is managed by a board of directors and other officers appointed by it under the direction and advice of its principal officers at Louisville, Ky., and which has been the fiscal agent of the Commonwealth and done and performed all and every service required of it as such: That all the property of every description, belonging or appertaining to its said Branch bank at Frankfort, Ky., is the property — and belongs to this respondent: That for and during the years mentioned in said summons, viz: the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883, the amount of its capital stock assigned to and which was the capital stock of its said Branch bank and all that was used by it in Franklin county was and is $200,000, of which $10,000 was and is invested in real estate for a banking-house, which real estate consists of a lot of ground on St. Clair street in the city of Frankfort, Ky., where its said Branch bank is now situated, and
23 upon which it has erected a building containing the proper rooms or offices for conducting the business of said Branch

bank and a residence for its cashier, the same being so arranged that the residence of the cashier and sleeping *departments* for one or more of its clerks surround its banking-rooms and vault for the proper security at night as well as day to the money and property of said bank and the State and other depositors therein and being no more than sufficient for its business and for the purpose of furnishing such proper and adequate security, and said lot and building are and have been used for no other purpose, and of which the sum of $100,000 was, for the years 1876 to 1879 inclusive, invested in United States Government bonds held by said bank, and which were not by law taxable for any purpose whatever. That it had nor has no other real estate or taxable property assessable for any purpose in kind or species in its own right or as agent for any one else situated in Franklin county. That all of its property in Franklin county, including said capital stock, except a small amount of office worth not exceeding $—, consists and consisted of the bonds aforesaid, notes, bills, accounts, choses in action, and evidences of debt, and that the aggregate of the same is and has been fully covered by its indebtedness to its stockholders, depositors, and other creditors, and that it has not held or owned and does not now hold or own any balance whatever under the provisions of sec. 5, art. 1, chapter 92 of the General Statutes.

3d. It further says that by the terms of its said charter and by law it is provided, and it was contracted between the Commonwealth of Kentucky and it, that (it) should on the first day of July each and every year during the continuance of its charter, by the cashier of its principal bank, pay to the treasurer of the Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank in full of all tax or bonus; and it says it has each year and including each of the years named in said summons, reported and by the cashier of its principal bank paid to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, and such exemption contract or payment (is) also a bar to the proceeding. It denies that it is or has been delinquent or has failed to give in any property owned or held by it assessable for county taxation for any of said years. And having responded, it asks that this proceeding be dismissed.

D. W. LINDSEY,
Attorney for the President, Directors, and Co. of the Bank of Kentucky.

Franklin County Court.

In the Matter of a Summons against "THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY" to Assess its Property Situated in Franklin County for County Taxation.

Demurrer.

The President, Directors, and Company of the Bank of Kentucky demurs to the summons and the proceedings herein; because it says that this court has no jurisdiction of the subject-matter thereof.

D. W. LINDSEY,
Attorney for P., D., and Co. of Bank of Kentucky.

24 Franklin County Court.

Bank Kentucky case.

The County of Franklin, by attorney, demurs to the response filed by the bank herein because the same does not state facts sufficient to relieve it from payment of county taxes.

IRA JULIAN, *Att'y.*

Franklin County Court.

MONDAY, *May* 7, 1883.

COMMONWEALTH, for FRANKLIN COUNTY Court,
versus
THE PRESIDENT, DIRECTORS, and COMPANY of the Bank of Kentucky.
} Rule to List Property for Taxation.

The defendant filed a demurrer in writing to the summons and proceedings herein which is now overruled, to which the bank excepts, and the defendant then filed a response in writing, the verification of which was waived by the attorney for the county, and the county attorney then demurred to said response, and the demurrer filed by the attorney for the county to the response of the bank is sustained, to which defendant also excepts, and it being admitted by the bank, through its attorney, that due demand had been made by the assessor of Franklin county of the president of defendant's Branch bank at Frankfort, Ky., to list the property of defendant's bank, situate in Franklin county, for taxation for county purposes for four years last past, and that he failed and refused to list any part of same with the assessor. There was no evidence heard, but the case was submitted upon the said admission, the facts stated in the response of defendant, and the sheriff's reports of delinquents for said years.

The clerk of this court is hereby ordered to assess and list for taxation for county purposes the property of said bank situate in Franklin county for the years aforesaid, viz: for the years 1876, 1877, 1878, and 1879, property of the value of one hundred thousand dollars ($100,000), to be taxed at the rate of the *ad valorem* county levy tax for each of said years respectively, and for the years 1880, 1881, 1882, and 1883 property of the value of two hundred thousand dollars ($200,000), to be taxed at the rate of the *ad valorem* county levy tax for each of said years respectively, and the clerk will certify the whole of said assessments to the sheriff of Franklin county for collection of the county taxes as above indicated. To all of which the defendant excepts.

The sheriff of Franklin county nor any one else has reported the Bank of Kentucky as a delinquent tax-payer to Franklin county for the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, nor for either of said years.

25 STATE OF KENTUCKY, } *sct:*
County of Franklin, }

I, Jas. G. Crockett, clerk of the county court for the county and State aforesaid, certify the foregoing to be a true copy of the proceedings of The Franklin County Court against The Bank of Kentucky as of record and on file in my said office.

Given under my hand this the 13th day of July, 1883.

JAMES G. CROCKETT, *Clerk*,
By W. D. GRAVES, *D. C.*

Property Listed with Clerk of County Court.

Bank of Kentucky property assessed under judgment of county court for taxation for county purposes for the year 1876, $100,000; 1877, $100,000; 1878, $100,000; 1879, $100,000; 1880, $200,000; 1881, $200,000; 1882, $200,000.

STATE OF KENTUCKY, } *sct:*
County of Franklin, }

I, Jas. G. Crockett, clerk of the county court of the county aforesaid, certify the foregoing to be a true and correct copy of the assessment of the property of the Bank of Kentucky as made by me under a judgment of said court directing that said assessment be made against said Bank of Kentucky for the years 1876, 1877, 1878, 1879, 1880, 1881, and 1882 for county purposes, as of record in my office.

Given under my hand this the 5th day of September, 1883.

JAS. G. CROCKETT, *Clerk*,
By W. D. GRAVES, *D. C.*

Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Kentucky, Plaintiff,
versus
JOHN W. GAINES, Sheriff of Franklin County, and Franklin County, Defendants. } Order.

This day came the parties to the above-styled action, by their attorneys, and the plaintiff, applying for an injunction, and the defendants appearing by Ira Julian, their attorney, and waiving notice of the time and place of said application, and it appearing that the judge of this court, and also the judge of the Franklin circuit court, are absent from Franklin county, an injunction is granted and will be issued by the clerk of this court, agreeable to the prayers of the petition upon the plaintiff's executing before the clerk of this court bond with good security to the effect that the plaintiff will pay to the defendants such damages as they may sustain, not exceeding $9,000.00, if it be finally decided that the injunction ought not to have been granted.

September 6, 1883.

W. FRANKLIN, *C. F. C. C.*

26 Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky *versus* JOHN W. GAINES. } Injunction Bond.

We undertake that the plaintiff, The President, Directors, and Company, shall pay to the defendants, John W. Gaines, sheriff of Franklin county, the damages not exceeding nine thousand dollars, which they or either of them may sustain, if it be finally decided that the injunction ought not to have been granted.

Witness my hand this 6th day of September, 1883.

E. L. SAMUEL.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon John W. Gaines, sheriff of Franklin county, and Franklin County to answer, on the first day of the next November term, a petition in equity filed against them in Franklin common pleas court, by President, Directors, and Company of the Bank of Kentucky, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next November term of said court.

Witness, W. Franklin, clerk of said court, this 6th day of September, 1883.

W. FRANKLIN, *C. F. C. C.*

Executed on J. W. Gaines, sheriff of Franklin county and R. A. Thomson judge of Franklin county court, by delivering to each of them a copy of the within summons.

September 6, 1883.

W. L. COLLINS, *Sheriff.*
JOHN L. TOBIN, *D. S.*

At a court held on 1st day of December, 1883:

The defendants filed a demurrer to the plaintiff's petition and the cause was submitted on said demurrer, and the court not being sufficiently advised took time.

Franklin Circuit Court.

BANK OF KENTUCKY *versus* JOHN W. GAINES. } Demurrer.

The defendants, The Franklin County Court and John W. Gaines, sheriff, come and demur to plaintiff's petition herein because the same does not state facts sufficient to sustain the injunction herein, and does not state facts sufficient to relieve plaintiff from payment of the taxes.

27 At a court held on the 17th day of May, 1884:

The demurrer to the petition being heard, the court overruled the demurrer and defendants except, and defendants, by their attorney, declining to answer:

It is adjudged that the injunction in this cause be perpetuated, and the defendants are perpetually enjoined and restrained from further proceeding to collect the taxes mentioned in the action, and that the plaintiff recover against the defendants its costs herein expended, to all of which defendants except and pray an appeal to the court of appeals, which is granted.

KENTUCKY:

Franklin Court of Common Pleas.

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing thirty-one pages and the above lines contain a full, true, and complete transcript of the record and proceedings had in the cause therein mentioned.

Witness my hand this 11th day of June, 1884.

W. FRANKLIN, *Clerk.*

At the same time counsel for appellant filed with the transcript the following statement:

THE FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin Co., Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Appellees. } Statement.

The judgment appealed from was rendered at the May term, 1884, of Franklin common pleas court, and may be found at pages 31, 32 of this record. Appeal granted in court below. No summons.

IRA JULIAN,
Attorney for Appellants.

Afterwards at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 18th day of November, 1884, the following order was entered:

THE FRANKLIN COUNTY COURT, &c.,
versus
THE BANK OF KENTUCKY. } Franklin.

* * * * * * *

Ordered that these causes be continued for oral argument.

Afterwards at a court of appeals held as aforesaid, on December 15, 1885:

Ordered that these causes be continued for oral argument.

28 Afterwards at a court of appeals held as aforesaid, on the 23d day of February, 1886:

These causes coming on to be heard were argued by D. W. Lindsey for appellee, and W. H. Julian for appellant, and laid over for further argument.

And on February 25, 1886:

These causes coming on to be further heard were argued by Wm. Lindsey for appellee, and John Rodman for appellant, and laid over for further argument.

And on February 27, 1886:

These causes coming on for further hearing were argued by A. Duvall for appellee, and laid over.

And on March 2, 1886:

These causes coming on to be further heard were argued by Ira Julian for appellant, and submitted.

Afterwards at a court of appeals held as aforesaid on June 5, 1888, the following judgment was entered:

THE FRANKLIN COUNTY COURT, &c., Appellants,	}	Appeal from Franklin Circuit Court.
versus		
THE BANK OF KENTUCKY, Appellee.		

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that appellee recover of appellants its cost herein.

(The opinion delivered is copied in record of City of Frankfort *v.* Bank of Kentucky, and is not recopied here.)

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify that the preceding twenty-five pages contain a true and complete transcript of the record and proceedings had in said court in case of Franklin County Court, appellant, against Bank of Kentucky, appellee, except the opinion of the court in said case (which is copied in transcript this day made of case of Board of Councilmen of City of Frankfort against Bank of Kentucky), and except the petition for rehearing and proceedings on same as appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort this 6th day of May, 1897.

ABRAM ADDAMS,
Clerk Ky. Court of Appeals.

29 The following is

EXHIBIT 2.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 5th day of June, A. D. 1895, Chief Justice Pryor and Judges Lewis, Holt, and Bennett sitting.

THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Appellees.
} Appeal from Franklin.

Be it remembered that heretofore, to wit: on the 9th day of August, A. D. 1884, the appellant by counsel filed in the clerk's office of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

Kentucky Franklin Court of Common Pleas.

Proceedings before the Hon. C. S. French, judge of the court aforesaid, at the court-house, in the city of Frankfort, on the 16th day of May, 1884.

Be it remembered that on the 21st day of November, 1882, the following petition was filed in the clerk's office of the court aforesaid:

Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal of said City, Defendants.
} Petition in Equity.

The plaintiff, The "President, Directors, and Company of the Bank of Kentucky," states that by an act of the General Assembly of the Commonwealth of Kentucky, approved February 22, 1834, entitled "An act to establish the Bank of Kentucky," it was incorporated under the name and style of "The President, Directors, and Company of the Bank of Kentucky," with "power to contract and be contracted with, sue and be sued, plead and be impleaded, answer and be answered, defend and be defended in all courts and places and in matters as natural persons, with full power and authority to acquire, hold, possess, use, occupy, and enjoy, and to sell, convey, and dispose of all such real estate, goods, effects, and
30 chattels as shall be convenient for the transaction of its business, or which may be conveyed to said bank as surety for

any debt, or which may be received in discharge of any debt, or purchased in satisfaction of any judgment or decree in favor of the bank or in the purchase of any property on which said bank may have a lien." And by an act of the same body, approved February 15, 1858, entitled "An act to extend the chattels of the Bank of Louisville, Bank of Kentucky, and Northern bank," its charter as amended and its chartered privileges and rights were extended for the period of twenty years from the 1st day of October, 1864. Said acts and all amendments thereto are referred to as part hereof.

It says that under and by virtue of the terms of its charter, and as a part of the privileges given and requirements demanded of it thereby, and in consideration of its organization and management thereunder, it was authorized and bound by the cashier of its principal bank, on the 1st day of July of each and every year during the continuance of its charter, to pay to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, "which shall be in full of all tax or bonus."

Plaintiff avers that it has, pursuant to the terms and requirements of said acts, on the 1st day of July in each year, including the year 1882, during the time it was so required by its charter, by the cashier of its principal bank, paid to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, which payments, it avers, were and are in full of all tax or bonus.

The plaintiff states that soon after the adoption of said original act of incorporation, and in conformity with its terms and provisions, it organized and established said bank, with a branch at the seat of government, Frankfort, Kentucky, to aid in the management of the fiscal affairs of the State—said branch being known as and called the Branch Bank of Kentucky at Frankfort, Kentucky, which bank and branch bank have ever since been and still are in regular operation, doing the business authorized by its said charter; and for the location of the place or office of discount and deposit for said branch in the city of Frankfort, Kentucky, and for the safe and convenient transaction of its business, plaintiff purchased a lot or parcel of ground on the west side of St. Clair street in said city, and erected thereon a building suitable for a banking-house, which building includes rooms suitable for and used as a residence for the cashier of said branch bank and for one or more of its clerks, said building of such a character and so arranged as to promote and secure the convenient transaction of the business of said branch bank and the safety and protection of the property under its control—the portion or rooms therein devoted to the residence and use of the cashier and clerks in said branch bank surrounding and protecting as far as possible without incommoding its business, the banking-rooms and vault of said bank. Plaintiff says that neither said building nor the lot of ground on which it stands, nor any part of either is used or was purchased or intended for any other purpose or object than as stated, and all of said building and ground is convenient and necessary for the transaction of said business and the safety and security of said property.

31 The plaintiff further states that it was on January 10, 1882, the owner in fee-simple of a house and lot in the city of Frankfort, Kentucky, on the east side of St. Clair street, which formerly belonged to A. G. Hodges, and known as the "Old Commonwealth building," which said property was first mortgaged to it to secure an indebtedness due to it, created in the usual course of its business, for money loaned upon paper discounted at its bank, and was finally conveyed to and received by it in discharge and satisfaction of the said indebtedness due to it, which was for a sum much larger than the value of the property, and greatly larger than the sum for which it has since January 10, 1882, sold and conveyed the same. That from the time it acquired said property as aforesaid, the same has been held in the market for sale, but plaintiff was unable to dispose of the same to any purchaser until since January 10, 1882.

Yet the plaintiff says that notwithstanding the premises, the defendant, The Board of Councilmen of the City of Frankfort, has, recently and without authority of law, assumed and undertaken to levy a tax upon the house and lot last mentioned on the east side of St. Clair street, and upon a part of the real estate hereinafter mentioned used by the plaintiff in its business, and the defendant Kirtley, as deputy of the defendant Todd, marshal of the city of Frankfort, under the order and direction of the defendant, The Board of Councilmen of the City of Frankfort, has advertised in the newspaper published in said city called the "Tri-Weekly Yeoman" that he will on December the 4th, 1882, sell at public sale at the court-house door in the city of Frankfort, Kentucky, portions of said property belonging to plaintiff, which portions are described by said marshal in said advertisement as follows: (1) "Commonwealth building on St. Clair street, value $7,500," to raise the sum of $112.50, besides his pretended costs and commissions amounting as claimed to $11.75 more. (2) "Residence on St. Clair street used for cashier, value $5,000," to raise the sum of $75, besides his pretended costs and commissions amounting as claimed to $8 more, making in all the sum of $207.25, which the said defendant Kirtley will, unless immediately enjoined or restrained, sell said properties to realize under the pretense that the same is due from plaintiff to said Board of Councilmen of the City of Frankfort, as delinquent taxes on the property so advertised for sale for the year 1882.

Plaintiff says it does not owe the defendant, The Board of Councilmen of the City of Frankfort, the sum so claimed or any part of it for taxes on said property or any part of it for the year 1882 or for any other period; and that said Kirtley has no legal right or authority to make said proposed sale for the purpose stated, but unless enjoined and restrained he will do so according to said advertisement, to the great and irreparable injury of the plaintiff.

Plaintiff avers that he is without adequate remedy at law, and that no injunction has been heretofore asked for, and none has been refused by the court, by any circuit judge or by any one else.

Wherefore plaintiff prays that the defendants Todd and Kirtley

and The Board of Councilmen of the City of Frankfort and all others be enjoined and restrained from selling said properties
32 or any part thereof for the purpose above stated or for any other purpose or upon any other pretext whatever, and that said injunction be made perpetual. And it prays judgment for its costs and all other relief general or special to which it in law or equity may be entitled.

D. W. LINDSEY,
Att'y for Plaintiff.

A.W. Dudley says he is the president of the Branch Bank of Kentucky at Frankfort, Kentucky, and the chief officer and agent of the plaintiff at this time in this county, all of the officers of the principal bank being now absent from this county, and he believes the statements of the foregoing petition to be true.

A. W. DUDLEY.

Sworn to by A. W. Dudley before me this 21st day of November, 1882.

JOHN B. LINDSEY,
Notary Public, Franklin Co., Kentucky.

On the 21st day of November, 1882, the following summons issued on the foregoing petition:

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon the Board of Councilmen of the City of Frankfort, T. J. Todd, marshal, and J. E. Kirtley, deputy marshal of said city, to answer on the first day of the next May term a petition in equity filed against them in the Franklin common pleas court by the President, Directors, and Co. of the Bank of Kentucky, and warn them that upon their failure to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next May term of said court.

Witness W. Franklin, clerk of said court, this 21st day of November, 1882.

W. FRANKLIN, *C. F. C. C.*,
By ROB'T B. FRANKLIN, *D. C.*

Executed on E. H. Taylor, Jr., mayor of the city of Frankfort; on T. J. Todd, marshal of the city of Frankfort, and John E. Kirtley, deputy marshal of the city of Frankfort, by delivering to him a copy of the within summons, November 28, 1882.

J. W. GAINES, *S. F. C.*

At a court held on the 23d day of November, 1882:

The plaintiff filed notice and moved the court to grant injunction as prayed for in the petition, which motion is laid over for hearing.

33 Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT; T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal, of said City, Defendants.

The defendants, The Board of Councilmen of the City of Frankfort, T. J. Todd, marshal, and J. E. Kirtley, deputy marshal of said city, are hereby notified that on the fourth day of the present November term, 1882, of the Franklin common pleas court, the plaintiff, The President, Directors, and Company of the Bank of Kentucky, will apply to said court to grant an injunction according to the allegations and prayer of the petition in the above-styled cause now on file in the clerk's office of said court.

THE PRESIDENT, DIRECTORS & CO.
OF THE BANK OF KENTUCKY,
By D. W. LINDSEY, *Its Attorney.*

E. H. Taylor, Jr., mayor of the city of Frankfort, not being found, *and* executed the same on Board of Council- of the City of Frankfort, by delivering to H. Rodman, attorney for city of Frankfort, by delivering to him a copy of the within notice Nov. 23, 1882.

J. W. GAINES, *S. F. C.*

Executed on T. J. Todd and J. E. Kirtley by delivering to each of them a copy of the within, Nov. 20, 1882.

J. W. GAINES, *S. F. C.*,
By W. HUGHES, *D. S.*

E. H. Taylor, mayor of the city of Frankfort, not found, Nov. 23, 1882.

J. W. GAINES, *S. F. C.*,
By W. HUGHES, *D. S.*

At a court held on the 25th day of November, 1882:

Came the parties by their attorneys and the defendants, The Board of Councilmen of the City of Frankfort, T. J. Todd, marshal, and J. E. Kirtley, deputy marshal of said city, filed a demurrer to the petition, and the cause being heard on said demurrer and on the motion of the plaintiff for an injunction herein, and the court being advised, it is ordered that the demurrer be overruled, to which defendants except, and the clerk of this court will issue order of injunction agreeable to the prayer of the petition, enjoining the defendants and each of them from selling the properties described in the petition, or either of them or any part of either of them, for delinquent taxes claimed to be due the Board of Councilmen of the City of Frankfort until the further order of this court, upon the plaintiff executing to the defendants bond with good security, conditioned that the plaintiff will pay to the defendants such damages as they may sus-

tain if it is finally decided that the injunction ought not to have been granted. To all of which the defendants except.

34 Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky *versus* CITY OF FRANKFORT, &c. } Injunction Bond.

We undertake that the plaintiffs, The President, Directors, and Company of the Bank of Kentucky, will pay to the defendants, The Board of Councilmen of the City of Franklin, Thos. J. Todd, marshal, and J. E. Kirtley, deputy marshal of said city, such damages as they or either of them may sustain if it is finally decided that the injunction in this action ought not to have been granted, Nov. 25, 1882.

E. L. SAMUEL.

Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky *versus* THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort, &c. } General Demurrer.

The defendants and each of them come and demur to the petition herein, and say the same is not sufficient in law.

HUGH RODMAN,
Attorney for the Defendants.

At a court held on the 27th day of November, 1883:

The defendants moved the court to dissolve the injunction herein, and the matters of law arising on said motion and the demurrer to the petition being heard, the court overruled both the motion and the demurrer, to which rulings the defendants except.

Thereupon the Mayor and Board of Councilmen of the City of Frankfort filed their answer:

Franklin Common Pleas Court.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Plaintiff, *versus* THE BOARD OF COUNCILMEN OF THE CITY of Frankfort; T. J. Todd, Marshal, and J. E. Kirtley, Deputy Marshal, of said City, Defendants. } Answer of the Board of Councilmen of the City of Frankfort.

The defendant, The Board of Councilmen of the City of Frankfort, for answer herein, says: It denies that plaintiff under and by virtue of the terms of its charter, and as a part of the privileges

given and requirements demanded of it thereby, and in consideration of its organization and management thereunder, it was
35 authorized and bound by the cashier of its principal bank, on the 1st day of July of each and every year during the continuance of its charter, to pay to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, "which shall be in full of all tax or bonus." It denies that said fifty cents so alleged to have been paid was in full of all tax due from the plaintiff. It denies that plaintiff has, pursuant to the terms and requirements of the said acts referred to in the petition, on the 1st day of July in each year, including the year 1882, during the time it was so required by its charter, by the cashier of its principal bank, paid to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, which payments were and are in full of all tax or bonus. It denies that all of said building and ground described in the petition is necessary for the transaction of the business of said bank or for the security or safety of said property. It denies that without authority of law it has recently assumed and undertaken to levy a tax upon the house and lot mentioned on the east side of St. Clair street, known as the "old Commonwealth building," and also upon a part of the real estate described in the petition and known as the "cashier's residence." It denies that the defendant Kirtley, as deputy marshal aforesaid, has no legal right or authority to make said proposed sale for the purpose stated.

It avers that by virtue of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16, 1869, it has full power and authority to assess annually, levy and collect a tax not exceeding two dollars and fifty cents on the one hundred dollars' worth of property on all real estate within the limits of the city of Frankfort. Said act and all amendments thereto, and all the ordinances of this defendant are referred to and made part of this answer. It alleges that by regular assessment and levy there is due from plaintiff to it the taxes set out in the petition and the percentage due the defendants as marshal and deputy marshal of the city of Frankfort, and the costs and penalties therein stated. It says the rate of taxation fixed by it, by its order, for the year 1882 was $1.50 on the one hundred dollars valuation.

Having fully answered, it prays that the injunction [illegible]ted herein be dissolved, and that the petition be dismissed, [illegible]or its costs and all proper relief to which it may be entitled.

HUGH RODMAN,
Att'y for Defendants.

Hugh Rodman says he is the attorney for the Board of Councilmen for the City of Frankfort, and that its chief officer, to wit, the mayor, is absent from Franklin county, and he believes the foregoing statements to be true.

HUGH RODMAN, *City Att'y.*

Sworn to and subscribed before me this the 27th day of November, 1883.

WM. CROMWELL,
Ex. F. C., Ky.

36 At a court held on the 6th day of May, 1884, the plaintiff filed a statement of the auditor of public accounts, also the agreement of parties in regard thereto:

FRANKFORT, *M'ch* 14, 1884.

Gen. D. W. Lindsey, attorney-at-law, Frankfort, Kentucky.

DEAR SIR: In compliance with your request to state to you whether the Bank of Kentucky had regularly paid its tax to the State of Kentucky from its organization until now under the provisions of its charter, we have to say that an examination of the records in this office show that such tax was so paid.

Respectfully yours, FAYETTE HEWITT, *Auditor.*

It is agreed that the above and foregoing certificate and statement of Fayette Hewitt, auditor of public accounts for the State of Kentucky, shall be filed as evidence in the case of The President, Directors & Co. of the Bank of Kentucky *v.* Board of Councilmen of the City of Frankfort now pending in the Franklin common pleas court, and shall be proof of the fact that the plaintiff has during the time it was so required by its charter on the first day of July of each year, including the year 1882, paid to the treasurer of the Commonwealth of Kentucky fifty cents on each $100 of stock held and paid for in said bank.

HUGH RODMAN, *City Att'y.*
D. W. LINDSEY,
Att'y for Bank of Kentucky.

At a court held on the 16th day of May, 1884:

This day came the parties by their attorneys, and this cause being submitted upon the pleadings, exhibits and proof, and the argument of counsel, and the court being now sufficiently advised, it is adjudged that the injunction heretofore granted by this court be and the same is now hereby perpetuated, and the defendants and all others are perpetually enjoined and restrained from selling the properties mentioned and described in the petition, or any part thereof, for delinquent taxes claimed to be due by the plaintiff to the Board of Councilmen of the City of Frankfort. And it is further adjudged that the plaintiff recover of the defendants its costs herein expended and for which it may have execution, to all of which the defendants except and pray an appeal to the court of appeals, which is granted.

37 KENTUCKY:

Franklin Common Pleas Court.

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing fifty-eight pages and the above lines contain a full and

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complete transcript of the record and proceedings had in the cause therein mentioned.

Witness my hand this 9th day of August, 1884.

W. FRANKLIN, *C. F. C. C.*,
By ROBERT B. FRANKLIN, *D. C.*

At the same time counsel for appellant filed with the transcript a statement and an assignment of errors as follows:

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Appellee. } Statement.

The judgment appealed from was rendered on the 16th day of May, 1884, at the May term of the Franklin common pleas court, and can be found on page 22 of this transcript. No summons desired.

SAME, Appellants,
versus
SAME, Appellees. } Assignment of Errors.

The appellants assign for error the following: The court below erred in rendering the judgment appealed from herein and found on page 22 of the transcript.

HUGH RODMAN,
City Attorney, for Appellants.

Afterwards at a court of appeals held in and for the State of Kentucky at the capitol on the 11th day of October, 1884, the following order was entered:

BOARD OF COUNCILMEN OF CITY OF FRANKFORT
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky. } Franklin.

* * * * * * *

Ordered that these causes be continued for oral argument.

Afterwards at a court of appeals held as aforesaid, May 23, 1885, the following order was entered:

Ordered that these causes be continued for oral argument.

Afterwards at a court of appeals held as aforesaid, on December 15, 1885, the following order was entered:

Ordered that these causes be continued for oral argument.

Afterwards at a court of appeals held as aforesaid, on the 23d day of February, 1886, the following order was entered herein:

These causes came on and were argued by D. W. Lindsey for appellee, W. H. Julian for appellant, and laid over for further argument.

Afterwards on March 4, 1886:

These causes coming on to be further heard, were argued by D. W. Lindsey for Bank of Kentucky, A. Duvall for the Farmers' bank, and Wm. Lindsey for appellant, and submitted.

Afterwards at a court of appeals held as aforesaid, on the 5th day of June, 1888, the following judgment was entered:

CITY OF FRANKFORT, Appellant,
versus
THE BANK OF KENTUCKY, Appellee. } Apppeal from the Franklin Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein.

38 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify that the foregoing 54 pages contain a true and complete transcript of the record and proceedings had in said court in the case of The Board of Councilmen of the City of Frankfort, appellant, against The Bank of Kentucky, appellee, except the petition for rehearing and proceedings thereon as appears from the records and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, this 6th day of May, 1897.

ABRAM ADDAMS,
Clerk Ky. Court of Appeals.

The following is

EXHIBIT 3.

Resolutions of Stockholders of the Bank of Kentucky at a Meeting Held June 25, 1887.

At a meeting of the stockholders of the Bank of Kentucky, held at their banking-house in Louisville, Kentucky, Saturday, June 25, 1887, pursuant to notice legally given, John P. Morton was called to the chair and W. T. Rolph was appointed secretary. W. S. Macrae, Frank Miller, and Allen R. Hite having been duly appointed judges of the votes to be taken, and having been duly qualified, the following resolutions were submitted to a vote of the stockholders, with the result as stated below:

1st. *Resolved*, That the stockholders of the Bank of Kentucky hereby give their consent to the levying of the tax imposed by the provisions of article 2 of an act of the legislature of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, so far as the same apply to the banks of this State, and agree to pay the tax as pro-

vided by said act, and waive and release all right under the charter of said bank to a different mode or smaller rate of taxation.

2d. *Resolved*, That the foregoing resolution, consent, agreement, waiver, and release be certified to the governor of this Commonwealth by the president of the board of directors of the Bank of Kentucky, under the corporate seal of said bank.

For			Against		
Accepting the provisions of article 2 of an act of the legislature of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886.			Accepting the provisions of article 2 of an act of the legislature of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886.		
Voters.	Shares.	Votes.	Voters.	Shares.	Votes.
262	14,221	8,805	None.	None.	None.

W. S. MACRAE,
FRANK MILLER,
ALLEN R. HITE, *Judges.*

Upon motion of Thomas L. Barret the meeting adjourned.

JOHN P. MORTON, *Chairman.*

W. T. ROLPH, *Secretary.*

39 The undersigned having been appointed by the board of directors of the Bank of Kentucky, Louisville, Ky., to take count and report to said board the vote of the stockholders of said bank, upon the adoption or rejection of the following resolutions, viz:

1st. *Resolved*, That the stockholders of the Bank of Kentucky, Louisville, Ky., hereby give their consent to the levying of the tax imposed by the provisions of article 2 of an act of the legislature of the State of Kentucky, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, so far as the same apply to the banks of this State, and agree to pay the tax as provided by said act, and waive and release all right under the charter of said bank to a different mode of taxation.

2d. *Resolved*, That the foregoing resolution, consent, agreement, waiver, and release be certified to the governor of this Commonwealth by the president of the board of directors of said bank, under its corporate seal.

We do hereby certify that we did, on the 25th of June, 1887, proceed to take and count the vote of the stockholders of said bank cast upon the adoption or rejection of said resolutions, that there were 362 votes cast in favor of said resolutions and 0 votes for the rejection.

That the votes in favor of said resolutions represented a majority in interest of a quorum of the stockholders of said bank, that the number of votes to which the stockholders voting were entitled was 8,805.

That the number of stockholders voting in favor of said resolutions by proxy and in person was 362, and that the total number of the stockholders of said bank was 482.

The number of shares voted was 14,221.

W. S. MACRAE,
FRANK MILLER,
ALLEN R. HITE, *Judges.*

LOUISVILLE, KY., *June* 7, 1897.

I hereby certify that the above is a true copy.

E. W. HAYS, *Cashier.*

Subscribed and sworn to before me this 7th day of June, 1897.

JOHN B. HUNDLEY,
Notary Public, Jefferson Co., Ky.

Commission expires January 14, 1899.

40 The following is

EXHIBIT 4.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the first day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Appellants, *versus* R. D. ARMSTRONG, Sheriff of Franklin Co., and Franklin County Court, Appellees.	Appeal from the Franklin County Circuit Court.

Be it remembered that heretofore, to wit, on the 28th day of February, A. D. 1894, the appellants by their counsel filed in the office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

Be it remembered that on the 22d day of December, 1893, the plaintiff filed in the clerk's office the following petition, viz:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky, Plaintiff, *versus* R. D. ARMSTRONG, Sheriff of Franklin Co., and Franklin County Court, Defendants.	Petition in Equity.

The plaintiff states that it is a body politic and corporate under the corporate name and style of "The President, Directors, and Company of the Bank of Kentucky," created by and organized

under an act of the General Assembly of the Commonwealth of Kentucky, approved February 22, 1834, with power to contract and be contracted with, sue and be sued, to carry on a general banking business, and with all the privileges and powers conferred, and the duties and obligations imposed upon it by said act and the amendments thereto, and with its principal place of business in the city of Louisville, county of Jefferson, and State of Kentucky: That by the terms of its charter, among other things, it was required to establish and maintain a branch of its bank to be located and continued at the seat of government "to aid in the fiscal affairs of the State:" That by the 15th section of its said charter it was enacted and provided in words and figures as follows:

"SEC. 15. That it shall be the duty of the cashier of the principal bank on the first day of July, 1836, and on the first day of
41 July in each succeeding year, during the continuance of this charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus: *Provided*, that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

By an act of the legislature, approved February 12, 1836, entitled "An act to increase the revenue," the amount it was required to pay into the public treasury on the first day of July, 1836, and on the first day of July each year during the continuance of its charter, in full of all tax or bonus, was increased to fifty cents on each share of one hundred dollars of stock held and paid for in said bank: That by the acts of the same body—the one, approved February 15, 1858, entitled "An act to extend the charters of the Bank of Louisville, Bank of Kentucky, and Northern bank," and the other, approved February 1, 1872, entitled "An act to amend the charter of the Bank of Kentucky"—its charter and its chartered privileges and duties as amended were extended to twenty-five years from and after October 1, 1884. The said acts of the legislature hereinbefore mentioned are referred to as parts hereof. And the plaintiff avers that in the said charter and the acts extending the same are clearly stated all of the rights, power, and reservations retained over the same, and that the intent that the legislature should not have the right to increase the rate of tax upon it or its property beyond fifty cents on each one hundred dollars of its stock held and paid for, but that that rate and mode of tax should be in full of all tax and bonus during the continuance of its charter as extended, is therein plainly expressed.

The plaintiff alleges that soon after the adoption of the original act of its *on* corporation, and in conformity to its terms and provisions, which were extended as aforesaid, it organized and established said bank, and, as required, established a branch thereof at the seat of government, Frankfort, Kentucky, as the fiscal agent of and to aid in the management of the fiscal affairs of the State, which branch is known as and is called the "Branch Bank of Kentucky at Frankfort, Kentucky," and is managed by a board of directors and other officers appointed by the board of directors of the principal bank at

Louisville, Kentucky, and under the advice and direction of the corporation's principal officers in that city, and which has been and is the fiscal agent of the State, and has done and performed, and is doing and performing all and every service required of it as such: That all the property and rights of every description belonging or appertaining to its said Branch bank at Frankfort are the property and rights of and belong to this plaintiff.

It further says that under and by virtue of its charter, extended and continued as aforesaid, and as part of the rights and privileges conferred and requirements demanded of it thereby, and in consideration of its organization and conduct thereunder, and of the establishment, management, and maintenance of its said principal bank and the said branch bank therein required, it was authorized and bound, by the cashier of its principal bank, on the first day of July in each and every year from July 1, 1836, and during
42 the continuance of its charter, to pay to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, and that the same should be in full of all tax or bonus.

The plaintiff avers that it has kept and performed all of the terms and requirements of said acts of the legislature, and by the cashier of its principal bank, at the proper times paid into the State treasury all taxes due by it thereunder.

The plaintiff states that in an action lately pending in this honorable court, wherein this plaintiff was the plaintiff, and J. W. Gaines, the then sheriff of Franklin county, and the defendant Franklin County Court, were defendants, and which had for its object the enjoining and restraining the defendants from assessing or attempting to assess the plaintiff or its property for county purposes, or collecting or attempting to collect any tax from plaintiff for county purposes, the questions were directly raised, presented, and decided by this court, and affirmed and held by the court of appeals (Franklin County Court *v.* Bank of Kentucky, 87 Ky. R., 376), that the charter aforesaid granted to plaintiff by the said act of 1834 created, and the said acts of 1858 and 1872 continued in force, between plaintiff and the State, an irrevocable contract by the terms of which the plaintiff was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock "in full of all tax or bonus," and that no other or further tax, State, county, or municipal, could be exacted from plaintiff. So it says that those questions are *res adjudicata* between it and the defendants to this action. It refers to as parts hereof the record of said action on file in this court, and the opinion and mandate of the court of appeals therein.

It further says, that in an act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886 (commonly known as the Hewitt bill), Gen. Stats., chap. 92, art. 2, it is provided:

SEC. 1. That shares of stock in State and national banks and other institutions of loan or discount, and in all "corporations required by law to be taxed on their capital stock, shall be taxed

seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies; and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State county, and municipal."

"SEC. 2. The cashier of a bank and the treasurer of any 'other institution or corporation whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due.'

"SEC. 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a ma-
43 jority in interest of a quorum of its stockholders at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided; and to waive and release all right under the acts of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

The plaintiff alleges that at a called meeting of its stockholders, held June 25, 1887, a majority in interest of a quorum of such stockholders did vote their consent to the levying of the tax prescribed in *section 1 of article* 2 of the said act, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and to the agreement to pay the same, and waive and release all right under its charter to a different mode or smaller rate of taxation; and at a meeting of the board of directors of plaintiff, held December 27, 1887, by resolutions of the said board it did consent to the levying of the tax prescribed by the first section of the second article of the act aforesaid, and agreed to pay the same, and to waive and release all right under its charter to a different mode or smaller rate of taxation; and the said consent or agreement, under the seal of plaintiff, was, before the meeting of the General Assembly next thereafter, delivered to the governor of this Commonwealth, and an attested copy thereof is filed herewith as a part of this petition.

It now says that on the first day of July, 1887, and on the first day of July each year since then down to and including the year 1893, its cashier has reported to the auditor of public accounts the true amount of its capital stock and surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided

profits or undivided accumulations were invested, and at the proper time paid into the treasury the amount of tax due under the said first section of the second article of the act aforesaid for each of said years except the year 1893. And in addition it, for each of said years, including 1893, gave into and listed with the county assessor, for taxation for county purposes, its real estate used by it for conducting its business, and has for each of said years paid the tax thereon.

The plaintiff avers that on July 1, 1893, it produced to the auditor of public accounts, in lawful legal-tender money of the United States, the amount necessary to pay to the State of Kentucky the taxes due from it under the said agreement, a copy of which is exhibited herewith and has heretofore been made a part hereof, to wit, the sum of $—, and tendered and offered to pay the same into the treasury in full of the taxes due from it under said agreement, and demanded of the auditor of public accounts a permit authorizing it to pay said amount into the treasury in full of said taxes, but said tender and offer was refused by said officer. It then in like manner produced to said officer the amount necessary to pay the taxes due from it under the terms of its charter extended as aforesaid, and of-
44 fered to pay the same into the treasury in full of all taxes due from it, and demanded of said officer a permit authorizing it to pay said amount into the treasury in full of said taxes, but its said tender and offer was refused by the auditor of public accounts. It then, under protest, and to prevent suits and prosecutions against it, on the demand of the auditor of public accounts, on said July 1, 1893, paid into the treasury the sum of $—, which was demanded of it by the auditor as the amount claimed by that officer to be due from it under and by virtue of an act of the legislature entitled "An act relating to revenue and taxation," which became a law November 11, 1892 (chap. 103, Acts 1891–'2–'3).

The plaintiff alleges it nor any part or portion of its property, rights, or franchise is or was assessable or taxable for county or any other purpose under the said chapter 103 of the Acts of 1891–'2'–3, nor for county purposes under any law. But notwithstanding its non-liability for assessment for taxation for county purposes, the auditor, treasurer, and secretary of State, acting as the board of valuation and assessment provided for in section 1, article 3, chapter 103, of the Acts of 1891–'2'–3, have without warrant or authority of law assumed to assess and value plaintiff's franchise for the tax year of 1892–'3, and the auditor, with like want of authority in law, has certified to the county clerk of Franklin that $195,000 of the value assumed as aforesaid to be placed by said board on plaintiff's franchise is liable for county, city, town, or district tax, and said clerk has delivered an attested copy of the auditor's said certificate, so far as the same relates to this plaintiff, to R. D. Armstrong, sheriff of Franklin county, to collect from plaintiff county taxes thereon (a copy of the said copy attested by said clerk and delivered to said sheriff is filed herewith as part hereof), and said Armstrong, sheriff, is now claiming the right to collect from plaintiff taxes for the purpose of the county of Franklin on said $195,000 at the rate of fifty-six and two-thirds cents on the one hundred dollars, and is threat-

ening to levy upon and sell the property of this plaintiff to make the same, and unless enjoined and restrained from so doing will levy upon and sell the property of plaintiff to make said unauthorized tax.

And plaintiff alleges that the said act of the legislature of Kentucky, entitled "An act relating to revenue and taxation," which became a law November 11, 1892 (chapter 103, Acts 1891–'2–'3), and under the provisions of which the said board of valuation and assessment has attempted to assess this plaintiff, and that defendant Franklin County has attempted to tax plaintiff for county purposes, and the defendant Armstrong is attempting to collect said tax, was and is in violation of and repugnant to the constitution of the State of Kentucky and of these United States, in that by said act it is sought to impair the obligations of the contract between the plaintiff and the State of Kentucky, created by and continued in force by its said charter of 1834 and the said acts of 1858 and 1872 extending and continuing in force the same, and creating and arising out of the said act of May 17, 1886 (commonly known as the Hewitt bill), and the acts of plaintiff in relation thereto hereinbefore fully set out:

Wherefore, it avers that the said board of valuation and
45 assessment had no right or authority to make any assessment or valuation of its property or franchise or against it for taxation for any purpose, and especially for county or municipal purposes; and that the auditor of public accounts had no authority to certify to the county clerk any assessment or valuation against it, its property or franchise for taxation for county or municipal purposes; and said clerk had no authority to certify or list with said sheriff any assessment or valuation against its property or franchise for taxation for county or municipal purposes; and said Armstrong, sheriff, has no authority to collect from it any taxes for county or municipal purposes. Nevertheless, he is threatening so to do by the compulsory process of levy upon and sale of plaintiff's property.

Plaintiff says it has no remedy at law for its protection against the wrongs and injuries hereinbefore set out and complained of; that it would sustain great and irreparable injury by the levy upon and sale of its property by said sheriff as he is threatening, and as he will make if an injunction be not immediately granted restraining and enjoining him from making such levy and sale; and that no previous injunction has been granted, refused or applied for.

Wherefore the plaintiff prays that the defendant Armstrong, sheriff as aforesaid, be enjoined and restrained from levying upon or selling any property of the plaintiff or in any manner collecting from plaintiff any money as taxes for the purposes of Franklin county under said alleged and illegal tax-list, and that the defendant Franklin County, be enjoined from assessing or attempting to assess or from collecting or attempting to collect hereafter any tax upon the plaintiff, its property or franchise for county purposes, or any other.

WM. LINDSAY,
HUMPHREY & DAVIE,
HELM & BRUCE,
D. W. LINDSEY,
Attorneys for Plaintiff.

D. W. Lindsay says he is the president of the Branch Bank of Kentucky at Frankfort, and the chief officer or agent of the plaintiff corporation now in Franklin county, and that he believes the statements of the foregoing petition are true.

D. W. LINDSEY.

Subscribed and sworn to by D. W. Lindsay before me this December 22, 1893.

C. E. JAMES,
D. C. F. C. C.

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Plaintiff,
versus
R. D. ARMSTRONG, Sheriff of Franklin County, and FRANKLIN County, Defendants.

This day came the plaintiff in the above-styled action by its attorney and applying for an injunction, and it appearing that
46 the judge of this court is now absent from this county, and it being made to appear to my satisfaction that great and irreparable injury will result to the plaintiff if an injunction as asked for in the petition be not immediately granted, an injunction is granted and will be issued by the clerk of this court, agreeable to the prayer of the petition, upon the plaintiff's executing before the clerk of this court bond with good security to the effect that the plaintiff will pay to the defendants such damages as they may sustain, not exceeding $1,500, if it be finally decided that the injunction ought not to have been granted.

THOS. B. FORD,
Clerk Franklin Circuit Court.

December 22, 1893.

Exhibit with Petition.

At a meeting of the board of directors of the Bank of Kentucky, held the 27th day of December, 1887, the following was offered, viz:

It appearing from the report of W. S. Macrae, Frank Miller, and Allen R. Hite, the persons appointed by the board of directors, of the president, directors, and company of the Bank of Kentucky, to take and report the votes of the stockholders of said bank as to paying the tax assessed upon banks and other corporations in this State, prescribed in section 1 of article 2 of an act entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, which has been returned and filed with this bank, that a majority in interest of a quorum of the stockholders of this bank did, at a called meeting of such stockholders, held on the 25th day of June, 1887, at the office of said bank, vote their consent to the levying of said tax *agreement* to pay the same and to waive and release all right under its charter to a different mode or smaller rate

of taxation. Now, therefore, "Resolved by the board of directors, of the president, directors, and company of the Bank of Kentucky, that the said bank does hereby consent to the levying of the tax prescribed by the first section of the second article of the act before named, and agrees to pay the same as provided by said act, and waive and release all right under the charter of said bank to a different mode or smaller rate of taxation.

"Resolved, That these resolutions, consent, waiver, and release be certified under the seal of this corporation, under the hand of the president, and attested by the cashier of the bank, and delivered by the president to the governor of the State of Kentucky."

[SEAL.] THOMAS L. BARRET, *President.*

E. W. HAYS,
Assistant Cashier.

I certify that the foregoing is a true copy of the original paper of what it purports to be, now on file in the office of the auditor of public accounts of the State of Kentucky.

Given under my hand this January 5, 1894.

L. C. NORMAN, *Auditor.*

47 Thereupon the plaintiff executed the following bond, to wit:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky
versus
R. D. ARMSTRONG, Sheriff of Franklin County, and Franklin County, Ky. } Injunction Bond.

We undertake that the plaintiff, The President, Directors, and Company of the Bank of Kentucky shall pay to the defendants, R. D. Armstrong, sheriff of Franklin county, and Franklin County, Ky., the damages, not exceeding fifteen hundred dollars, which they or either of them may sustain if it be finally decided that the injunction ought not to have been granted.

Witness my hand this 22d day of Dec., 1893.

E. L. SAMUEL.

Attest:
THOS. B. FORD, *C. F. C. C.*,
By C. E. JAMES, *D. C.*

Thereupon the following summons and injunction was issued, to wit:

The Commonwealth of Kentucky to the coroner of Franklin county, Greeting:

You are commanded to summon R. D. Armstrong, sheriff of Franklin county, and Franklin County, Ky., to answer, on the first day of next January term of the Franklin circuit court, a petition in equity filed against them in said court by the President, Direct-

ors, and Company of the Bank of Kentucky, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next January term of said court.

Witness, Thos. B. Ford, clerk of the said court, this 22d day of December, 1893.

THOS. B. FORD, *Clerk*,
By C. E. JAMES, *D. C.*

(Endorsed.)

The defendants, R. D. Armstrong, sheriff of Franklin county, and Franklin County, are enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from plaintiff any money as taxes for the purposes of Franklin county under said alleged and illegal tax-list, and that the defendant Franklin County is enjoined from assessing or attempting to assess or from collecting or attempting to collect hereafter any tax upon the plaintiff, its property or franchise for county purposes, or any other.

Dec. 22, 1893.

THOS. B. FORD, *C. F. C. C.*

48 Executed by delivering a true copy of the within summons and injunction to R. D. Armstrong, sheriff of Franklin county, and B. G. Williams, county judge of Franklin county, this 22d day of Dec., 1893.

W. S. DEHONEY,
C. of F. Co.

Afterwards at a court held on the 18th day of January, 1894, the plaintiff filed an amended petition herein, as follows, to wit:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Plaintiff,
versus
R. D. ARMSTRONG, Sheriff, &c., Defendants. } Amended Petition.

The plaintiff amends its petition herein and says that at the filing of the original petition it did not have at hand the amounts left blank in the original petition as tendered and offered by it and paid by it into the treasury; but it now alleges that the said sum first mentioned by it in its original petition, as by it tendered and offered to be paid into the treasury on July 1, 1893, under the said agreement exhibited with the petition, was $16,177.87; and the amount tendered by it then under its charter as extended, as alleged in the petition, was $8,225.50; and the amount paid by it into the treasury under protest, as alleged in the petition, was $11,354.12.

It further avers that in addition the 56⅔ cents on the $100 of said $195,000 set out in the original petition which the defendant, Arm-

strong, sheriff, is threatening to coerce from it for county purposes, as set out in the original petition, the city of Frankfort is threatening to collect from it as taxes due it for the year 1893, $1.30 on the $100, on the alleged assessment and valuation of $195,000, and the city of Louisville is threatening to collect from it as taxes due to it 4 per cent. on its gross earnings, which gross earnings it avers were about $200,000, as taxes due to said city for the year 1893. And it avers that the said several amounts thus threatened to be coerced from it by the county of Franklin, city of Louisville, and city of Frankfort will amount to about the sum of $11,340, which, added to the amount paid by it into the treasury as hereinbefore stated, would aggregate the sum of $22,694.12. It avers that it does not owe to the county of Franklin, the city of Frankfort, or the city of Louisville, or either of them, the said sums respectively, or any part of either of said sums. Wherefore it prays as in its original petition.

LINDSAY AND OTHERS,
Attorneys for Plaintiff.

Afterwards at a court held on the 27th day of January, 1894, the plaintiff filed the following amended petition herein, to wit:

49 Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Plaintiff,
versus
R. D. ARMSTRONG, &c., Defendants.
} Amended Petition.

The plaintiff amends its petition by adding thereto and saying: that before the institution of this suit, to wit, on the — day of ——, 1893, defendant R. D. Armstrong, being then and there the only elected, qualified, and acting sheriff of Franklin county, filed in the office of the clerk of the Franklin county court a report stating that plaintiff had been delinquent in failing to list for taxation at the then presiding assessment—that is, the assessment upon which the taxes for the year 1893 were to be paid, its notes, bonds, choses in action, and other property, alleged to have amounted to $250,000; that therefore a summons was issued commanding plaintiff to appear at the then ensuing term of the county court of said county and show cause, if any it could, why its property aforesaid should not be listed at the amounts aforesaid; that therefore, to wit, on the — day of ——, 1893, plaintiff did appear and file its answer and response, showing that it was not required by law to give into the assessor its property for taxation, and that it had reported to the auditor as required by law; and said court held and adjudged that plaintiff was not delinquent as to any of its property or assets, and dismissed the said proceedings at the county costs; that therefore the county of Franklin, as relator, made and perfected an appeal to this court from said order, and the same appeal came on for hearing on September 28, 1893; at its September term a judgment was duly rendered dismissing the said proceedings and giving plaintiff a

judgment for costs against Franklin county, to which judgment the said Franklin county excepted and prayed an appeal to the court of appeals, which was granted. And the plaintiff in said proceeding and the defendant in this action, Franklin County, has filed a transcript of the record of said proceeding in the clerk's office of the court of appeals, and is in said court prosecuting its said appeals.

Wherefore plaintiff prays as in the original petition.

W. D. LINDSAY,
Attorney for Plaintiff.

Afterwards at a court held on the 27th day of January, 1894, the following judgment was rendered herein, to wit:

PRESIDENT, DIRECTORS, AND COMPANY OF BANK OF KENTUCKY
versus
R. D. ARMSTRONG and FRANKLIN COUNTY, &c.

The plaintiff filed an amended petition herein, to which the defendant demurred; the demurrer was sustained to petition as amended, to which plaintiff excepts, and declining to amend
50 further the court filed an opinion herein, and it is adjudged that plaintiff's petition be dismissed and defendant recover of plaintiff its costs herein.

To all of which plaintiff excepts and prays an appeal to the court of appeals, which is granted.

The following is the opinion of the court referred to, viz:

Franklin Circuit Court.

BANK OF KENTUCKY, Plaintiff,
versus
FRANKLIN COUNTY, &c., Defendants. } Judgment.

This is a suit to enjoin the collection of county taxes levied under the provisions of the new revenue act which became a law November 11, 1892.

The petition sets out at length the charter of the bank, the amendments thereto, and the decisions of the court of appeals wherein it is held that the provisions of the original and amended charter created and constituted an irrevocable contract from which the State could not withdraw or recede without the consent of the bank. That the bank had such a contract with the State from the time it was chartered in 1834 to the time it accepted the provisions of the revenue law of 1886, known as the Hewitt bill, can hardly be questioned in the light of adjudications touching the chartered rights and privileges of this and like institutions.

In 1887 the plaintiff accepted the provisions of the Hewitt law in the manner prescribed therein, and it alleges that this acceptance made a contract with the State of the same binding force and validity, although different in terms, as the contract it had under its charter, and that the effort of the State *of* any of its subdivisions to collect any other tax than that mentioned in the act of 1886, is

in violation of the provision of the constitution of the State and the United States.

To the petition the defendant enters a general demurrer; it therefore devolves on this court to construe article 2 of the act of 1886, and in like manner pass upon the validity of the new revenue act of 1892. Section 1 of article 2 of the Hewitt bill provides that each share of stock equal to $100 shall be taxed 75 cents, and that all surplus exceeding 10 per cent of the capital stock shall be assessed at the same rate as real estate is assessed, and that the taxes on these shares and surplus shall be in full of all tax, State, county, and municipal. Section 4 of the same article provides how the banks "may give consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all rights under the acts of Congress and under the charters of the State banks to a different mode or smaller rate of taxation." "And upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

51 The language of these two sections is strong and seems to embody all the essential qualities necessary to constitute a valid contract between the banks and the State during the corporate existence of the banks accepting the provisions, and it is equally explicit in that only the tax on the shares of stock and the surplus therein defined shall be levied and collected.

It is contended, however, on the part of the defendants, that sections 6 and 7 of the same article place certain limitations and restrictions upon the provisions just above recited, and that the State intended to reserve and did reserve to itself the right and power to amend, repeal, modify, and enlarge the scope and meaning of the terms and conditions imposed by sections 1 and 4.

Section 6 is that the act under consideration shall be subject to the provisions of what is known as the act of 1856, the language of which is,

"That all charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature unless a contrary intent be therein plainly expressed."

Section 7 provides that in case any bank refuses to pay the tax imposed under this act ("Hewitt bill"), it shall be taxed for State, county, and municipal purposes as the taxable property in the hands of individuals, and it also provides:

"That nothing herein contained shall be construed as exempting *for* taxation for county and municipal purposes any real estate or building owned or used by said banks or corporation for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

This is indeed a confused and contradictory statute; the language of one section indicates that in case the bank pays the tax it shall be exempt from all other taxation during the corporate existence

of the bank, while another section provides that this exemption shall be only during the pleasure and will of the legislature. One section says if the bank will pay the 75 cents tax on each $100 share of its stock, and the tax on its surplus, it shall be exempt from all other tax whatsoever, while another section says its real estate "may be taxed for county and municipal purposes," yet its real estate is as much represented by its shares of stock as any other asset of the bank.

Much has been appropriately said about the times and circumstances surrounding the passage of the Hewitt bill—that it was an effort on the part of the State to adopt an uniform system of taxation for this class of property, that the State was sadly in need of the revenue which the increased tax of twenty-five cents per share of stock would yield—that the banks which had contract rights under their charters were willing to surrender them and be placed on the same footing as those which had none, but that in accepting the provisions of the Hewitt bill they believed they were securing another contract of as binding force as the one surrendered, and that the State cannot afford to practice bad faith by making promises she did not intend to keep.

It is further said with equal force that if the banks are compelled to pay taxes as required by the present revenue law, the
52 equality of taxation among banks will be destroyed, that certain county and municipal taxes will amount almost to the earnings of the capital stock of the banks in those localities, that bank capital receives but little if any benefit from county or municipal governments, while other classes of property receive many other benefits which the banks do not receive. On the other hand, this court cannot ignore the recent political history of the State which imposed upon the legislature the necessity of enacting a law of which the plaintiff now complains. When the new constitution was being discussed before the people for adoption or rejection, none of its provi-ions were more clearly defined or understood than those relating to taxation, and many bank officers and stockholders were earnest advocates for its adoption. And it is a fact that every bank community voted for the adoption of the new constitution, and those communities having the greatest number of banks gave therefor the largest majorities. In view of these facts it can hardly be contended that the holders of bank stock, especially those who favored the adoption of the new constitution, believed that they had an irrevocable contract under the Hewitt bill. But it is contended on the part of the plaintiff that section 6 of article 2 of the Hewitt bill was not intended to apply to sections 1 and 4 of the same article—that it has no more significance than if it were placed in article 1 or article 12. If such be the case, it ought to go a long ways toward maintaining the position that the terms of article 2 constituted a contract with the banks. In no other article of the bill, however, is reference made to the act of 1856, and in ascertaining the intention of the legislature, the courts will be governed not only by the language of the act, the position which one section thereof bears to the other—the purposes for which the law was

adopted, but also the history of the bill as contained in the journals kept by the two houses of the General Assembly. The journals of the senate and house of representives show that the Hewitt bill, which contains twelve articles, was considered more or less article by article, and that article 2 was considered by each house as if it constituted a separate act in itself. Efforts were made to exempt this article from the act of 1856, and without success. Failing in this, provision was attempted to be made that the act of 1856 should not apply to the provisions of article 2 until after the expiration of ten years, and this amendment was likewise defeated. The position of section 6 in article 2, together with the history of its enactment as shown by the journals of the two houses, clearly indicate the legislative intent.

After the passage of the Hewitt bill the plaintiff had the option to accept or reject its provisions. It elected to surrender its contract under its charter and accept those provisions, and, having so elected, this court is of the opinion that it cannot now be heard to say that the repeal of the Hewitt bill restored it to its original status under its charter.

It is ordered that the demurrer to the plaintiff's petition as amended be sustained, to which ruling of the court the plaintiff excepts, and the plaintiff being given leave but declining to plead further, it is ordered that the petition be dismissed and that the defendants recover their costs herein expended, and to all of which the plaintiff objects and excepts and prays an appeal to the court of appeals, which is granted.

53 STATE OF KENTUCKY, }
County of Franklin. }

I, Thomas B. Ford, clerk of the Franklin circuit court, do certify that the foregoing twenty-nine pages contain a true, perfect, and complete transcript of all the pleadings, orders, and proceedings, in the case mentioned therein, taken from the records of my said office.

Given under my hand, as clerk aforesaid, this the 19th day of February, 1894. The record in case of President, Directors, and Company of Bank of Kentucky *v.* J. W. Gaines & Co. not being copied because the same is now on file in the court of appeals.

THOMAS B. FORD, *Clerk.*

Upon which transcript was endorsed the following statement:

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, Appellant,
versus
R. D. ARMSTRONG, Sheriff of Franklin County, and FRANKLIN County, Appellees.

The judgment appealed from was rendered at the January term, 1894, of the Franklin circuit court, January 27, 1894, and can be found on page 22 of the Record.

The appeal was granted by the court below, and no summons is needed.

D. W. LINDSEY,
HUMPHREY & DAVIE,
HELM & BRUCE,
WM. LINDSAY,
For Appellant.

Afterwards at a court of appeals held as aforesaid, on March 5th, A. D. 1895, the following order was entered:

BANK OF KENTUCKY
v.
ARMSTRONG, Sheriff. } Franklin.

SAME
v.
CITY OF FRANKFORT. } Franklin.

* * * * * * *

By agreement of all the parties and on their motion it is ordered that these seventeen cases be heard together, and said causes coming on to be heard were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties and cities, and laid over until tomorrow for further hearing.

Afterwards on the 6th day of March, A. D. 1895, the following order was entered herein:

These cases coming on to be heard were argued by D. W. Lindsey for the banks, W. McD. Shaw and Hugh Rodman for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards on March 7, 1895:

These causes again coming on to be heard were argued by Wm. Goebel for the banks and H. C. Barker for the cities and counties, and laid over for further hearing.

54 Afterwards on March 8, 1895:

These causes again coming on to be heard were argued by John W. Rodman and T. L. Edelen for the banks, and laid over for further hearing on tomorrow.

Afterwards on March 9, 1895:

These causes again coming on to be heard were argued by James P. Helm for the banks, and laid over for further hearing on next Tuesday.

Afterwards on March 12, 1895, the following order was entered herein:

These causes again coming on to be heard were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards at a court of appeals held as aforesaid, on the 1st day of June, A. D. 1895, the following judgment was entered:

PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Appellants, *versus* R. D. ARMSTRONG, Sheriff of Franklin County, and Franklin County Court, Appellees.	Appeal from the Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appellants recover of the appellees their cost herein expended.

Judges Lewis, Paynter and Guffy dissenting.

At the same time, to wit, on June 1, 1895, the court, through Chief Justice Pryor, delivered the following opinion:

COMMONWEALTH, for Use, &c., *v.* FARMERS' BANK OF KY.	Franklin.
FARMERS' BANK OF KY., *v.* BOARD OF COUNCILMEN OF CITY OF FRANKLIN.	Franklin.
FARMERS' BANK OF KY. *v.* COUNTY OF FRANKLIN, &c.	Franklin.
BANK OF KY. *v.* ARMSTRONG, Sheriff, &c.	Franklin.
PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Ky. *v.* BOARD OF COUNCILMEN OF CITY OF FRANKFORT, &c.	Franklin.
COMMONWEALTH, for Use, &c., *v.* BANK OF KY.	Franklin.
SAME *v.* DEPOSIT BANK OF FRANKFORT.	Franklin.
DEPOSIT BANK OF FRANKFORT *v.* FRANKLIN COUNTY, &c.	Franklin.

COMMONWEALTH, for Use, &c., *v.* FRANKFORT NATIONAL BANK.	Franklin.
SAME *v.* STATE NATIONAL BANK.	Franklin.
THIRD NATIONAL BANK *v.* CITY OF LOUISVILLE, &c.	Jefferson C. P. Div.
55 LOUISVILLE BANKING CO. *v.* SAME.	Jefferson C. P. Div.
CITY OF LOUISVILLE, &c., *v.* PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Ky.	Jefferson C. P. Div.
PRESIDENT, DIRECTORS, AND COMPANY OF THE NORTHern Bank of Ky. *v.* BOURBON COUNTY.	Bourbon.
CITY OF COVINGTON *v.* FIRST NATIONAL BANK OF COVINGTON.	Campbell.
SAME *v.* GERMAN NATIONAL BANK OF COVINGTON.	Campbell.
FARMERS' BANK OF KY. *v.* CITY OF HENDERSON.	Henderson.

(Filed June 1, 1895.)

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 69 pages (being numbered 1 to 65 inclusive, with four interpolated numbers, viz: "page 1 continued" and numbers 32½, 33½, and 34½), contain a true, full, and complete transcript of the record and proceedings had in said court in the case of The President, Directors, and Company of the Bank of Kentucky, appellants, against R. D. Armstrong, sheriff of Franklin county, and Franklin County Court, appellees, as the same appears on file and of record in my office (except the petition for a rehearing and the proceedings upon same).

In testimony whereof I have hereunto set my hand and affixed

the seal of my office. Done at Frankfort, Kentucky, this 10th day of April, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

My fee for this transcript, $26.50.

The following is

EXHIBIT 5.

Franklin Circuit Court.

JANUARY 21, 1896.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
R. D. ARMSTRONG, Sheriff, &c., Defendants. } Judgment.

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised: It is adjudged that article 2 of the act of the General Assembly, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, (Gen. Stats., chap. 92, art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only
56 upon its real estate used by it in conducting its business: That the provisions of the present constitution of this State and the act of November 11, 1892 (art. 3, chap. 103, Acts 1891-'1-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess a tax for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void: That the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation: That the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in and manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property

of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing is a true copy of the judgment in the above-entitled action lately pending in said court.

Witness my hand as clerk of said court this April 5, 1897.

THOS. B. FORD, *C. F. C. C.*,
By J. R. ELLIOTT, *D. C.*

57 The following is

EXHIBIT 6.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the first day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Appellants,
versus
BOARD OF COUNCILMEN OF THE CITY OF Franfort and J. M. Hallnan, Tax Collector for the City of Frankfort, Appellees.
} Appeal from the Franklin Circuit Court.

Be it remembered that heretofore, to wit, on the 2d day of October, A. D. 1894, the appellants, by their counsel, filed in the office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

Pleas before the honorable judge of the Franklin circuit court, at the court-house, at Frankfort, Ky.

Be it remembered that on the 6th day of September, 1894, the President, Directors, and Company of the Bank of Kentucky filed in the clerk's office of said court its petition herein, which is in words and figures, viz:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and James M. Hallnan, Tax Collector for the City of Frankfort, Defendants.
} Petition in Equity.

The plaintiff states that it is a corporation, under the corporate name and style of "The President, Directors, and Company of the Bank of Kentucky," created by and organized under an act of the

General Assembly of the Commonwealth of Kentucky, approved February 22, 1834, entitled "An act to establish the Bank of Kentucky," with power to contract and be contracted with, sue and be sued, to carry on a general banking business, and with all the privileges and powers conferred, and the duties and obligations imposed, upon it by said act and the amendments thereto, and with its principal place of business in the city of Louisville, county of Jefferson, and State of Kentucky: The fifteenth section of its said charter is in words and figures as follows:

58 SEC. 15. That it shall be the duty of the cashier of the principal bank on the first day of July, 1836, and on the first day of July in each succeeding year, during the continuance of this charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus: *Provided*, that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

That by an act of the legislature, approved February 12, 1836, entitled "An act to increase the revenue," the amount the plaintiff corporation was required to pay into the public treasury on the first day of July, 1836, and on the first day of July each year during the continuance of its charter, in full of all tax or bonus, was increased to fifty cents on each share of one hundred dollars of stock held and paid for in said bank.

That by an act of the legislature, approved February 15, 1858, entitled "An act to extend the charter of the Bank of Louisville, Bank of Kentucky, and Northern bank," the charter of the plaintiff corporation was extended and continued in full force for twenty years from October 1st, 1864; and by an act of the same body, approved February 1st, 1872, entitled "An act to amend the charter of the Bank of Kentucky," said charter was extended and continued in full force for twenty-five years from October 1st, 1884.

The said several acts of the legislature are referred to and made parts of this petition.

The plaintiff avers, that in the said charter and in the acts extending the same, are clearly stated all the rights, powers and reservations retained over the same; and that the intent that the State should not have the right to increase the tax upon it or its property for any purpose whatever, beyond the annual rate of fifty cents on each one hundred dollars of its stock held and paid for, but that that rate and mode of tax should be in full of all tax and bonus during the continuance of its charter as extended, is in its charter and also in the acts extending the same plainly expressed. And plaintiff alleges that in the actions lately pending and decided in this court and appealed to the court of appeals, of this plaintiff against Franklin county, etc., and of this plaintiff against the defendant, The Board of Councilmen of the City of Frankfort, and its then tax collector, the court of appeals in its opinion (87 Ky., 370), held: That plaintiff's charter created, and the said acts of 1857 and 1872 continued in force an irrevocable contract by the terms of

which the plaintiff was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock "in full of all tax or bonus," and that no other or further tax, State, county, or municipal, could be exacted from plaintiff. It refers to as parts hereof the records of said actions on file in this court, and the opinion and mandate of the court of appeals therein.

The plaintiff alleges that soon after the adoption of the original act of its incorporation, and in conformity to its terms and provisions, which were extended as aforesaid, it organized and established said bank, and from time to time as required the branches provided for in the original charter and the said acts extend-
59 ing the same, and, as required, established a branch of its bank at the *seat* of government, Frankfort, Kentucky, as the fiscal agent of and to aid in the management of the fiscal affairs of the State, which branch is known as and is called the "Branch Bank of Kentucky at Frankfort, Kentucky," and is managed by a board of directors and other officers appointed by the board of directors of the principal bank at the city of Louisville, Kentucky, and under the advice and direction of the corporation's principal officers in that city, and has no legal existence as distinct from the principal bank. That the bank and branch so established have been maintained continuously to the present time under its said charter extended as aforesaid, exercising the powers, franchises, and privileges therein conferred, and performing all the duties and obligations therein imposed. That its said branch bank at Frankfort, Kentucky, has been and is the fiscal agent of the State, and has done and performed and is doing and performing all and every service required of it as such agent.

That all the property and rights of every description belonging or appertaining to its said branch bank at Frankfort are the property and rights of this plaintiff.

It further says that under and by virtue of its charter, extended and continued as aforesaid, and as part of the right and privileges conferred and requirements demanded of it thereby, and in consideration of its organization and conduct thereunder and of the establishment, management, and maintenance of its principal bank and branch bank therein required, it was authorized and bound, by the cashier of its principal bank on the first day of each and every year from July 1, 1836, and during the continuance of its charter, to pay to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, and that the same should be in full of all tax or bonus. It now avers that it has kept and performed all of the terms and requirements of its charter and the said acts of the legislature extending the same; and has on the 1st day of July, 1836, and on the 1st day of July in every year up to and including the year 1886, by the cashier of its principal bank paid into the State treasury the tax of fifty cents on each share of $100 of its stock held and paid for.

By an act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May —,

1886, and commonly known as the Hewitt bill (Gen. Stats., chap. 92, art. 2), it is provided:

SEC. 1. That shares of stock in State and national banks and other institutions of loan or discount, and all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal.

60 SEC. 2. The cashier of a bank, and the treasurer of any other institution or corporation whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations, *and how or in what said surplus, undivided profits, or undivided accumulations is* invested, and pay into the treasury the amount of tax due.

SEC. 4. That each of said banks, institutions, and corporations by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

The plaintiff states that at a called meeting of its stockholders, held June 25, 1887, a majority in interest of a quorum of such stockholders did vote their consent to the levying of the tax prescribed in section 1 of article 2 of the said act entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and to the agreement to pay the same, and waive and release all rights under its charter to a different mode or smaller rate of taxation; and at a meeting of the board of directors of plaintiff, held December 27, 1887, by resolutions of said board it did consent to the levying of the tax prescribed by the first section of the second article of the act of May 17, 1886, aforesaid, and agreed to pay the same and to waive and release all right under its charter to a different mode or smaller rate of taxation; and the said consent or agreement, under the seal of plaintiff, was, before the meeting of the General Assembly next thereafter, delivered to the governor

of this Commonwealth, and a certified copy thereof is filed herewith as a part of this petition.

It now alleges that through its cashier it has made its reports, in proper form as required by said act, to the auditor of public accounts on the first day of July in each and every year from and including the year 1887 up to this time, and has, on the first day of July in each and every of said years until 1893, paid into the State treasury the full tax required by said act, being seventy-five cents on each share of its capital stock, and in addition the same rate of taxation that was for each of said years *respectfully* assessed upon real estate upon each one hundred dollars of so much of its surplus, undivided profits, or undivided accumulations as exceed an amount equal to ten per cent. of its capital stock, and was only prevented from paying the whole of said tax for the first day of July, 1893, and the first day of July, 1894, by the refusals of the auditor, the fiscal agent of the State for each of said dates, to receive the same. And it has
61 also, from and including the year 1887 up to and including the year 1894, for each of said years, listed with the assessors for the counties and cities where its principal — and branch are located, for taxation for county and city purposes, its real estate used by it in conducting its business, and for each of said years paid to each of the cities and counties where its principal office and branch are located the full amount of tax for county and municipal purposes assessed on all the real estate and buildings in which the principal bank and its branch bank conducted their business.

On the first day of July in each of the years 1893 and 1894 the plaintiff's cashier made, as he had regularly done for years before, written reports to the auditor of public accounts, verified by his oath as required by law, of the true amount of the capital stock of its bank, and of its surplus, undivided profits, and accumulations; and did on the first day of July, 1893, successively tender and offer to pay into the treasury, and demanded of the auditor permits to pay into the treasury, first, the sum of $8,225.50, the maximum tax for that year required by its charter, to wit, fifty cents for each one hundred dollars of stock held and paid for in its bank, and, second, the sum of $16,177.86, the full amount of the tax for that year required and due under the aforesaid act, approved May 17, 1886. But both of said offers and tenders and demands were successively refused and rejected by the said auditor of public accounts, who, as the State's agent, refused to accept or to allow plaintiff to pay into the treasury any other or greater sum than the sum of $11,354.12, which amount he claimed and demanded as due to the State as the tax for that year on the franchise of plaintiff under an act of the legislature entitled "An act relating to revenue and taxation," which became a law November 11, 1893; and under protest plaintiff paid said last-named sum into the State treasury. And it did, on the first day of July, 1894, successively tender and offer to pay into the treasury, first, the sum of $8,225.50, the maximum tax for that year required by its charter, to wit, fifty cents for each one hundred dollars of stock held and paid for in its bank, and, second, the sum of $16,260, the full amount of the tax for that year required and due

under the aforesaid act, approved May 17, 1886. But both of said offers and tenders and demands were successively refused and rejected by the said auditor of public accounts, who, as the State's agent, refused to accept or to allow plaintiff to pay into the treasury any other or greater sum than the sum of $11,374.49, which amount he claimed and demanded as due to the State as the tax for that year on the franchise of plaintiff under an act of the legislature entitled "An act relating to revenue and taxation," which became a law November 11, 1892; and under protest plaintiff paid said last-named sum into the State treasury. The said offers, tenders, and demands were on each of said occasions refused and rejected by the said auditor, under the claim made by him that both the tax provisions of plaintiff's charter and the said act to amend the revenue laws approved May 17, 1886, had been superseded and repealed by the new constitution of the State of Kentucky, which went into operation September 28, 1891, and the aforesaid act of November 11, 1892.

62 The plaintiff, protesting against said constitution and said acts as illegal in their application to the taxation of plaintiff, acceded to the said auditor's demands and under protest as aforesaid paid into the State treasury the sums above named as paid. The plaintiff has further paid to the sheriff and proper collecting officers in the counties and cities where its principal office and branch are located the sums assessed or claimed to be due by it, on its tangible property in said counties and cities for said years 1893 and 1894, to the State, said counties, and cities.

By the terms of the act aforesaid, which went into effect November 11, 1892, entitled "An act relating to revenue and taxation" (chapter 103, Acts 1891–'2–'3), it is provided that all banks and other corporations, besides the taxes to the State treasury therein provided for, should also pay to the counties and cities in which they may be located or doing business, taxes, not only on all its tangible property located in such counties and cities, but also the "franchise" of said corporation, which is a term used to describe all the other property and assets of said corporation. That said county and municipal taxation shall be at the same rate that other property is assessed or taxed; that when a corporation has offices or conducts its business in more than one county of the State, it is the duty of the State "board of valuation and assessment," created by said act, to apportion to the several counties and cities in which the bank or corporation is located, or conducting its business, the part of the "franchise" of the bank or corporation which may be taxed in each of said counties and cities. By an act of the General Assembly, approved June 14, 1893, entitled "An act for the government of cities of the third class," to which class the defendant, The City of Frankfort, whose corporate name is the Board of Councilmen of Frankfort, belongs, the cities of that class are authorized, so far as the legislature can confer such powers, to assess annually, levy, and collect taxes on all the property of said banks and corporations located in said cities, and also on such portion of the "franchise" of

such banks or corporations as may, by the said board of valuation and assessment, be assigned to such cities for local taxation.

By said act the common council of said cities are authorized at their first meeting in April in each year to elect a collector of taxes, who, among other duties, is required "to list for taxation any property he may find has been omitted, and he shall report such lists to the city clerk, who shall endorse same on the tax book and charge the collector therewith, and the collector shall have the same power to collect said lists as if they had been originally listed by the assessor." And in pursuance of the power so granted the common council of the city of Frankfort did, at its first regular meeting in April, 1894, elect the defendant, James M. Hallnan, to the office of tax collector for said city for the year 1894, and he has been since then and is now such collector. Prior and up to the enactment of the said act of June 14, 1893, the city of Frankfort was a municipal corporation under the corporate name aforesaid, having for its charter an act of the General Assembly, approved March 16, 1869, entitled "An act to amend and reduce into one the several
63 acts relating to the city of Frankfort," by the provisions of which said city was authorized, so far as the legislature could confer such powers, to assess annually, levy, and collect taxes on all real estate within the limits of said city, and all bank stocks, bridge stocks, manufacturing stocks, or any other kind of stocks, money notes, or bonds of cities, towns, corporations, or States, choses in action, and all personal estate of every kind, not exempt by law from execution, belonging to citizens of the city of Frankfort, and any capital or other property belonging to any other corporation or citizen of any other place employed in said city. Under each of the said acts of March 16, 1869, and June 14, 1893, it is required that the assessments of property for taxation shall be made as of the 10th day of January in each year.

Each of the said several acts of the General Assembly are referred to and made parts of this petition.

The plaintiff states that said city of Frankfort did, in accordance with its said charters, respectively, order in due form of, and at the proper time, assessments for taxation for the years 1892, 1893, and 1894 upon all the property provided by said charters respectively to be assessed; but it alleges that neither it nor any part or portion of its property, rights, or franchise is or was assessable or taxable in either of the years 1892, 1893, or 1894 for city or any other purposes under the said act of November 11, 1892 (chapter 103 of the Acts of 1891–'2–'3), nor for city purposes under either of said city charters or any law. And no assessment was made or attempted to be made against it for said city in either of said years, nor at any time except as hereinafter stated.

But notwithstanding its non-liability for assessment for taxation, and especially municipal or county purposes, the said "board of valuation and assessment" provided for in section 1, article 3, chapter 103 of the Acts of 1891–'2–'3 aforesaid, have, without warrant or authority of law, assumed to assess and value and has assessed and valued plaintiff's "franchise," which is, as before stated, a term

used to describe all of the corporation's property and assets other than its tangible property, for the tax year 1893 and 1894, and to make approtionment thereof as aforesaid; the part thereof apportioned by reason of its said branch bank located, as aforesaid, in the city of Frankfort, in the county of Franklin, as taxable by said city and county, being for the year 1893 fixed and valued at $195,000, and for the year 1894 at $190,000, and the auditor, with like want of authority in law, has certified the said valuations and apportionments for each of said years to the county clerk of Franklin county as liable for county and city taxation, and said clerk has delivered attested copies of the auditor's said certificate to the officers respectively charged with the collection of taxes for that county and city. And the defendant James M. Hallnan, collector of taxes for said city for the year 1894, has without warrant or authority in law, and without notice to or the knowledge of plaintiff, assumed to list and has listed against plaintiff for taxation by said city as omitted property, and has reported such lists to the city clerk, who has indorsed the same on the tax book as of and for the year 1892 property described as "notes, money, choses in action, and other property of the value of $250,000;" and as of and for the
64 year 1893 property described as "notes, money, choses in action, and other property of the value of $195,000;" and as of and for the year 1894 property described as "notes, money, choses in action, and other property of the value of $190,000." The plaintiff alleges that the property so attempted to be listed for taxation by the defendant Hallnan, collector of taxes as aforesaid, was the intangible property in the hands of its said branch bank, and was reported to the said "board of assessment and valuation," and was by said board estimated and fully covered in said board's assessment and valuation, as aforesaid, of plaintiff's franchise for the years 1893 and 1894.

The plaintiff states that it was compelled by the contract between it and the State made by the said act of May 17, 1886, known as the Hewitt bill, and its agreement to pay the taxes prescribed by the first section of the second article of said act in full of all tax, State, county, and municipal to and did pay into the State treasury on the first day of July, 1892, the taxes prescribed by said section to wit, the sum of $16,573.23; yet the defendant, The City of Frankfort, is claiming and demanding of it under the said pretended assessment of the defendant Hallnan, collector as aforesaid, for the said year 1892 as taxes due to it the sum of $3,125; and said city is claiming under said alleged assessments against it of $195,000 for 1893 as city taxes the sum of $2,535, and said assessment of $190,000 for 1894 the sum of $2,660 and the sum of $773 for penalties and interest to August 27, 1894, on the said alleged taxes for 1893 and 1894. And in addition, on the said alleged assessment and valuation of its "franchise," the county of Franklin and the city of Louisville are each claiming against plaintiff sums for county and city taxes respectively for the said years 1893 and 1894, which said several sums claimed each year for local taxes by said cities and county when added to the amount paid by plaintiff into the treasury as aforesaid

for each of those years will aggregate an amount largely in excess of the amount that could be *could be* claimed of the plaintiff either under its charter or under the said act of May 17, 1886.

It avers that it does not owe to the city of Frankfort the said alleged sums or others, or any part of either of them, as taxes or penalties or interest, or the city of Louisville or the county of Franklin, or either of them, the said sums respectively, or any part of either of said sums; that the defendants, James M. Hallnan, collector as aforesaid, of the said city of Frankfort, had no power or authority under the charter of the city of Frankfort, or otherwise, to make the said alleged assessments, or either of them, or to impose or collect said penalties or interest, or any part of either; that the said "board of assessment and valuation" had no power or authority to make the said assessment and valuations of plaintiff's franchise, or either of them, and said city nor its collector has any right or authority to demand or collect any penalty or interest for nonpayment of any taxes. That the said charters of the city of Frankfort, and the said act, entitled "An act relating to revenue and taxation," which became a law November 11, 1892, and each of them, in so far as they or either of them prescribed additional or different taxation of plaintiff or its property for the benefit of cities or
65 counties, are repugnant to and in violation of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts, and were and are wholly void. It alleges that the granting and acceptance of its charter and the several acts extending and continuing the same, which were accepted and acted upon by it, constituted a contract between the State on the one part and this plaintiff and its stockholders on the other part, continuing during the legal existence of plaintiff corporation, and that the State of Kentucky never had, and now has not, the right to repeal, alter, or annul said agreement or the rights conferred by said charter limiting the rights of the State to impose a tax on plaintiff or its property without its consent.

The plaintiff states that it did, in the manner and form hereinbefore stated, and upon the considerations recited in the first and fourth sections of the second article of the said act entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, give its consent to the levying of the tax prescribed by the said first section of the second article of said act, and agreed to pay the same and to waive and release its rights under its charter to a different mode or smaller rate of taxation than is in said first section provided. Such consent and waiver was made in good faith by it and under the belief that the agreement so made would endure during its corporate existence. And it now submits that such is the true construction of said act, and that the proposition from the State contained in said act, and its acceptance by plaintiff, in the manner and form stated, constituted a contract which the State cannot annul or repeal and which is binding on the State in all its departments and subdivisions; and if on final hearing it is adjudged that the said act of May 17, 1886, is still operative as

(to) the law regarding plaintiff's taxation, the plaintiff having tendered full compliance with said law is still ready and willing to pay to the State treasury any balance due thereunder, and to still be bound by its assent to its terms. But if the said act and agreement be not binding on the State, and if it be held to be abrogated by the State, then the plaintiff insists that it is entitled to all its rights under its charter extended as aforesaid, and that it cannot be taxed at a higher rate or in a different method than therein prescribed.

Nevertheless the plaintiff says that the defendants, The City of Frankfort and its tax-collector, James M. Hallnan, are claiming that plaintiff is indebted to the said city in the sums of $3,125 as city taxes for said city as aforesaid for the year 1892, $2,535 as city taxes for said city as aforesaid for the year 1893, $2,260 as city taxes for said city as aforesaid for the year 1894, and $773 as penalty and interest on the said taxes for 1893 and 1894; and the defendant Hallnan, collector of taxes for said city, at the instance and by the direction of said city, is threatening to and is about to levy and sell the plaintiff's property and real estate in the city of Frankfort wherein its said branch is located, and will forthwith make said levy and proceed to sell said property to make the sums aforesaid claimed as taxes due said city, unless restrained by the order of this court, and that such levy and sale would result in putting a stain and cloud upon the plaintiff's title to its said property and stop the
66 business of its said branch bank, and would produce great and irreparable injury and mischief to the plaintiff. The said collector of taxes, unless restrained and enjoined, will proceed forthwith to make said levy and advertise and sell said property. The injunction herein prayed for has never been applied for, or refused by any court, judge, or any one else.

Wherefore the plaintiff prays that the defendant-, and each of them, be enjoined from making any levy or destraint on, or selling any property of plaintiff for the said sums, or any of them, or any part of either of them alleged to be due from plaintiff as taxes to the city of Frankfort, or taking any other proceeding or means to collect or recover the same, and that the city of Frankfort be enjoined from assessing or attempting to assess, or from collecting or attempting to collect hereafter any tax upon the plaintiff, or its property or franchise, except upon its real estate used in conducting its business, for the purpose of said city. It prays that the said tax and said charters of said city and the said act of November 11, 1892, be, in their application to plaintiff, adjudged illegal, unconstitutional, and void. It prays for a temporary injunction to restrain the commission of said wrongs during the pendency of this action; that on final hearing said injunction be made perpetual, and that plaintiff be adjudged its costs and all relief, general or special, to which in law or equity it may be entitled.

HUMPHREY & DAVIE,
HELM & BRUCE,
D. W. LINDSEY,
Att'ys for Pl'ff.

D. W. Lindsey says that he is the president of the Branch Bank of Kentucky, at Frankfort, and the chief officer or agent of the plaintiff corporation now in Franklin county, and that he believes the statements of the foregoing petition are true.

D. W. LINDSEY.

Subscribed and sworn to by D. W. Lindsey, before me this September 6, 1894.

T. N. LINDSEY,
N. P. F. Co., Ky.

The following is the exhibit referred to in the petition, viz:

At a meeting of the board of directors of the Bank of Kentucky, held the 27th day of December, 1887, the following was offered, viz:

It appearing from the report of W. S. Macrae, Frank Miller, and Allen R. Hite, the persons appointed by the board of directors of the president, directors, and company of the Bank of Kentucky, to take and report the votes of the stockholders of said bank, as to paying the tax assessed upon banks and other corporations in this State prescribed in section 1, of article 2, of an act entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, which has been returned and filed with this bank, that a majority in interest of a quorum of the stockholders of this bank, did at a called meeting of such stockholders, held on the 25th day of June, 1887, at the office of said bank, vote their consent to the levying of said tax, agreement to pay the same, and to
67 waive and release all right under its charter to a different mode or smaller rate of taxation, now, therefore "*Resolved* by the board of directors of the president, directors, and company of the Bank of Kentucky, that the said bank does hereby consent to the levying of the tax prescribed by the first section of the second article of the act before named, and agrees to pay the same as provided by said act and waive and release all right under the charter of said bank to a different mode or smaller rate of taxation; *Resolved*, that these resolutions, consent, waiver, and release be certified under the seal of this corporation, under the hand of the president, and attested by the cashier of the bank, and delivered by the president to the governor of the State of Kentucky."

[SEAL.] THOMAS L. BARRET, *P't.*

E. W. HAYS,
Ass't Cashier.

I certify that the foregoing is a true copy of the original paper of what it purports to be now on file in the office of the auditor of public accounts of the State of Kentucky.

Given under my hand this January 5, 1894.

L. C. NORMAN, *Auditor.*

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and James N. Hallnan, Collector of Taxes for the City of Frankfort, Defendants.

Order of Injunction.

Upon the application and motion of the plaintiff for an injunction, as prayed in the petition this day, came the plaintiff and the defendant- by their respective attorneys, and the defendants entered their appearance to this application and motion and waived any and all notice that might be required, and gave consent that the said application and motion may now be acted upon; and it being made to appear to my satisfaction that the judge of the Franklin circuit court is now absent from Franklin county, and that great and irreparable injury will result to the plaintiff if an injunction be not immediately granted, upon consideration of the petition herein, the clerk of the Franklin circuit court is directed to issue an order of injunction agreeable to the prayer of the petition, enjoining and restraining the defendant-, The Board of Councilmen of the City of Frankfort, and James M. Hallnan, collector of taxes for the city of Frankfort, and each of them, from making any levy or destraint, or selling any property of the plaintiff for the sums or any part of them, or any part of either of them alleged to be claimed by the defendant, The Board of Councilmen of the City of Frankfort, to be due it from the plaintiff for taxes for the years 1892, 1893, and 1894, during the pendency of this action, and enjoining said Board of Councilmen of the City of Frankfort
68 from assessing or attempting to assess, or from collecting or attempting to collect, any tax for the purposes of said city upon the plaintiff, its property or franchise, except upon its real estate in said city used in conducting its business during the pendency of this action. But said clerk shall not issue such order of injunction until bond shall have been executed by one or more sufficient sureties of plaintiff to the effect that plaintiff shall pay to the defendant- such damages as they may sustain, not exceeding $10,000, if it be finally decided that the order of injunction herein ought not to have been granted.

B. G. WILLIAMS,
Presiding Judge of the Franklin County Court.

September 6, 1894.

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort and James M. Hallnan, Collector of Taxes for the City of Frankfort, Defendants. } Injunction Bond.

I undertake and am bound to the defendants, Board of Councilmen of the City of Frankfort and James M. Hallnan, tax collector for the city of Frankfort, to pay to said defendants the damages they may sustain, not exceeding the sum of ($10,000) ten thousand dollars, if it be finally decided that the order of injunction herein ought not to have been granted.

This September 6th, 1894.

E. L. SAMUEL.

Attest: THOS. B. FORD,
Clerk Franklin Circuit Court,
By C. E. JAMES, *D. C.*

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF Frankfort and James M. Hallnan, Collector of Taxes for the City of Frankfort, Defendants. } Order of Injunction.

The defendants, Board of Councilmen of the City of Frankfort and James M. Hallnan, collector of taxes for the city of Frankfort, and each of them, are hereby enjoined and restrained from making any levy or destraints or selling any property of the plaintiff for the sums, or any part of them, or any part of either of them, alleged to be claimed by the defendant Board of Councilmen of the City of Frankfort to be due it from the plaintiff for taxes for the years 1892, 1893, and 1894, or taking any other proceeding or means to collect or recover the same, during the pendency of this action; and the Board of Councilmen of the City of Frankfort is enjoined from
69 assessing or attempting or assess or from collecting or attempting to collect any tax, for the purposes of said city, upon the plaintiff, its property, or franchise, except upon its real estate in said city used in conducting its business, during the pendency of this action and until this case shall have been heard by the chancellor of this court.

This September 6th, 1894.

THOS. B. FORD,
Clerk Franklin Circuit Court,
By C. E. JAMES, *D. C.*

The sheriff's return of summons issued on said petition and upon the order of injunction is as follows:

Executed on the board of councilmen of the city of Frankfort by delivering to Ira Julian, mayor of said city, a true copy of the within, and on James Hallnan, by delivering to him a true copy of the within.

R. D. ARMSTRONG, *S. F. C.*,
By N. SULLIVAN, *D. C.*

September 7, 1894.

On September 10th, 1894, the following order was entered:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Kentucky, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Defendants. } Order.

The defendants, The Board of Councilmen of the City of Frankfort, and James Hallnan, tax collector for the city of Frankfort, hereby having entered their appearance to the petition filed in this case on the — day of September, 1894, and consented that this cause be placed upon the docket, same is now placed upon the docket of this court for proceedings as if process had been served ten days before the 1st day of this term. Defendants filed a general demurrer to the petition.

The defendants' demurrer, filed on 10th day of September, 1894, is in words and figures as follows:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and JAMES HALLNAN, Tax Collector for the City of Frankfort, Defendants. } Demurrer.

The defendants, The Board of Councilmen of the City of Frankfort and James Hallnan, tax collector for the city of Frankfort, say that the plaintiff's petition herein does not state facts sufficient to constitute a cause of action, and demur to said petition.

HUGH RODMAN,
City Attorney.
W. H. JULIAN,
For Defendants.

70 On September 25, 1894, a judgment was entered in this cause, which judgment is in words and figures as follows:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Defendants.
} Judgment.

This day came the parties by their attorneys, and this cause having been submitted upon the defendants' demurrer to the plaintiff's petition, and the court being now sufficiently advised, is of the opinion and adjudges that the defendant city had and has had no authority or right to levy, assess, or collect any taxes against the plaintiff for the year 1892, and that for that year the plaintiff properly made its report to the auditor, and paid its taxes into the treasury under the provisions of the Hewitt revenue statute. That for the years 1893 and 1894, the defendant, Hallnan, tax collector for the city of Frankfort or said city, had no power or authority to assess for taxation the intangible property of the plaintiff described in the petition, but that the same was properly assessed for taxation by the State board of assessment and valuation in assessing the franchise of plaintiff as provided for in the act of November 11, 1892.

And that for the delinquency of plaintiff in the payment to the city of Frankfort on so much of the assessments of its franchise for the years 1893 and 1894 as has been apportioned for taxation by said city, the defendants have no power or authority to collect any penalty or interest.

It is therefore adjudged that the defendants' demurrer to the petition be overruled; and they declining to answer but electing to stand by their demurrer, it is further adjudged that the preliminary injunction heretofore granted herein, in so far as the same enjoins the defendants from collecting from the plaintiff any sum for taxes against it for the year 1892 and any sums as penalty or interest for delinquency in payment of taxes on its franchise for the years 1893 and 1894, be and the same is hereby made perpetual, and that so much of said injunction as enjoins the defendants from collecting from the plaintiffs the sum set out in the petition as taxes on franchise for the years 1893 and 1894 be and the same is hereby dissolved.

The defendants except to so much of the foregoing judgment as overrules their demurrer to the plaintiff's petition and perpetuates the injunction herein for any purpose. And the plaintiff excepts to so much of the foregoing judgment as dissolves in part its injunction and as adjudges that plaintiff's intangible property or franchise was assessable by the board of assessment and valuation or otherwise than as contended for in the petition, and prays an appeal to the court of appeals, which is granted; and on motion of the plaintiff so much of the injunction herein as is dissolved by this judgment is hereby continued in force during the pendency of the appeal herein granted upon the plaintiff executing before the clerk
71 of this court by one or more good sureties bond conditioned that the plaintiff will, if this judgment dissolving the injunc-

tion is affirmed, pay to the defendants all damages they or either of them may sustain by reason of the continuance of such injunction pending the appeal.

On Sept. 25, 1894, the following bond was executed:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Kentucky, Plaintiff,
versus
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and J. M. Hallnan, Tax Collector for the City of Frankfort, Defendants. } Bond.

Whereas by judgment in the above-styled cause in the Franklin circuit court on the 25th day of September, 1894, the temporary injunction previously granted the plaintiff against the defendants was in part dissolved, and from so much of said judgment as dissolved in part the said injunction an appeal was asked of and granted by said court; and in the order granting said appeal it was ordered that the injunction dissolved should continue in force, pending the appeal, upon the plaintiff executing bond, as in the judgment provided: Now I, E. L. Samuel, surety, hereby covenant to and with the defendants, Board of Councilmen of the City of Frankfort and J. M. Hallnan, tax collector for said city, that the plaintiff will, if the said judgment dissolving the injunction is affirmed, pay to the defendants all damages they or either of them may sustain by reason of the continuance of such injunction, pending the appeal.

E. L. SAMUEL.

STATE OF KENTUCKY, *Franklin County,* } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, do hereby certify that the foregoing twenty-seven pages *is* a full and complete and correct copy of the pleadings, exhibits, etc., in the case of The President, Directors, and Company of the Bank of Kentucky against The Board of Councilmen of the City of Frankfort and J. M. Hallnan, tax collector for the city of Frankfort, as appears from the records of my office.

Given under my hand as clerk of said court this — day of October, 1894.

THOMAS B. FORD,
Clerk Franklin Circuit Court.

72 Upon which transcript was endorsed the following statement:

Statement.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Appellant,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT and J. M. Hallnan, Tax Collector for the City of Frankfort, Appellees.

The judgment appealed from was rendered on September 25, 1894, and will be found on pages 25 and 26 of this transcript.

The appeal was granted by the court below, and no summons is desired.

D. W. LINDSEY,
Of Counsel for Appellant.

Afterwards, at a court of appeals begun and held for the Commonwealth of Kentucky at the capitol, in the city of Frankfort, on the 2d day of October, A. D. 1894, the following order was entered:

BANK OF KENTUCKY
versus
BOARD OF COUNCILMEN OF CITY OF FRANKFORT, FRANKLIN.

Came the parties by counsel, and on their motion and by consent, it is ordered that this cause be docketed.

The appellant moved to advance this case, together with the case of The Bank of Kentucky against Armstrong, sheriff, and to hear both with the case of Commonwealth *v.* Bank of Kentucky, which was continued for oral argument at the last term of this court, and said motion is submitted.

Afterwards, at a court of appeals held as aforesaid, on October 23, A. D. 1894, the following order was entered:

BANK OF KENTUCKY
versus
BOARD OF COUNCIL OF FRANKFORT, FRANKLIN.

BANK OF KENTUCKY
versus
ARMSTRONG, Sheriff, Franklin.

"The court being advised, it is ordered that these causes be advanced and set for hearing with the case of Commonwealth of Kentucky *v.* Bank of Kentucky on the argument docket for the next term of this court."

73 Afterwards, at a court of appeals held as aforesaid, on March 5, A. D. 1895, the following order was entered:

BANK OF KENTUCKY *versus* ARMSTRONG, Sheriff.	Franklin.
SAME *versus* CITY OF FRANKFORT.	Franklin.

* * * * * * *

By agreement of all the parties and on their motion, it is ordered that these seventeen cases be heard together, and said causes coming on to be heard were argued by A. P. Humphrey, for the bank, and Ira Julian, for the Commonwealth, counties, and cities, and laid over until tomorrow for further hearing.

Afterwards, on the 6th day of March, A. D. 1895, the following order was entered herein:

These cases coming on to be heard were argued by D. W. Lindsey, for the banks, W. McD. Shaw and Hugh Rodman, for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, on March 7, 1895:

These causes again coming on to be heard were argued by Wm. Goebel, for the banks, and H. C. Barker, for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, on March 8, 1895:

These causes again coming on to be heard were argued by John W. Rodman and T. L. Edelen for the banks and laid over for further hearing on tomorrow.

Afterwards, on March 9, 1895:

These causes again coming on to be heard were argued by James P. Helm for the banks and laid over for further hearing on next Tuesday.

Afterwards, on March 12, 1895, the following order was entered herein:

These causes again coming on to be heard were argued by Wm. J. Hendrick for the Commonwealth, and submitted.

Afterwards, at a court of appeals held, as aforesaid, on the 1st day of June, A. D. 1895, the following judgment was entered:

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky, Appellants, *versus* BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Appellees.	Appeal from the Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed, and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

74 It is further considered that the appellants recover of the appellees their cost herein expended.

Judges Lewis, Paynter, and Guffy dissenting.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 33 pages (being numbered 1 to 31 inclusive with two interpolated numbers, viz: "page 1 continued" and number 20½) contain a true, full, and complete transcript of the record and proceedings had in said court in the case of The President, Directors, and Company of the Bank of Kentucky, appellants, against The Board of Councilmen of the City of Frankfort, etc., appellees, except the opinions of the court which are copied into the record in case of Bank of Kentucky against City of Frankfort, and except the proceedings upon and the petition for rehearing, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 10th day of April, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

My fee for this transcript, $10.75.

The following is

EXHIBIT 7.

Franklin Circuit Court.

JANUARY 21, 1896.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff, *versus* BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Defendants.	Judgment.

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised: it is adjudged that article 2 of the act of the General Assembly, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886 (Gen. Stats., chap. 92, art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes or in a different mode or

75 at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and

municipal purposes only upon its real estate used by it in conducting its business: That the provisions of the present constitution of this State and of the act of November 11, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess a tax for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void: That the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation: That the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now hereby, made perpetual, and the defendants be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing is a true copy of the judgment in the above-entitled action lately pending in said court.

Witness my hand as clerk of said court this April 5, 1897.

THOS. B. FORD, *C. F. C. C*,
By J. R. ELLIOTT, *D. C.*

76 The following is

EXHIBIT 8.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 1st day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting.

THE CITY OF LOUISVILLE and R. H. THOMPSON, Judge of the City Court of Louisville, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Appellees.

Be it remembered that heretofore, to wit, on the 27th day of August, 1894, the appellants by their counsel filed in the office of the clerk of the court of appeals a transcript of a record, in words and figures following, to wit:

STATE OF KENTUCKY, }
Jefferson County. }

Pleas before the Honorable Emmet Field, judge of the Jefferson circuit court, common pleas division, at the court-house, in Louisville, Ky., on dates hereinafter mentioned.

Be it known that heretofore, to wit, on the 4th day of May, 1894, came plaintiff by Helm & Bruce, attorneys, and filed its petition in the office of the clerk of the aforesaid court.

Said petition is as follows:

Jefferson Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Plaintiffs,
versus
R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Defendant.
} No. 4339. Petition.

The plaintiff, The President, Directors, and Company of the Bank of Kentucky, states that it is a corporation duly created by and existing under the laws of the State of Kentucky. It was originally incorporated by an act approved February 22, 1834. By the terms of said act it was created a banking corporation under the name given above, and there *was* conferred upon it the powers usual to such corporations, and it was so to continue a body politic and corporate until the 1st day of October, 1864. By an act entitled "An act to extend the charter of the Bank of Louisville, Bank of Kentucky, and Northern bank," approved February 15,
77 1858, it was provided that the chartered privileges of the plaintiff should continue in full force for twenty years from the 1st day of October, 1864; that the stockholders of said bank should, within one year from the 10th of May, 1858, by a vote of a majority of all the stockholders, given at a stated or called meeting, determine whether they would accept the proposed extension; and each bank accepting the provisions of the said act in the mode aforesaid should notify the governor of the Commonwealth of the acceptance, by the certificate of the president and directors of such bank; and that when notice should be thus given, the said act should be considered in full force and effect as to such bank.

The plaintiff states that its stockholders did, within the said one year from the 10th of May, 1858, by a vote of more than a majority thereof, and given at such meeting as was prescribed by the said act, determine that they would accept the proposed extension, and this plaintiff did notify the governor of the Commonwealth of said acceptance in the manner prescribed by said act.

The plaintiff further states that by an act entitled "An act to amend the charter of the Bank of Kentucky," approved February 1, 1872, it was provided that the charter of the plaintiff be and the same was thereby, extended twenty-five years.

The plaintiff further states that its said corporation was duly or-

ganized under the said act creating it as aforesaid, and has ever since been and continues to be a banking corporation duly created under the laws of the State of Kentucky, especially by the said acts and the acts amendatory thereof.

The plaintiff further states that by its said charter aforesaid it was authorized to establish branches; that it has from time to time, under authority of law, established divers branches; and has from time to time, as authorized by law, ceased the operation of the said branches; that under and in pursuance of charter authority it established many years since a branch in the town of Frankfort, State of Kentucky, assigning to it, as it was authorized to do, the sum of $20,000.00 of capital; and the said branch still exists.

By the fifteenth section of said act of February 22, 1834, it was provided:

"That it shall be the duty of the cashier of the principal bank, on the first day of July, 1836, and on the first day of July in each succeeding year during the continuance of this charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus: *Provided*, that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

Plaintiff states that, as aforesaid, this bank was promptly organized under and in accordance with this charter and has ever since continued in existence to this time under said charter and the aforesaid acts of extension, exercising the powers, franchises, and privileges therein conferred, and performing all the obligations therein imposed.

By an act approved February 12, 1836, entitled "An act to increase the revenue," the legislature of Kentucky exercised the right reserved in the said 15th section of the charter above quoted, and imposed a tax of fifty cents on each share of the stock of said bank.

78 The plaintiff avers and submits that in said charter, and also in the extensions thereof, the legislative intent is clearly and plainly expressed that the State should have no power to increase the tax on said bank for any purpose whatever beyond the annual rate of fifty cents on each share of one hundred dollars of stock in said bank.

The plaintiff has performed its duties and obligations under its said charter, and the amendments thereto, and has on the first day of July in every year, beginning with the year 1834, paid into the State treasury the tax of twenty-five cents for 1834 and *1834*, and ever since fifty cents on each share of its stock, as required by the charter, up to the year 1886.

The plaintiff states that during most, if not the whole of said time, the said rate of taxation was very much higher upon the said bank than was imposed by the State upon other persons or corporations.

By an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually,

on the 1st day of July of each year, make report of their condition to the auditor, and should pay into the State treasury seventy-five cents on each share of its capital stock, and should in addition pay into said treasury on its surplus, undivided profits and accumulations in excess of ten per centum of its capital stock, a tax at the same rate as the real property should be assessed, and it was distinctly provided by said act that the said taxation should be in full of all tax, State, county, and municipal, except that the real estate or building owned and used by the banks in conducting their business should not be exempted from taxation for county or municipal purposes, but that such real estate alone might be taxed for county and municipal purposes as other real estate is taxed. As a condition to its operation upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress or under the charters of the State banks to a different mode or a smaller rate of taxation, which consent and agreement to and with the State of Kentucky shall be evidenced by writing under the seal of said bank, and delivered to the governor of the Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax should be paid during the corporate existence of the bank."

The consent provided for by this act and the notice to the governor was further required to be given before the meeting of the next General Assembly, provided the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the plaintiff bank, held on the 25th day of June, 1887, a quorum of the stockholders and a majority thereof being present, said stockholders and a ma-
79 jority in interest thereof did give their consent to the levying of said tax, and to the waiver and release of all right under its charter to a different mode or a smaller rate of taxation, and said consent of the bank to the waiver and release aforesaid, and the said agreement was certified in writing under the seal of the bank by the proper corporate authority to the governor of the Commonwealth, and delivered to him before the next meeting of the General Assembly after the passage of said act.

There is filed herewith as part hereof a duly certified copy of such resolution, consent, and agreement. The plaintiff bank also, through its cashier, made its report and paid into the State treasury, on the 1st day of July, 1886, the full tax required by said act, and in conformity with said act has made its reports in proper form to the auditor of public accounts on the 1st day of July in each and every year up to this time, and has until the year 1893 paid to the State treasury, on each 1st day of July in every year from 1886 the full tax

required by said act, being seventy-five cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State upon its surplus, undivided profits, and accumulations in excess of ten per centum of its capital stock. It was only prevented from paying the whole of said tax on the 1st day of July, 1893, by the refusal of the auditor, the fiscal agent of the State, to receive the same. The plaintiff has also, from and including the year 1886 up to and including the year 1893, paid to each of the cities and counties where its principal office and branch is located, the full amount assessed for county and municipal taxation on all the real estate and buildings in which the principal bank and each of its branches conduct their business.

On the 1st day of July, 1893, the plaintiff's cashier did, as he had regularly done for years before, make a written report to the auditor of public accounts, verified by his oath required by law, of the true amount of the capital of the bank and of its surplus, undivided profits and accumulations; and did then and there successively tender and offer to pay into the treasury of the State the sum of $8,225.50, the maximum tax required by its charter to wit, fifty cents for each share of its stock, and also the sum of $16,177.86, the full amount of the tax required and due under the aforesaid act to amend the revenue laws, approved May 17, 1886. Both of said offers and tenders were successively refused and rejected by the said auditor of public accounts, under the claim made by him that both the tax provisions of the plaintiff's charter, and the said act to amend the revenue laws, approved May 17, 1886, had been superseded and repealed by the new constitution of the State of Kentucky, which went into operation on the 28th day of September, 1891, and by the act of the legislature, entitled "An act relating to revenue and taxation," which went into effect on November 11, 1892. The said auditor, as the agent of the State, refused and declined to accept any other sum than the sum of $11,354.12, the amount claimed by him to be due to the State on the franchise of said bank under the provisions of the aforesaid act of November 11, 1892. The plaintiff, protesting against said act as illegal in its application to plaintiff, acceded to the said auditor's demand, and under protest as aforesaid paid into State treasury last-named sum.

80 The plaintiff further states that by an act entitled "An act for the government of cities of the first class," approved July 1, 1893, and which is applicable to the city of Louisville, it was provided among other things, that the general council may, by ordinance, provide for the following licenses to be paid into the sinking fund, with adequate penalties for doing business, for following the calling, occupation, profession, or using or holding or exhibiting the articles herein named without the required license: For each bank, trust, and title company, the license tax shall not be less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city.

In pursuance of the said charter as aforesaid, the general council of the city of Louisville did pass an ordinance, which was approved January 29, 1894, by which it was provided, among other things,

that hereafter the following licenses shall be paid into the sinking fund of the city of Louisville: Each bank and trust company shall pay an annual license tax of four per cent. of its gross earnings exclusive of rent from real estate paying taxes in the city of Louisville.

The plaintiff states that the said act granting a charter to cities of the first class, and the said ordinance passed in pursuance thereof, are both *unconstitutional* and *void*, in that they impair the obligation of the contract between the plaintiff and the Commonwealth of Kentucky, as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the said revenue law of May 17, 1886, and are a violation of the Constitution of the United States, and especially the section thereof providing that no State shall pass any law impairing the obligation of a contract.

The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance as aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter, and the several acts extending and continuing the same, which were accepted and acted upon by said bank, constituted a contract between the State on the one part, and the bank and its stockholders on the other part, continuing during the legal existence of the corporation, and the State never had and has not now the right to repeal or annul said agreement or the rights conferred by said charter, limiting the right of the State to impose a tax on said bank without the consent of said bank.

The plaintiff further states that it did give its consent to said act of May 17, 1886, and did, upon the considerations therein recited, waive and release its right under its charter to a different mode or a smaller rate of taxation than is therein provided. Said consent and waiver was made on the belief that the said act was intended to put in operation a permanent legislative policy governing the taxation of all banks then existing which would accept its provisions, to endure at least during the corporate existence of all said assenting banks. The plaintiff submits that such is the true construction of said act, and that said act and its acceptance constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments.

Plaintiff states that in view of the action of the State in
81 disregarding its contract and endeavoring to put into effect a system of taxation on all the banks in the State, including plaintiff, much higher and more onerous than that described in the act of May 17, 1886, in that all of said banks, including the plaintiff, are required to pay full municipal taxes in addition to the State taxes, the consideration which induces the plaintiff to consent to be taxed under and in accordance with the terms of said act has wholly failed, and it insists and submits to the court that it is, by the action of the State, restored to its charter right to be discharged from all kinds of taxation by the payment of fifty cents on each share of its capital stock; but if this be not true, still the plaintiff insists and submits to the court that it never at any time consented to be taxed for municipal purposes, except as prescribed in said act

of May 17, 1886, and never at any time waived its objections to a higher rate or more onerous taxation than that imposed by said act of May 17, 1886.

The plaintiff states that it was provided in said ordinances that all licenses should be paid in advance, and in every case where it is based upon a per centum of the earnings, or income of the corporation, the computation shall be made upon the earnings or income of said corporation for the year immediately preceding the time the license is to be dated or is payable; and the corporation to whom the license shall be granted shall, at the end of the year, pay the amount due for the excess over the estimates made at the time of issuing the license under the same penalty as if it had failed or refused to procure a license. And it was further provided that any corporation violating any of the provisions of the said ordinance shall be fined not less than five dollars nor more than one hundred dollars for each offense, each day that the violation is continued to constitute a separate offense.

The plaintiff states that, notwithstanding the premises as aforesaid, the commissioners of the sinking fund of the city of Louisville have demanded of plaintiff that it shall pay to them the sum of $8,063.48; upon its failure to pay have caused a warrant to be issued out of the police court of the city of Louisville, wherein this plaintiff is charged with the offense of conducting a bank without a license, and unless prohibited by this honorable court the defendant, R. H. Thompson, who is judge of the police court of the city of Louisville, will cause this plaintiff to be tried under the said warrant, and will cause the said plaintiff to be fined *not* failing to comply with the said ordinance, and not procuring a license to do business in accordance therewith. The plaintiff further states that as aforesaid the said ordinance is null, void, and of no effect, and the said R. H. Thompson, judge of the police court of the city of Louisville, has no rightful power or authority to enforce the same or to cause this plaintiff to be tried upon the said warrant.

Wherefore plaintiff prays that this court, by a writ of prohibition or order addressed to the police court of the city of Louisville, prohibit it from proceeding in the matter of the warrant sued out in said court against plaintiff for failing to pay said license fee, and that on final hearing it be adjudged that said license ordinance and said act for the government of cities of the first class in so
82 far as they authorize a tax in any form to be levied against and collected from the plaintiff be declared unconstitutional and void, and for all general and proper relief.

HELM & BRUCE,
HUMPHREY & DAVIE,
For Plaintiff.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

T. L. Barret says that he is president of plaintiff, and that the facts in the above petition are true as he believes.

THOMAS L. BARRET.

Subscribed and sworn to before me by T. L. Barret this May 4, 1894.

J. FISHER, JR.,
[SEAL.] *Notary Public, Jefferson County, Ky.*

And thereupon the clerk issued summons and copy which is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

We command you to summon R. H. Thompson, judge of the police court of the city of Louisville, to answer a petition filed against him in our Jefferson circuit court by the President, Directors, and Company of the Bank of Kentucky, and warn him that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return hereof within sixty days from the date hereof.

Witness, John S. Cain, clerk of said court, this 4th day of May, 1894.

JOHN S. CAIN, *Clerk*,
By E. WHITEHEAD, *D. C.*

The sheriff returned said summons with the following endorsement thereon:

Came to hand May 5, 1894, at 11.00 a. m.

Executed May 8, 1894, on R. H. Thompson, judge police court, by delivering to him a copy of the within summons.

H. A. BELL, *S. J. C.*,
By F. P. CARROLL, *D. S.*

At a court held for the court aforesaid on the 11th day of June, 1894:

By agreement this case is to be heard with case No. 4340, Louisville Banking Co. *v.* R. H. Thompson, judge of the police court of the city of Louisville. And—

By agreement cases set for 19th (day of) June, 1894, for trial.

83 At a court held for the court aforesaid on the 19th day of June, 1894:

Came parties by counsel, and said case being heard, was submitted, and the court not being advised, takes time.

At a court held for the court aforesaid on the 24th day of July, 1894:

The court being sufficiently advised, filed an opinion herein.

Said opinion is as follows:

Jefferson Circuit Court, Common Pleas Division.

BANK OF KENTUCKY, &c.,
versus
R. H. THOMPSON, Judge, &c.

These cases involved the liability of the several plaintiffs to municipal taxation. The Bank of Kentucky represents the class of banks chartered before 1856; the Louisville Banking Co. represents the banks chartered since that date, and the Third national the interests of the national banks of the city.

A bank chartered before 1856 and one whose charter is subsequent to that date were made plaintiffs, because in that year the following general statute became a law:

"All charters and grants of or to corporations, or of amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary interest be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Gen. Stats., chap. 68, sec. 8, p. 861.)

Before that act was passed there was no general law giving the legislature control over charters. If the right to amend or repeal was not *reversed* in the charter, it did not exist. But as to charters granted since that date the act quoted becomes a part as fully as if it was incorporated therein, unless a plain intent to exclude it is shown.

The charter of the Bank of Kentucky was approved February 22, 1834; that of the Louisville Banking Company, January, 1867. In the charters of all the banks interested in this litigation it is provided in substance that at no time shall the tax exceed fifty cents on each $100 of stock therein.

In 1886 an act, generally known as the "Hewitt bill," was passed to amend the revenue laws, by which it is provided that all banks in the State shall pay a tax of seventy-five cents upon the $100 of their stock, and certain other taxes for which they were not theretofore liable, but knowing that the rate of taxation could not be increased beyond the limit fixed in their charters, so far as banks created before February, 1856, were concerned, without their consent, the law required of all the banks as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in
84 interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank

and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

"SEC. 5. The said banks may take the proceedings authorized by section 4 of this act any time until the next meeting of the next General Assembly: *Provided*, they pay the tax provided in section 1 from the passage of this act.

"SEC. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes."

All of the banks concerned filed their written consent in due time to pay the tax thus provided for.

The present constitution seeks to have all property taxed in proportion to its value.

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses, or franchises." (Sec. 176.)

The General Assembly, in the charter for cities of the first class, saw now *proper* to adopt a license tax for banks and certain other monied corporations, whereby each of them is required to pay not less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city. The city council passed an ordinance conforming to the charter requiring each bank to pay an annual license tax of four per cent.

The banks ask in this action for a writ of prohibition against the city to prevent it from enforcing the tax levied by the ordinance, for the reason, mainly, that the "Hewitt bill" constitutes a contract which the State has no right to violate either by constitutional provisions or legislative enactment.

As the law touching all the questions raised by the demurrer of the city has recently undergone a thorough investigation by two distinguished circuit judges who delivered carefully prepared and able opinions, I shall merely state the conclusions to which an attentive consideration of the authorities submitted by counsel has led.

As to the Bank of Kentucky and the banks represented by it there is little room for argument in this court, because in the recent case of The Franklin County Court *v.* Deposit Bank, &c., 87 Ky., 387, the court of appeals decided the identical questions now prevented. The city of Frankfort assessed the corporate property of the Bank of Kentucky for municipal taxation. The bank relied upon its charter to defeat the tax.

85 The court held that the agreement in its charter that it should pay to the State a tax of fifty cents on each of its shares of stock, and that this should be in full of all other tax, constituted a contract which cannot be violated or changed without the consent of the bank.

Referring to the Dartmouth College case, where this principle first obtained prominence, the opinion says:

"This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recognized by the courts of last resort of all the States, that a decision by us holding the contrary would be regarded as eminently sporadic."

The Dartmouth College case was decided in 1819, and has been steadily adhered to ever since. The doctrine established by it has sometimes been questioned, but never overthrown.

It would be idle now to theorize whether or not, in view of the mighty changes that have occurred in our social polity during the three-quarters of a century which have elapsed, one legislature should be permitted to make a contract curtailing the sovereign power of taxation by which all succeeding legislatures and law-making bodies are to be bound through all the coming years. The Dartmouth College case is a fact in our jurisprudence, and Mr. Justice Miller realized it when he said, in the opinion in the case of New Jersey *v.* Yard, 95 U. S. 354:

"The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But so long as a majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

It is true in this State such power has been taken from the legislature by constitutional provision, but contracts of that character heretofore made and not affected by the statute of 1856 are as binding and inviolable as they ever were.

The demurrer to the petition of the Bank of Kentucky will have to be overruled.

Concerning the Louisville Banking Co. and the banks it represents it is sufficient to say, that notwithstanding the definite and formal terms of the contract entered into between them and the State by means of the "Hewitt bill," the legislature which passed that law gave them notice that the right was reserved to any succeeding legislature to amend or repeal it. "This act shall be subject to the provisions of section eight (8) of chapter sixty-eight (68) of the General Statutes."

The fact that the right was reserved by the State to repeal or modify the Hewitt bill and abrogate the contract with the banks under it, presents no valid objection in their behalf.

As long as the law stood unrepealed they were entitled to enjoy all the benefits of their contract, and they were not and could not be taxed except in the manner and to the extent indicated by their written consent; the obligation rested equally upon both parties as long as it lasted.

86 Section 8 of chapter 68 was as much a part of the contract as if it had been embodied in the writing. This question was fully considered in Griffin *v.* Kentucky Ins. Co., 3d Bush, 592, and Clark *v.* Louisville Water Co., 143 U. S., page 1. The demurrer to the petition of the banking Co. will have to be sustained.

The national banks *desire* all their powers from Congress, and

their corporate rights cannot be abridged nor in any manner interfered with by a State legislature, but with reference to taxation they occupy the same position that State banks of issue hold; the only limitation placed by Congress upon the power of the State to tax them being that they shall not be discriminated against in this particular. City National Bank of Paducah *v.* City of Paducah, 10 Ky. Law Rep., 506.

The fact that there are banks in the State which, by contracts in their charters made before national banks came into existence, pay a smaller tax than is assessed against national banks and other similar institutions organized since the national banking act became a law can make no difference. All that is required is that as far as the State has the power to control the matter national banks shall not be taxed at a higher rate than it taxes the State banks. In the case of Lionberger *v.* Rowe, 9 Wallace, 468, it is said:

"Congress meant no more by the second limitation in the proviso to the 41st section of the national banking act than to require of each State as a condition to the exercise of the power to tax the shares in national banks, that it should as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.—Syllabus.

"The measure had reference to prospective legislation by the States, and its object was accomplished when the States conformed as far as practicable their revenue system to it. Exact conformity was required if attainable, but the law-making power did not intend such an absurd thing as that the power of the State to tax should depend on its doing an act which it obliged itself not to do."

As the national banks will be taxed in the same manner and only to the same extent that the State banks organized since February, 1856, will be taxed, it follows that there is no discrimination against them; therefore the demurrer to the petition of the Third national will have to be sustained.

It would be more satisfactory to hold that all the plaintiffs are equally liable, or that none of them is subject to municipal taxation, but the law must be given as it is.

EMMET FIELD, *Judge.*

At a court held for the court aforesaid on the 24th day of July, 1894:

This cause having been heard and submitted on demurrer and the court being advised, it is adjudged that the plaintiff's petition sets forth a good cause of action, and the defendants' demurrer to the said petition is overruled, to which the defendants except; and the defendants in open court declined to answer or plead further herein; and thereupon the plaintiff moved for judgment, and
87 it is considered by the court that the prayer of the petition be granted, and that the city of Louisville and R. H. Thompson, judge of the Louisville city court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, The Bank of Kentucky in the city of Louisville, or making any further order therein; and it is further considered that the plaintiff

recover of the defendant, The City of Louisville, its costs herein expended, and may have execution therefor. To all of which defendants except and pray an appeal to the court of appeals, which is granted.

STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing 21 pages contain a full, true, and complete transcript of the record and proceedings had in an action therein pending wherein The President, Directors, and Company of the Bank of Kentucky are plaintiffs, and R. H. Thompson, judge of the police court of the city of Louisville, is defendant, No. 4339, as the same appears of record and on file in my said office.

Witness my hand this 17th day of August, 1894.

JOHN S. CAIN,
Clerk Jefferson Circuit Court.

Upon which transcript was indorsed the following statement:

THE CITY OF LOUISVILLE and R. H. THOMPSON, Judge of the City Court of Louisville, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Appellees.

The judgment appealed from was rendered in Jefferson circuit court, common pleas division, on the 24th of July, 1894, and is on page 21 of this transcript. Appeal prayed below. No process.

H. S. BARKER,
City Attorney, for Appellants.

HUMPHREY & DAVIE,
HELM & BRUCE,
For Appellees.

At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 9th day of October, A. D. 1894, the following order was made:

CITY OF LOUISVILLE and R. H. THOMPSON, Judge of the City Court of Louisville, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Appellees.
} Appeal from the Jefferson Circuit Court, Common Pleas Division.

Ordered that this case be continued for oral argument.

88 Afterwards, at a court of appeals held as aforesaid on March 5, A. D. 1895, the following order was entered:

THE CITY OF LOUISVILLE and R. H. THOMPSON, Judge of the City Court of Louisville, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY OF the Bank of Kentucky, Appellees.
} Appeal from the Jefferson Circuit Court.

* * * * * * *

By agreement of all the parties, and on their motion, it is ordered that these seventeen cases be heard together, and said causes coming on to be heard were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties, and cities, and laid over until tomorrow for further hearing.

Afterwards, on the 6th day of March, A. D. 1895, the following order was entered herein:

These causes coming on to be heard, were argued by D. W. Lindsey for the banks, W. McD. Shaw and Hugh Rodman for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, on March 7, 1895:

These causes again coming on to be heard, were argued by Wm. Goebel for the banks, and H. C. Barker for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, on March 8, 1895:

These causes again coming on to be heard, were argued by John W. Rodman and T. L. Edelen for the banks, and laid over for further hearing on tomorrow.

Afterwards, on March 9, 1895:

These causes again coming on to be heard, were argued by James P. Helm for the banks and laid over for further hearing on next Tuesday.

Afterwards, on March 12, 1895, the following order was entered herein:

These causes again coming on to be heard, were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards at a court of appeals held as aforesaid, on the 1st day of June, A. D. 1895, the following judgment was entered:

THE CITY OF LOUISVILLE and R. H. THOMPSON, Judge of City Court of Louisville, Appellants,
versus
THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Appellees.
} Appeal from the Jefferson Circuit Court, Common Pleas Division.

The court being sufficiently advised, it seems to them there
89 is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their cost herein expended.

Judges Lewis, Paynter, and Guffy dissenting.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 26 pages (being numbered 1 to 25, inclusive, with an interpolated number, viz., "page 1, continued"), contain a true, full, and complete transcript of the records and proceedings had in said court in the case of The City of Louisville and R. H. Thompson, judge of the city court of Louisville, appellants, against The President, Directors and Company of the Bank of Kentucky, appellees, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 10th day of April, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

My fee for this transcript, $9.00.

BANK OF KENTUCKY
v.
STONE and Others.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to Samuel H. Stone, auditor public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, County of Franklin, Board of Councilmen of City of Frankfort, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by the President, Directors and Company of the Bank of Kentucky, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By —— ——, *His Deputy.*

90 MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office, on or before the 7th day of June next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk*,
By —— ——, *His Deputy*.

Upon which subpœna the marshal made the following return:

Executed April 24th, 1897, on the City of Louisville, by delivering a copy of the within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAINES, *D. M.*

Fees, $2.00.

Executed May the 4th, 1897, on the County of Franklin, by delivering a copy of the within spa. in ch'y to B. G. Williams, county judge; on the City of Frankfort, by delivering a copy of within to Ira Julian, mayor of said city, and on Chas. Finley, secretary of state. Executed on May 14th, on Geo. W. Long, treasurer; executed May 15th, on Samuel H. Stone, auditor of public accounts, by delivering a copy of within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By P. D. TUCKER, *D. M.*

Fees, $10.00.

And on another day of said term of said court, to wit, on May 27th, 1897, came the complainant, by its counsel, came also the defendant, The City of Louisville, by its counsel, and thereupon the parties, by their counsel, filed their stipulation herein, which is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } No. 6555. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill, and an answer at the same time, without waiving the demurrer.

HUMPHREY & DAVIE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Came again the defendant, The City of Louisville, and filed its demurrer to the bill of complaint herein, which is as follows:

91 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } No. 6555. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Kentucky, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer, states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JOHN F. GROENE,
Notary Public, Jefferson County, Kentucky.

92 Came again the defendant, The City of Louisville, by its counsel, and filed its answer to the bill of complaint herein, which is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} No. 6555. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Kentucky, Complainant.

This defendant now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception, which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, states — the limit on the rate of taxation to be paid to the State, provided for in section fifteen (15) of complainant's original charter, approved February 2, 1834, and that the same should be in full of all tax and bonus, was an immunity from local taxation, which expired with the complainant's original charter life on October 1, 1864, and the amendments to complainant's original charter, approved subsequent to February 14, 1856, whereby extensions of its charter life, and like immunity from local taxation, were granted unto the complainant for twenty and twenty-five years, respectively, came within the purview of the act of the legislature of the State of Kentucky, approved February 14, 1856, and were by the provisions of the last-named act subject to amendment or repeal at the will of the legislature.

This defendant denies that the tax of fifty cents on each share of stock of the complainant was, when fixed by the act of February 12, 1836, referred to in complainant's bill, or at any time since, largely or at all in excess or as much as the ordinary rate of taxation, State and local, paid by other moneyed capital or property in the State of Kentucky.

This defendant denies that by the settled course of decision of the highest court of the State of Kentucky, the meaning of the provisions in complainant's charter, and the amendments thereto, has been fixed and determined, or that by reason thereof the complainant has an inviolable contract with said State, or that said provisions constitute a limitation on the legislative power of said State to provide for the taxation of plaintiff's property by the municipal subdivisions of said State, or that said provisions prevented such municipal subdivisions from taxing the real estate, or other property of the complainant.

This defendant denies that the complainant has since November 11, 1892, paid in full to this defendant the municipal tax on its real estate and other property.

93 The defendant states section six (6) of article two (2) of said act of May 17, 1886, referred to in complainant's bill,

pertaining to the taxation of banks, expressly provided that said act (meaning article two (2) therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6) of article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal, at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks from county and municipal taxation therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5), of article twelve (12), of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was claimed such authority existed under said act when said ordinance was adopted.

This ordinance was held to be in violation of the State constitution and void by the court of appeals of Kentucky, May 5, 1895, in the cases of Levi, &c., *v.* City of Louisville, 97 Ky. Rep., 394.

This defendant denies that the defendant in the action of the complainant against R. H. Thompson, judge of the police court of the city of Louisville, was in reality the city of Louisville, or that this defendant appeared in said action by counsel, either in the Jefferson circuit court or in the court of appeals of Kentucky; but it is true that the city attorney of this defendant appeared and represented in said action the defendant therein, the said police judge, and also indirectly the commissioners of the sinking fund of the city of Louisville, for whom he was the regularly employed attorney, which was and is a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto, and to which commissioners of the sinking fund the
94 license tax against banks under the ordinance mentioned in the complainant's bill was to be paid.

This defendant states the record in said action will show what questions were submitted to the said circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts; and this defendant denies all the statements in complainant's bill inconsistent with said record referred to as "Exhibit E" and made part of the complainant's bill.

This defendant denies that the amount of taxes the complainant would have to pay under the assessments of the State board, over and above what it would have to pay under the Hewitt bill, would be as much or more than $20,000 per annum.

This defendant denies that the scheme of taxation provided for in the general revenue law of November 11, 1892, violates the alleged contract, alleged to have been made between the complainant and the State in its charter and the amendments thereto, or violates the alleged contract, alleged to have been made between it and the State under the Hewitt bill; or that there was any irrepealable contract made between the complainant and the State in the complainant's charter and the amendments thereto, or under the Hewitt bill, or that the act of the legislature of Kentucky, of November 11, 1892, instituting such method of taxation, is violative of the Constitution of the United States, or particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract, or that said act is void, or that it is violative of the constitution of the State of Kentucky in that, by the said constitution, it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof respectively the power to assess and collect such taxes, or, in that the said law of November 11, 1892, provides for an assessment of the capital stock of corporations, among others, banks, by a State board of valuation and assessment, and provides for the certification of such value by the State board to the counties and municipalities where any such capital stock is situated or franchises employed giving said State board the right to apportion the same among the taxing districts and providing that the corporation shall pay to such taxing districts local taxes thereon; or that this defendant has no power to impose any taxes whatever upon the franchise or intangible property of the complainant.

This defendant states that the court of appeals of Kentucky has construed said provision of the constitution of said State, which is section one hundred and eighty-one (181) thereof, as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation, and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property of corporations, companies, and associ-

ations by the State board of valuation and assessment, in the
95 method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that by reason of the complainant's compliance with the provisions of the said Hewitt bill, under an alleged adjudication of the court of appeals for both of the years, or any year mentioned in complainant's bill, it is now inequitable to allow this defendant to collect any taxes from it, even though there may be, subsequent to the date of complainant's alleged payments as aforesaid, a change in the ruling in regard to the law of Kentucky on these subjects.

This defendant denies it has power under the law to harass or vex the complainant in order to coerce any alleged unjust demand or demands, or to throw into confusion complainant's transactions, or to cast a cloud upon its title to its personal property, or to create great or any disturbance or confusion in regard to the indebtedness to it of the various persons, or any person, with whom it has had dealings or to whom it has loaned money.

This defendant denies that it was at the institution of this action, or is now, threatening to collect the said taxes for the years 1893 and 1894, under the valuation of the complainant's capital stock, or intangible property made by the State board of valuation and assessment, or will put into operation against the complainant the provisions of the law authorizing it to make collections, or that it will collect, or attempt to collect, from the complainant the taxes aforesaid, or any taxes held to be unlawful by said decision of the court of appeals of June 1, 1895, affirming the judgment of the Jefferson circuit court in said case of The Bank of Kentucky against R. H. Thompson, judge of the police court of the city of Louisville, or under the revenue law of November 11, 1892, so long as said decision shall be not overruled and remains in full force and effect, or that it has threatened or is threatening to do any illegal act, or act in violation of complainant's alleged contract, or to the great or any detriment of the complainant in its property or franchises, or that complainant has such alleged contract with the State of Kentucky, or that from these alleged threatened wrongs, or any threatened wrong, the complainant has no remedy at the common law, or that its only remedy is by a bill in equity.

This defendant denies it has threatened, or is threatening, the complainant with any wrong or wrongs.

This defendant for further answer and defense to complainant's bill states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank-tax cases, wherein the same legal questions were involved and issues were made as in the case referred to in the complainant's bill of complaint against R. H. Thompson, judge, etc., rendered a decision in which the former decisions of said court in said case delivered June 1, 1895, and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank-tax cases, decided June 5, 1888, reported

in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust com-
96 pany, or other similar institution, in the State of Kentucky had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of or compliance with those provisions, and that the same with respect to all said banks and similar institutions in the State were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and all banks were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of the four old banks, originally chartered prior to the last-named date, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, hereinabove referred to as section eight (8), chapter sixty-eight (68), of the General Statutes of the State of Kentucky, and were all subject to amendment or repeal by and at the will of the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to bank taxation were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have already been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose on its part to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of ap-

peals of Kentucky of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and
97 in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897, with the auditor or State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant denies that should it be determine that the State of Kentucky has the right to retire from said alleged contract with the complainant, the complainant is or would be entitled to be restored by this court, or any court, to its alleged former position.

This defendant denies that the defendants Samuel H. Stone, Charles Finley, and George W. Long, constituting said State board, are now or were at the institution of this action, threatening or, unless restrained by this honorable court, will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896, and 1897, or either of them, or to certify such value to the county court clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville, or to certify such value to the county court clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort, and the collecting officer of the county of Franklin, or that such assessments, or either of them, will be illegal or in violation of the complainant's alleged contract, or will cast a cloud over complainant's alleged franchise, or cause a multiplicity of suits, or any suit, to be brought against the complainant, or damage it in a way that cannot be repaired or estimated at common law, or that from these alleged threatened wrongs the complainant has no remedy at the common law, or that its only remedy is by a bill in equity; or that unless restrained by this honorable court this defendant, or the defendants, The County of Franklin and The Board of Councilmen of the City of Frankfort, or either of them, will attempt to levy or collect taxes based upon the apportionment found by said State board of valuation and assessment, or will subject complainant to the harassment of many suits, or any suit, or cast a cloud upon its franchises and property, or that an effort will be made to enforce penalties, or any penalty, against the complainant; and this defendant denies that this defendant, or either of its codefendants herein, will undertake to collect any taxes from the complainant held to be unlawful by said decision of the court of appeals of Kentucky of June 1, 1895, so long as said decision is not overruled by said court and remains in full force and effect.

This defendant, therefore, submits that the complainant was not at the institution of this action, and is not now, being subjected to any false or illegal claim or claims, nor to any suit or suits, nor will it

suffer any irreparable injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment
98 of the franchise of the complainant, until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant, City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson Co., Ky.

And on another day of said term of court, to wit, on May 28, 1897, came the complainants, etc.

Circuit Court of the United States for the Sixth Circuit, District of Kentucky, at Louisville, Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF LOUISVILLE, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

WESTERN BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

LOUISVILLE BANKING COMPANY, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

UNION NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

99 LOUISVILLE CITY NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

AMERICAN NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

FARMERS' & DROVERS' BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

THIRD NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

FIRST NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

CITIZENS' NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

GERMAN SECURITY BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

FIDELITY TRUST & SAFETY CO., Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

LOUISVILLE TRUST CO., Complainant,
versus
SAMUEL H. STONE, &c., Defendant-.

This day came the complainants in each of the above-entitled causes, and filed herein notice of motion to be entered herein this day. And thereupon came the complainants, The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all the other causes, by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants, Samuel H. Stone, George W. Long, and Charles Finley, composing the board of valuation and

assessment, from valuing or certifying the value of the intangible property and franchises of the complainants under the act of November 11, 1892, until the further order of the court herein, and enjoining and restraining the other defendants herein, to wit: The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

100 And at the same time the City of Louisville, appearing herein by H. L. Stone, city attorney, and the County of Franklin, appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort, appearing herein by Ira Julian, objected to the said motion, and the same was argued and submitted, and the court, not being advised, takes time.

And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without waiving the effect of the said demurrers, filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, George W. Long, and Charles Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bills of complaint. And the said cause having been argued by counsel upon the said general and special demurrers, as well as upon the demurrer of the City of Louisville, was submitted, and the court, not being advised, takes time.

May 28, 1897.

WM. H. TAFT,
Circuit Judge.

The notices above referred to are as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainants,
versus
SAMUEL H. STONE, &c., Defendants.

The defendants, The City of Frankfort and The County of Franklin, will take notice that the complainants in the above-entitled cause will, on Friday, May 28, 1897, at the Federal court room in Nashville, Tennessee, about the hour of 10 a. m., or when the court shall convene, move the court to grant an interlocutory injunction against you from proceeding to collect any taxes upon any valuation by the board of valuation and assessment, for the years mentioned in the bill of complaint; said injunction to restrain you pending

this suit and until a final decree can be had; and to be in such terms as the court may direct.

HUMPHREY & DAVIE,
Counsel for Complainants.

Upon which notice there appears the following return:

I am over sixteen years of age and not a party to, nor interested in, the within action. I served this notice on B. G. Williams, judge of the county court of Franklin county, on May 11, 1897, at 10.30 a. m., by delivering a true copy thereof to him; Ira Julian, mayor of the city of Frankfort, being out of the county, I served this notice on W. H. Snead, city attorney; B. C. Milam, mayor *pro tem.*,
101 and W. H. Julian, a white male person over sixteen years of age, a brother to said Ira Julian and located at same place, by delivering to each of them a true copy of the within notice, May 11, 1897.

HUSTON QUIN.

Subscribed and sworn to by Huston Quin, before me this 12th day of May, 1897.

ARTHUR PETER,
Notary Public, Jefferson County, Ky.

Commission expires January 15, 1898.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainants,
versus
SAMUEL H. STONE, &c., Defendants.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF LOUISVILLE, Complainants,
versus
SAMUEL H. STONE, &c., Defendants.

PRESIDENT, DIRECTORS, AND COMPANY, NORTHERN BANK OF Kentucky, Complainants,
versus
SAMUEL H. STONE, &c., Defendants.

The defendants, Samuel H. Stone, Charles Finley, G. W. Long, will take notice that the complainant in each of the above-entitled causes will, on Friday, May 28, 1897, at the Federal court room in Nashville, Tennessee, about the hour of 10 a. m., or when the court shall convene, move the court in each of said causes to grant an interlocutory injunction against you from proceeding to value the property of the complainant for taxation, or to certify the same to the municipalities mentioned in the several bills of complaint for the years mentioned in said several bills of complaint;

said injunction to restrain you pending this suit, and until a final decree can be had.

J. D. HUNT,
HUMPHREY & DAVIE,
Counsel for Complainants.

Upon which notice there appears the following return:

I am over 16 years of age, and not a party to nor interested in the within actions, or any of them. I served this notice on H. E. James, assistant treasurer, May 11, 1897, at 9.50 a. m.; on E. D. Guffy, assistant secretary of state, May 11, 1897, at 9.55 a. m., and on F. H. Johnson, assistant auditor, May 11, 1897, at 10.05 a. m., by delivering a true copy thereof to each of them—Samuel H. Stone, George W. Long, and Charles Finley, being respectively
102 auditor, treasurer, and secretary of state of the Commonwealth of Kentucky, all being out of the State.

HUSTON QUIN.

Subscribed and sworn to by Huston Quin before me this 12th day of May, 1897.

ARTHUR PETER,
Notary Public, Jefferson Co., Ky.

Commission expires January 15, 1898.

The demurrer of the Board of Councilmen of the City of Frankfort and County of Franklin above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky
against
SAMUEL H. STONE, BOARD OF COUNCILMEN OF THE City of Frankfort, County of Franklin, and Others. } In Equity.

The demurrer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named The President, Directors, and Company of the Bank of Kentucky, complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill. And for cause of demurrer showeth:

That it appeareth by the complainant's own showing by the said bill, that it is not entitled to the relief prayed for by the bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants doth demur thereto; and pray

the judgment of this honorable court, whether or not they shall be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed with their reasonable cost in this behalf sustained.

JAS. H. POLSGROVE,
County Attorney, Franklin Co.
IRA AND W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

The plea of the Board of Councilmen of the City of Frankfort and County of Franklin above referred to is as follows:

103 Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky
against
SAMUEL H. STONE, THE BOARD OF COUNCILMEN OF the City of Frankfort, The County of Franklin, and Others. } In Equity.

The plea of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named President, Directors, and Company of the Bank of Kentucky, complainant.

These defendants (Board of Councilmen of the City of Frankfort and Franklin County), by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged — in all the said bill; and humbly crave the judgment of this honorable court whether or not they ought to be compelled to make any further or other answer to the said bill.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
IRA & W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

Sworn to and subscribed before me May 28, 1897.
H. M. DOAK, *Clerk.*

Personally appeared before me, H. M. Doak, clerk of the circuit court of the United States in and for the middle district of Tennessee, Ira Julian, mayor city of Frankfort, Ky., with whom I am personally acquainted, and made oath that the matters and things stated in the foregoing plea are true, where they are stated as of his own knowledge, and where they are stated on information or belief he verily believes them to be true.

IRA JULIAN,
Mayor of City of Frankfort, Ky.

Sworn to and subscribed before me this the 28th day of May, A. D. 1897.

H. M. DOAK, *Clerk.*

I hereby certify that the foregoing plea, in my opinion, is well founded in point of law.

IRA JULIAN,
Of Counsel for Defendants.

104 The answer of the Board of Councilmen of the City of Frankfort and County of Franklin above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky
against
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort. } In Equity.

Answer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named President, Directors, and Company of the Bank of Kentucky.

In answer to the said bill, without waiving demurrer to the jurisdiction or the general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort and the County of Franklin say as follows:

The allegations of the first to the sixteenth paragraphs, inclusive, of the bill are substantially true, except the conclusions of law and of fact therein contained.

Responding to the said sixteen paragraphs, these defendants allege as follows: Neither of the renewing acts of 1858 and 1872, mentioned in the bill, contains any express limitation upon the taxing power of the State. On the contrary, the renewing act of 1872 provides: "Sec. 5. That the charter of the Bank of Kentucky be extended for twenty-five years. Sec. 6. The president, directors, and company of said bank shall have all the rights, privileges, and franchises granted to *other banks* of Kentucky." 'Tis under and by virtue of this renewing act that the Bank of Kentucky now exists, and has existed ever since 1884. Hence, the charter of said bank is not, and has not been since 1858, an irrevocable contract.

XVII.

As to the XVII paragraph of said bill, these defendants deny that it has been fully or finally or at all adjudicated that complainant is protected by contract from local taxation. These defendants deny that it has been fully or finally or at all adjudicated that complainant

may, in any event, be restored to taxation as provided in its charter These defendants deny that the legislature ever granted to complainant or entered into with complainant any irrevocable contract of exemption from taxation; as fully appears from the language of complainant's present charter and of article two (2) of the Hewitt act, and the House and Senate Journals of 1886, which journals are here referred to as part hereof—House Journal pages 1241 and 1295,
105 and Senate Journal page 1315. These defendants deny every allegation of the said XVII paragraph. There has never been but one decision of the Kentucky court of appeals to the effect that article two (2) of the Hewitt act constituted an irrevocable contract. That was rendered on June the 1st, 1895, by a divided court, in the consolidated cases referred to and exhibited in the bill herein. The two cases of complainant against these defendants, which arose under the Hewit- act, and which are set forth in the bill as separate adjudications, were included in the said consolidated cases and were all decided by the court of appeals at the same time in one opinion, the said opinion rendered on June the 1st, 1895. In those cases, Judge Pryor delivered the opinion. Three (3) of the seven appellate judges concurred with him therein, and three (3) of the said judges dissented therefrom in an elaborate dissenting opinion. The petition for rehearing in those cases was overruled on October the 8th, 1895. The time for an appeal therefrom has not yet expired, and may yet be prosecuted. In the trial of same, these defendants relied upon the Constitution of the United States. The matter of said appeal has heretofore been in abeyance, awaiting decision in other cases. When said petition for rehearing was overruled on October the 8th, 1895, there were left pending in the said court of appeals other cases, from the city of Owensboro and elsewhere, which involves the same questions as the said consolidated cases decided, as above stated, by the divided court. The said remaining cases having been heard and maturely considered on March the 24th, 1897, in the case Deposit Bank of Owensboro *v.* Daviess County, and other cases consolidated therewith, the said opinion rendered on June the 1st, 1895 (upon which alone the complainant herein relies) was entirely overruled and abrogated by the court of appeals of Kentucky. Said opinion rendered on March the 24th, 1897, *holds:* That complainant is not and was never under its present charter protected by contract from local taxation—that neither its charter nor article 2 of the Hewitt act constitutes an irrevocable contract between the bank and the State—that article two of the Hewitt act, having expressly provided in the sixth section thereof, that it should be subject to alteration, amendment or repeal, the same was so subject, and was repealed by the State constitution of 1891 and the revenue law of 1892; and that said repeal does not impair the obligation of any contract, nor restore complainant to any contract right of exemption under its charter. Said opinion is here referred to as part hereof. Certified copies of the records of the cases in which this (the said) opinion was rendered will be filed herewith as part hereof, if required. A petition for rehearing in the said last-named cases is now pending, but same will probably be passed upon

before June the 20th, next. When that petition has been passed upon, these defendants will ask permission of this court to file herein a supplement to this answer, setting forth the ruling of the court of appeals upon said petition. Further answering, these defendants say that the two judgments (set forth in the bill) entered in the Franklin circuit court, under said overruled opinion, in the cases of complainant against these defendants, are erroneous and not in accordance with the mandate of the court of appeals
106 therein, and void in so far as the same may apply to the taxes in controversy herein. None of the taxes now in controversy were involved in those two cases.

XVIII.

If complainant was, by repeal of the Hewitt act, "restored to its former position under its charter," the Bank of Kentucky was and is, nevertheless, subject to legislative control by virtue of the general act of February the 14th, 1856, relative to the repeal and amendment of charters.

XIX.

These defendants deny that Samuel H. Stone, Charles Finley, and George W. Long are threatening to or will value the franchise of complainant, or are threatening to or will certify the valuation of said franchise to any county clerk, otherwise than in accordance with the revenue act of November the 11th, 1892 (cited in the bill herein), as construed by the court of last resort of the State. These defendants deny that such valuation and certification would be illegal or violative of any contract between complainant and the State, or would cast a cloud over complainant's franchise, or would cause a multiplicity of suits to be brought against complainant, or would damage complainant in a way that could not be repaired or estimated at common law. These defendants deny that complainant has no remedy at law for the wrongs complained of. Under the laws of Kentucky complainant may pay the taxes in controversy, under protest, and afterwards in a single suit at law have its rights adjudicated and enforced. These defendants allege that each of these defendants is solvent and amply able to reimburse complainant for any loss it may, in any event, sustain by reason of the wrongs alleged in the bill. These defendants deny that they or either of them will collect or attempt to collect of complainant any tax otherwise than in accordance with the said revenue law of 1892, as construed by the court of last resort of the State, or will subject complainant to the harassment of many suits, or will cast a cloud upon its franchise or property, or will attempt to enforce any penalties against complainant otherwise than as provided by law.

XX.

These defendants allege that to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers, from executing the State constitution and the present reve-

nue law of the State as construed by the court of last resort of the State. These defendants allege that to grant the injunction prayed for would be (in effect and in fact) to enjoin all proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court at Frankfort, Kentucky, a suit by
107 these defendants against complainant and others for mandamus to compel the State board of assessments to value and apportion complainant's franchise, and the auditor (Samuel H. Stone) to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to — collection of the taxes now in controversy herein between these defendants and the complainant.

These defendants submit that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and pray that the said bill be dismissed with costs.

IRA JULIAN &
W. H. JULIAN,
Attorneys for City of Frankfort, Ky.

Sworn to and subscribed before me May 28, 1897.

H. M. DOAK, *Clerk.*
W. H. SNEED,
City Attorney for the City of Frankfort.
IRA & W. H. JULIAN,
Assistant Counsel.

Personally appeared before me, H. M. Doak, clerk of the circuit court of the United States in and for the middle district of Tennessee, Ira Julian, mayor of city of Frankfort, Ky., with whom I am personally acquainted, and made oath that the matters and things stated in the foregoing answer are true, where they are stated as of his own knowledge, and where they are stated on information or belief, he verily believes them to be true.

IRA JULIAN,
Mayor of the City of Frankfort, Ky.

Sworn to and subscribed before me this the 28th day of May, A. D. 1897.

H. M. DOAK, *Clerk.*

The demurrer of the defendant, Samuel H. Stone, auditor, and others above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
SAMUEL H. STONE, &c., Defendant. } No. 6555.

The demurrer of the defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Bank of Kentucky, complainant.

These defendants, by protestation, not confessing any or
108 all of the matters and things in the complainant's bill of complaint contained, to be true in such manner and form as the same is therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants, Samuel H. Stone, auditor, Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky in the foregoing demurrer, that, in my opinion, the same is well founde l in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

109 The following is

EXHIBIT 9.

Filed November 13, 1895.

Franklin Circuit Court.

THE BOARD OF COUNCILMEN OF THE CITY of Frankfort, Plaintiff, *versus* L. C. NORMAN, Auditor; J. W. HEADLEY, Secretary State; H. S. Hale, State Treasurer; President, Directors, and Company of the Bank of Kentucky, Deposit Bank of Frankfort and Farmers' Bank of Kentucky, and State National Bank, Defendants.	Petition in Equity.

The plaintiff, The Board of Councilmen of the City of Frankfort, states:

Defendant, L. C. Norman, is, and has been for more than one year last past, the duly elected, qualified, and acting auditor of the State of Kentucky.

Defendant, J. W. Headley, is, and has been for more than one year last past, the duly elected, qualified, and acting secretary of state of the State of Kentucky.

Defendant, H. S. Hale, is, and has been for more than one year last past, the duly elected, qualified and acting treasurer of the State of Kentucky.

Defendant, President, Directors, and Company of the Bank of Kentucky, is a corporation, created and doing a banking business under and by virtue of the laws of Kentucky. Same was originally chartered by the legislature in 1835. The original charter thereof has been several times renewed and amended. Said corporation is now, and has been for more than three years last past, conducting a banking business (of loan and discount, etc.) in the city of Frankfort, and also in the city of Louisville.

Defendant, Farmers' Bank of Kentucky, is a corporation created, and doing a banking business under and by virtue of the laws of Kentucky. Same was originally chartered by the legislature in 1850. The original charter thereof has been several times renewed and amended. Said bank is now and has been for more than three years last past, conducting a banking business (of loan and discount, etc.) in the city of Frankfort, and also in Georgetown and elsewhere.

Defendant, Deposit Bank of Frankfort, is a corporation created and doing a banking (*business*) under and by virtue of the laws of Kentucky. Same was originally chartered by the legislature in 1863. The original charter thereof has been several times renewed and amended. Said bank is now and has been for more than three years last past, conducting a banking business (of loan, discount, etc.) in the city of Frankfort and not elsewhere.

110 Defendant, State National Bank, is a corporation created and doing a banking business under and by virtue of the laws of the United States. Same was originally incorporated about the year 1890, and not later than January 1, 1891. Said bank is now and has been for more than three years last past, conducting a banking business (of loan, discount, etc.) in the city of Frankfort and not elsewhere.

All of said original charters and renewals and amendments thereof, are hereby made a part of this petition.

Each of the defendant corporations (banks) during the present year, 1895, and on or before the 1st day of March thereof, made and delivered to the defendant auditor, the statement (report) required by section 4092 of the Kentucky Statutes, verified, as required by said section, and showing the following facts:

Name and place of business of the corporation; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 31st day of December, 1894; the amount of surplus fund and undivided profits, and the value of all the other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the 31st day of December, 1894; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor required.

Said statement (report) was made up to and including the 31st day of December, 1894.

After said statement had been made, and prior to July 1, 1895, the defendants, auditor, treasurer, and secretary of state, from said statement and such other evidence as they had, ascertained and fixed the value of the *franchise* of each of said corporations (banks) for taxation under levies of 1895. The value of the franchise of each of said banks, thus ascertained and fixed, is as follows:

Value of Franchise.

President, Directors, and Company of the Bank of Kentucky	$2,709,384 66
Farmers' Bank of Kentucky	1,153,574 14
Deposit Bank of Frankfort	116,015 80
State national bank	185,468 14

Yet defendant auditor has not certified to the county clerk of Franklin county either of the said assessments, nor the amount thereof liable for county, city, town, or district tax, as required by section 4084 of the Kentucky Statutes, nor anything in regard thereto.

The defendants, auditor, treasurer, and secretary of state, act-

ing as a board of valuation and assessment, have not apportioned the said values of the franchises of the President, Directors,
111 and Company of the Bank of Kentucky and Farmers' bank, nor either of them, among the localities in which the same are subject to taxation, as required by section 4077 of Kentucky Statutes, and have not made an apportionment of the said valuations, nor either of them, for the purpose of local taxation, or any purpose.

The said franchises of the Deposit bank and State national bank are liable to local taxation in the city of Frankfort and not elsewhere.

A portion of each of the said franchises of the President, Directors, and Company of the Bank of Kentucky and Farmers' bank, is liable to local taxation in the city of Frankfort, and not elsewhere. The said portions so subject are approximately as follows:

President, Directors, and Company of Bank of Kentucky	$190,000 00
Farmers' bank	503,400 00

That being the apportionment by said board for the year 1894.

The city *ad valorem* levy of the city of Frankfort for the year 1895 is $1.40 per $100 valuation, and the city of Frankfort is entitled to *ad valorem* taxes from each of said banks under said levy for 1895, as follows:

President, Directors, and Company of the Bank of Kentucky	$2,660 00
Farmers' Bank of Kentucky	7,353 60
Deposit bank	1,624 21
State national bank	2,616 55

No tax has been paid the city of Frankfort under said levy of 1895, by either of defendant banks, and the city of Frankfort is entitled to recover same from each of — banks respectively.

Wherefore the plaintiff, Board of Councilmen of the City of Frankfort, pray- that the defendants, auditor, treasurer, and secretary *and secretary* of state, be directed and ordered by this court to make the said apportionment of the said franchises of the President, Directors, and Company of the Bank of Kentucky and Farmers' bank, among the localities in which the same is liable to local taxation, and that the defendant auditor be directed and ordered to certify the said assessment and apportionments liable to taxation in the city of Frankfort to the county clerk of Franklin county. Plaintiff prays for its costs and all proper relief.

HUGH RODMAN,
City Attorney.
W. H. JULIAN,
For Plaintiff.

Affiant, mayor of the city of Frankfort, says that he believes the statements of the foregoing petition are true.

IRA JULIAN, *Mayor.*

Sworn to before me by Ira Julian, mayor of the city of Frankfort, on this November 13, 1895.

T. P. TREMERE,
Examiner for F. C.

112 *Equity Summons.*

THE COMMONWEALTH OF KENTUCKY:

To the sheriff of Franklin county, Greeting:

You are commanded to summon L. C. Norman, auditor, J. W. Headley, secretary of state, H. S. Hale, State treasurer, Deposit Bank of Frankfort, and State national bank and Farmers' Bank of Kentucky (sued with President, Directors & Co. of the Bank of Kentucky) to answer, on the first day of next January term of the Franklin circuit court, a petition in equity filed against them in said court by the Board of Councilmen of the City of Frankfort, and warn them that upon failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next January term of said court.

Witness Thos. B. Ford, clerk of the said court, this 13th day of November, 1895.

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

Endorsed.

Executed the within summons by delivering to L. C. Norman, auditor, J. W. Headley, secretary of state, and H. S. Hale, State treasurer, a copy hereof, and on each of the defendant corporations by delivering to their respective presidents a copy hereof: Thos. Rodman, president of the Farmers' Bank of Kentucky, B. C. Milam, president of the Deposit Bank of Frankfort, and Fayette Hewitt, president of the State national bank, this November 14, 1895.

R. D. ARMSTRONG, *S. F. C.*,
By L. W. MERCHANT, *D. S.*

Equity Summons.

COMMONWEALTH OF KENTUCKY:

To the sheriff of Jefferson county, Greeting:

You are commanded to summon the President, Directors, and Company of the Bank of Kentucky (sued with L. C. Norman, auditor, etc.,) to answer, on the first day of next January term of the Franklin circuit court, a petition in equity filed against them in said court by the Board of Councilmen of the City of Frankfort, and warn them that upon failure to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next January term of said court.

Witness, Thos. B. Ford, clerk of the said court, this 13th day of November, 1895.

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

113 Endorsed.

Came to hand November 15, 1895, at 9 a. m. Executed November 23, 1895, on Bank of Kentucky by delivering a copy of the within summons to E. W. Hays, cashier of said bank, he being (the) chief officer found in this county at this time.

JOHN R. PFLANZ, *S. J. C.*,
By AL. ——, *D. S.*

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff, *versus.* L. C. NORMAN, Auditor, &c., Defendants. } Notice of Motion for Mandamus.

The defendants, L. C. Norman, auditor, &c., are hereby notified that the plaintiff will on the 10th of the next January term of the Franklin circuit court, it being Wednesday, January 15, 1896, move the court to grant the mandamus prayed for in the above-styled case, upon the grounds stated in the petition therein.

HUGH RODMAN,
City Attorney, Frankfort, for Plaintiff.

Endorsed.

Executed the within notice by delivering to L. C. Norman, auditor, J. W. Headley, secretary of state, and H. S. Hale, State treasurer, a copy hereof, and on each of the defendant corporations by delivering to their respective presidents a copy hereof: Thos. Rodman, president of the Farmers' Bank of Kentucky; B. C. Milam, president of the Deposit Bank of Frankfort; and Fayette Hewitt, president of the State national bank, this November 14, 1895.

R. D. ARMSTRONG, *S. F. C.*,
By L. W. MERCHANT, *D. S.*

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Copy of Notice for Mandamus.

The defendants, L. C. Norman, auditor, &c., are hereby notified that the plaintiff will, on the tenth day of the next January term of the Franklin circuit court, it being Wednesday, January 15, 1896, move the court to grant the mandamus prayed for in the above-styled case, upon the grounds stated in the petition therein.

HUGH RODMAN,
City Attorney, Frankfort, for Plaintiff.

114 Endorsed.

Came to hand November 15, 1895, at 9 a. m.

Executed November 23, 1895, on Bank of Kentucky by delivering a copy of the within notice to E. W. Hays, cashier of said bank, he being chief officer found in this county at this time.

JNO. R. PFLANZ, *S. J. C.*,
By AL. ——, *D. S.*

Franklin Circuit Court.

Filed January 15, 1896.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff, *versus* L. C. NORMAN, &c., Defendants. } Motion for Mandamus.

Pursuant to notice herein, the plaintiff now comes into court and moves the court to grant the mandamus prayed for in the petition and upon the grounds set forth in the petition.

HUGH RODMAN, *City Att'y.*
W. H. JULIAN, *Attorneys.*

Franklin Circuit Court.

JANUARY 15, 1896.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Order.

Plaintiff appeared by attorney and filed a motion for a mandamus herein, and the court took time.

Franklin Circuit Court.

Filed January 22, 1896.

BOARD OF COUNCILMEN OF THE CITY of Frankfort, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Answer of the President, Directors, and Company of the Bank of Kentucky.

The defendant, The President, Directors, and Company of the Bank of Kentucky, for answer to the plaintiff's petition, says:

That it is a corporation under the corporate name and style of "The President, Directors, and Company of the Bank of Kentucky," created by and organized under an act of the General Assembly of
115 the Commonwealth of Kentucky, approved February 22, 1834, entitled "An act to establish the Bank of Kentucky," with power to carry on a general banking business, and with all the privileges and powers conferred, and the duties and obligations im-

posed upon it by the said act and the amendments thereto: That it was so to continue a body corporate until the 1st day of October, 1864. By an act of the legislature, entitled "An act to extend the charter of the Bank of Louisville, Bank of Kentucky, and Northern bank," approved February 15, 1858, it was provided that the chartered privileges of this defendant should continue in full force for twenty years from the 1st day of October, 1864; that the stockholders of the bank should, within one year from the 10th day of May, 1858, by a vote of a majority of all the stockholders, given at a stated or called meeting, determine whether they would accept the proposed extension; and the bank accepting the provision of said act in the mode aforesaid, should notify the governor of the Commonwealth of the acceptance, by the certificate of the president and directors of the bank; and when notice should be thus given, the said act should be considered in full force as to the bank; that its stockholders did within one year from the 10th day of May, 1858, by a vote of more than a majority thereof given at such meeting as was prescribed by the act, determine that they would accept the proposed extension, and its president and directors by their certificate did notify the governor of the Commonwealth of such acceptance.

This defendant further states that by an act of the legislature entitled "An act to amend the charter of the Bank of Kentucky," approved February 1, 1892, it was provided that the charter of this defendant be, and the same was thereby extended and continued in full force for twenty-five years from October 1, 1884.

The said several acts of the legislature are referred to and made parts of this answer.

The defendant states that the fifteenth section of its said charter is in words and figures as follows:

"SEC. 15. That it shall be the duty of the cashier of the principal bank on the first day of July, 1836, and on the first day of July in each succeeding year during the continuance of this charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus; *Provided*, that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock, paid for in said bank."

That by an act of the legislature, approved February 12, 1836, entitled, "An act to increase the revenue," the amount the defendant corporation was required to pay into the public treasury on the first day of July, 1836, and on the first day of July each year during the continuance of its charter, in full of all tax or bonus, was increased to fifty cents on each share of one hundred dollars of stock held and paid for in said bank.

This defendant avers, that in its said charter, and in the said acts extending the same are clearly stated all of the rights, powers and reservations retained over the same; and that the intent that
116 the State should not have the right to increase taxation upon it or its property for any purpose whatever, beyond the annual rate of fifty cents on each one hundred dollars of its stock held and

paid for, but that that rate and mode of taxation should be in full of all tax or bonus during the continuance of its charter as extended, is in its charter and also in the said acts extending the same plainly expressed. And the defendant alleges that in that certain action in this honorable court, wherein this defendant was the plaintiff, and the plaintiff The Board of Councilmen of the City of Frankfort, &c., were defendants, and decided by this court on the — day of May, 1884, and appealed to the court of appeals, it was adjudged by this court and by the court of appeals in its opinion (87 Ky., 370) held: That this defendant's charter created and the said acts of 1858 and 1872 continued in force an irrevocable contract, by the terms of which this defendant was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock "in full of all tax or bonus," and that no other or further tax, State, county or municipal, could be exacted from this defendant. It refers to as part hereof the record of said action on file in this honorable court, and the opinion and mandate of the court of appeals therein.

This defendant alleges that some time after the adoption of the original act of its incorporation and in conformity to its terms and provisions, it organized and established said bank and branches thereof, and, as required, established a branch of its bank at the seat of government, Frankfort, Kentucky, as the fiscal agent of and to aid in the management of the fiscal affairs of the State: that the bank and the Branch bank at Frankfort, Kentucky, which has been and is the fiscal agent of the State and has done and performed and is doing and performing all and every service required of it as such, it has maintained continuously to the present time under its said charter extended as aforesaid, exercising the powers, franchises, and privileges therein conferred, and performing all the duties and obligations therein imposed.

The defendant further says that under and by virtue of its charter extended and continued as aforesaid and as a part of the rights and privileges conferred and of the requirements imposed thereby, and in consideration of its organization and conduct thereunder and of the establishment, management, and maintenance of its principal and branch bank therein required, it was authorized and bound, by the cashier of its principal bank on the first day of July of each and every year from July 1, 1836, and during the continuance of its charter, to pay to the treasurer of this Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, and that the same should be in full of all tax or bonus. It now avers that it has kept and performed all of the terms and requirements of its charter and the said acts extending the same: and has on the first day of July, 1836, and on the first day of July in each and every year up to and including the year 1886, by the cashier of its principal bank paid into the State treasury 50 cents on each share of $100 of its stock held and paid for; and that the same was during the said time much in excess of the rate of taxation imposed by the State upon other persons or corporations.

117 By an act of the General Assembly, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky,"

approved May 17, 1886, and commonly known as the Hewitt bill (Gen'l Stats., chap. 92, art. 2), it is provided:

"SEC. 1. That shares of stock in State and national banks and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies; and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal.

"SEC. 2. The cashier of a bank and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due.

"SEC. 4. That each of said banks, institutions, and corporations by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

It was further provided in the said act that the real estate or building owned and used by the bank in conducting its business, and that alone, might be taxed for county and municipal purposes as other real estate is taxed; and that the consent contemplated by the act, and the notice thereof to the governor, might be given at any time before the meeting of the next General Assembly, provided the tax should be paid by the bank from the passage of the act.

The defendant states that at a called meeting of its stockholders, held June 25, 1887, a majority in interest of a quorum of its stockholders did vote their consent to the levying of the tax prescribed in *section* 1 *of article* 2 of the said act, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and to the agreement to pay the same, and waive and release all right under its charter to a *different mode or smaller rate of taxation;* and at a meeting of the board of directors of defendant,

held December 27, 1887, by resolution of said board it did
118 consent to the levying of the tax prescribed by the *first section of the second article* of the act of May 17, 1886, aforesaid, and agree to pay the same, and to waive and release all right under its charter to *a different mode or smaller rate of taxation;* and the said consent or agreement under the seal of defendant was, before the meeting of the General Assembly next after the passage of the said act, delivered to the governor of this Commonwealth, and a certified copy thereof is filed herewith as a part hereof.

(No such copy has been filed.

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*)

The defendant alleges that through its cashier it has made its reports in proper form, as required by said act, and containing the information required to be reported, to the auditor of public accounts on the first day of July in each *of* every year from and including the year 1887 up to the present time, and has on the first day of July in each and every of said years tendered and paid into the State treasury the full tax required by said act, being seventy-five cents on each share of one hundred dollars of its capital stock, and in addition the same rate of taxation that was for each of said years respectively assessed upon real estate for each one hundred dollars of so much of its surplus, undivided profits, or undivided accumulations as exceeded an amount equal to ten per cent. of its capital stock; and it has also, from and including the year 1887 to the present time for each of said years, listed with the assessors for the counties and cities where its principal office and branch are located, for taxation for county and city purposes, its real estate used by it in conducting its business, and for each of said years paid to each of the cities and counties where its principal office and branch are located the full amount of tax for county and municipal purposes assessed on all real estate and buildings used in conducting the business of the said principal and branch bank.

This defendant admits that it made to the defendant auditor the report mentioned, and referred to in the petition, and it made similar reports for two or three years before; but it avers that it made the said reports upon the demand of the auditor, and under protest as not required of it by law, and under the fear and duress of penal prosecutions if it refused to make said reports. This defendant insisted that it was protected by the said tax provisions of its charter, and the above-mentioned provisions of the act to amend the revenue laws, approved May 17, 1886, and the said contract made between it and the State thereunder; but it was claimed by the auditor, the agent of the State, and by the plaintiff in this action that the said charter provision and the act of May 17, 1886, and the contract thereunder had been superseded and repealed by the new constitution of the State of Kentucky which went into operation on September 28, 1891, and by the acts of the legislature, "An act relating to revenue and taxation," which went into effect November 11, 1892 (chapter

103, Acts 1891-'2-'3), and the other, entitled, "An act for the government of cities of the third class," approved June 14, 1893, the plaintiff being a city of the third class; and that under the provisions of the said two last-mentioned acts the property and
119 franchise of this defendant was assessed for taxation both for State, county, and municipal purposes, and that if the reports were not made the penalties prescribed in such cases by the said acts would be enforced. This defendant, protesting against the said acts as illegal in their application to it, made the said reports under protest and duress as aforesaid.

The defendant states that the said constitution of Kentucky provides that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, and that all corporate property shall pay the same rate of taxation paid by individual property. And the State of Kentucky by the said two acts of November 11, 1892, and June 14, 1893, provided for the taxation of all property and the franchise of all banking corporations for State, county, and municipal purposes in proportion to its value, to be ascertained as provided for in said act of November 11, 1892, and for the same rate of taxation paid by individual property. The defendant says that said system of taxation on the banks of the State as provided in said acts, if applied to this defendant, would be much higher and more onerous than that described in the said act of May 17, 1886, in that defendant would be required to pay full municipal taxes in addition to State taxes, and the consideration which induced the defendant to consent to be taxed under and in accordance with the terms of its contract with the State under the act of May 17th would wholly fail.

It avers that the said constitutional provisions and said two acts of the legislature in so far as they or either of them were intended to apply to the taxation of this defendant, its property or franchise, are illegal and unconstitutional, and are a violation of the Constitution of the United States, and especially the section thereof providing that no State shall pass any law impairing the obligation of a contract: That the defendants, the auditor, treasurer, and secretary of state, nor any or either of them, had any warrant or authority of law, from said statement by defendant to the auditor or any other evidence, to ascertain or fix the value of this defendant's franchise for taxation under levies of 1895, or any other, or for any other purpose. And this defendant is not bound by any value of its franchise so ascertained or fixed.

It avers that the defendant auditor has no right or authority in law, and is not required by section 4084 of the Kentucky Statutes, which is section 8 of art. 3, chap. 103 of the Acts of 1891-'2-'3 (act of November 11, 1892), to certify to the county clerk of Franklin or any other county any assessment of this defendant's franchise or property, nor the amount thereof liable for county, city, town, or district tax; and that the board of valuation and assessment has no right or authority in law, and is not required by section 4077 of the Kentucky Statutes, which is section 1 of art. 3 of the said act of November 11, 1892, (sec. 1, art. 3, chap. 103, Acts 1891-'2-'3) to ascer-

tain the value of this defendant's franchise or to apportion the same in or among any localities for the purpose of local taxation, or for any purpose; nor is this defendant's franchise by law subject to valuation or assessment or taxation for local or any purpose, because the defendant says that the said sections and provisions in said statute are as to this defendant unconstitutional and void.

120 The defendant further states that heretofore, to wit, on the 6th day of September, 1894, it filed its petition in equity in this honorable court, wherein it made the Board of Councilmen of the City of Frankfort defendant, and therein alleged its incorporation, the provisions of its charter in regard to taxation, the facts and circumstances connected with its said contract with the State of Kentucky under what is commonly known as the "Hewitt law" aforesaid; and alleged that the provisions of the constitution of the State of Kentucky now in force and then in force, and all laws passed in the alleged pursuance thereof, which endeavored to subject this defendant (who was the plaintiff in that action) to any other or different mode or rate of taxation than that set out in the said Hewitt law, was unconstitutional, void, and of no effect; and further alleged that the said Board of Councilmen of the City of Frankfort was endeavoring and threatening to assess, levy, and collect taxes upon the franchise and upon the property of this defendant (the plaintiff in said action) other than upon the real estate occupied and used in conducting its business, and prayed that the said Board of Councilmen of the City of Frankfort should be perpetually enjoined and restrained therefrom; that upon the said petition summons was duly issued and served upon, and there was an appearance by the said Board of Councilmen of the City of Frankfort in said action, and such proceeding- were had therein that when the cause came on to be heard upon its merits *and* this court adjudged that the city of Frankfort, or its officers, had no right to assess for taxation for city purposes, the intangible property of this defendant (plaintiff therein); but also adjudged that this defendant was liable for assessment and taxation under the provisions of the said act of November 11, 1892, whereupon this defendant prayed an appeal to the court of appeals, which was granted; that the said appeal was prosecuted with effect, and so that the said judgment of this court in said cause was reversed and the said cause was remanded with a direction to enter a judgment in conformity with the opinion of the court of appeals therein; and thereupon the said cause having been duly redocketed, the following judgment was entered therein; that is to say, to wit:

Franklin Circuit Court.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Kentucky, Plaintiff,
versus
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, &c., Defendants.
} Judgment.

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to

the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886
121 (Gen. Stats., chap. 92, art. 2), and the acceptance of the provision thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former, by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business. That the provisions of the present constitution of this State and of the act of November 11, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights or property, or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal constitution and void. That the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation. That the temporary injunction which was granted in this cause at the commencement of the action, be and the same is now hereby made perpetual, and the defendants be, and each of them are, perpetually enjoined and restrained from levying upon or selling any of the property of the plaintiff, for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

The defendant refers to the record of said cause and the said judgment and the opinion of the court of appeals therein, all on file in the honorable court as part hereof, the same as it copied in full herein.

And this defendant now pleads and relies upon the said judgments as *res adjudicata* of the controversy attempted to be made in this action.

And having fully answered it prays to be hence dismissed.

HUMPHREY & DAVIE,
D. W. LINDSEY,
Attorneys for Bank of Kentucky.

Franklin Circuit Court.

Filed January 22, 1896.

THE BOARD OF COUNCILMEN OF THE City of Frankfort, Plaintiff, *versus* L. C. NORMAN, Auditor, Defendant. } Answer of Farmers' Bank of Kentucky.

For answer the defendant, The Farmers' Bank of Kentucky, states that it was incorporated and chartered by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An
122 act to incorporate the Farmers' Bank of Kentucky," approved February 16, 1850, which act, together with all the amendments thereto, are referred to as part hereof; said act provides that the Farmers' Bank of Kentucky shall constitute a body politic and corporate until the 1st day of May, 1880.

It states that by reason of said act of incorporation it undertook and agreed to perform certain public duties therein mentioned, such as carrying on the banking business, loaning money, discounting notes and bills of exchange, etc., and it states that in accordance with said provisions of said charter it has fully performed all of its duties to the public and complied with its contract with the State.

That its principal bank, and principal place of business is in Frankfort, Ky. That one of its branches is in the city of Henderson, Ky., and one in Georgetown, Ky., all of which are in existence and operation.

The plaintiff states that by the terms of its charter and in consideration of its organization and acceptance of the same, it was authorized and bound, by the cashier of its principal bank, on the first day of July of each year and every year thereafter during the existence of its charter, to pay to the treasurer of Kentucky fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus.

Said provision is in *section* 15 of said act of 1850, chartering this plaintiff, and reads as follows: "It shall be the duty of the cashier of the principal bank on the first day of July, 1891, and on the first day of July in each succeeding year during the continuance of this charter, to pay into the treasury of the Commonwealth fifty cents on each one hundred dollars of stock held and paid for by said bank, which shall be in full of all tax or bonus, Provided that no tax shall be paid until said bank goes into operation: And provided further that the tax or bonus hereby proposed to be imposed on each share is set apart and forever dedicated to the cause of education on the common-school system, and whenever the same or any part thereof shall be directed otherwise by legislative enactment, said bank shall be exonerated from the payment of any tax or bonus whatever."

The plaintiff states that said contract and stipulations as contained in said charter fixing the rate of taxation of plaintiff's property conduced to an acceptance by plaintiff of said charter and the plaintiff was thereby induced to and did organize under said charter in a short time after its passage by the legislature; and the said contract and

provision in regard to taxation has been relied on by plaintiff and has conduced to the maintenance and operation of plaintiff's bank and its said branches.

That by an act entitled "An act extending the charter of the Farmers' Bank of Kentucky," approved March 10, 1876, the legislature of Kentucky extended the plaintiff's charter for a period of twenty-five years from the time of the expiration of its original charter, to wit: twenty-five years from the first day of May, 1880; said act is referred to as part hereof, and reads as follows:

"That the charter of the Farmers' Bank of Kentucky, as amended, be extended for the period of twenty-five (25) years from the
123 termination of its charter as therein fixed, Provided that said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act: And provided further, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Acts 1886, volume 2, page 324. Said acts are referred to as part hereof.

That in accordance with the provisions of its charter and the contract therein contained between the plaintiff and the Commonwealth of Kentucky, it paid to the treasurer of the Commonwealth of Kentucky on the first day of July in each year ever since its organization, and up to the 6th day of December, 1887, an annual tax of fifty (50) cents on each one hundred dollars of stock held and paid for in said bank, which payments, as plaintiff was advised, were in full of all tax or bonus, and the same was received and accepted by the Commonwealth of Kentucky in full of all tax or bonus against this plaintiff.

This defendant avers, that in its said charter and the said acts extending same are clearly stated all of the rights, powers, and reservations retained over the same; and that the intent that the State should not have the right to increase taxation upon it or its property for any purpose whatever beyond the annual rate of fifty cents on each one hundred dollars of its stock held and paid for; but that that rate and mode of taxation should be in full of all tax or bonus during the continuance of its charter as extended, is in its charter, and also in the said acts extending the same, plainly expressed. And the defendant alleges that in that certain action in this honorable court, wherein this defendant was the plaintiff and the plaintiff The Board of Councilmen of the City of Frankfort, &c., were defendants, and decided by this court on the — day of May, 1884, and appealed to the court of appeals, it was adjudged by this court, and by the court of appeals, in its opinion (87 Ky., 370), held: that this defendant's charter created, and the act approved March 10, 1876, continued in force an irrevocable contract, by the terms of which this defendant was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock "in full of all tax or bonus," and that no other or further tax, State, county, or municipal, could be exacted from this defendant. It refers to, as parts hereof, the record of said action on file in this

honorable court and the opinion and mandate of the court of appeals therein.

This defendant alleges that after the adoption of the original act of its incorporation, and in conformity to its terms and provisions, it organized and established said bank and branches, the principal bank being at Frankfort and the branches in Henderson and Georgetown, Kentucky. That it has duly performed, and is now performing all the services required of it as such corporation, it has exercised and is now exercising all the powers, franchises, and privileges conferred in said charter, and is now performing all the duties and obligations therein imposed.

The defendant says that under and by virtue of its charter extended and continued as aforesaid and as part of the rights
124 and privileges conferred and of the requirements imposed thereby, and in consideration of its organization and conduct thereunder and of the establishment, management, and maintenance of its principal and branch banks therein required, it was authorized and bound by the cashier of its principal bank on the first day of July of each and every year from July 1, 1850, and during the continuance of its charter, to pay to the treasurer of the Commonwealth fifty cents on each one hundred dollars of stock held and paid for in said bank, and that the same should be in full of all tax or bonus. It now avers that it has kept and performed all of the terms and requirements of the said acts extending the same; and has on the first day of July, 1850, and on the first day of July in each and every year up to and including the year 1886, by the cashier of its principal bank paid into the State treasury fifty cents on each share of $100 of its stock held and paid for; and that the same was during the said time much in excess of the rate of taxation imposed by the State upon other persons or corporations.

By an act of the General Assembly, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and commonly known as the Hewitt bill Gen'l Stats., chap. 92, art. 2), it is provided:

"SEC. 1. That shares of stock in State and national banks and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed twenty-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal.

"SEC. 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of capital stock, the true amount of surplus, undivided profits, or undivided accumulations, how or in what said sur.

plus undivided profits or undivided accumulations is invested, and pay into the treasury the amount of tax due.

"SEC. 4. That each of the said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered, and in consideration therefor, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

125 It was further provided in the said act that the real estate or building owned and used by the bank in conducting its business, and that alone, might be taxed for county and municipal purposes as other real estate is taxed; and that the consent contemplated by the act, and the notice thereof to the governor, might be given at any time before the meeting of the next General Assembly, provided the tax should be paid by the bank from the passage of the act.

The defendant states that previous to the next session of the General Assembly of the Commonwealth of Kentucky after the passage of said act, and within the time fixed by said act for an acceptance of the proposition of the State of Kentucky, to wit, on the 6th day of December, 1897, the defendant, The Farmers' Bank of Kentucky, at an adjourned meeting of a majority of a quorum of the stockholders of said bank, did consent and agree to and with the Commonwealth of Kentucky to the levying and payment of said tax as provided in and by article 2, chapter 92, of said act entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and waived and released all rights under its charter to a different mode or smaller rate of taxation, which agreement with the State of Kentucky was evidenced by writing under the seal of defendant, and delivered to the governor of the Commonwealth of Kentucky as provided by said act, and within the time prescribed by said act; a certified copy of said agreement is filed herewith as part hereof, marked "A," and the defendant in all respects complied with all the requirements of said act.

(No such copy has been filed.

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*)

And the said consent or agreement, under the seal of defendant, was, before the meeting of the General Assembly next after the passage of said act, delivered to the governor of the Commonwealth.

The defendant alleges that through its cashier it has made its

reports, in proper form as required by said act, and containing the information required to be reported, to the auditor of public accounts on the first day of July in each and every year from and including the year 1887 up to the present time, and has on the first day of July in each and every of said years tendered and paid into the State treasury the full tax required by said act, being 75 cents on each share of $100 of its capital stock, and in addition the same rate of taxation that was for each of the said years respectively assessed upon real estate for each one hundred dollars of so much of its surplus, undivided profits or undivided accumulations as exceeded an amount equal to ten per cent. of its capital stock; and it has also from and including the year 1887 to the present time for each of said years listed with the assessors for the counties and cities where its principal office and branches are located, for taxation for county and city purposes, its real estate used by it in conducting its business, and for each of said years paid to each of the cities and counties where its principal office and branches are located the full amount of tax for county and municipal purposes assessed on all real estate and buildings used in conducting the business of the said principal and branch banks.

This defendant admits that it made to the defendant
126 auditor the report mentioned and referred to in the petition, and it made similar reports for two or three years before; but it avers that it made the same reports upon the demand of the auditor and under protest as not required of it by law, and under the fear and duress of penal prosecution if it refused to make said reports.

This defendant insisted that it was protected by the said tax provisions of its charter, and the above-mentioned provisions of the act to amend the revenue laws, approved May 17, 1886, and the said contract made between it and the State thereunder; but it was claimed by the auditor and by the plaintiff in this action that the said charter provision and the act of May 17, 1886, and the contract thereunder had been superseded and repealed by the new constitution of the State of Kentucky, which went into operation Nov. 11, 1892, and by the acts of the legislature, the one entitled "An act relating to revenue and taxation," which went into effect November 11, 1892 (chap. 103, Acts 1891-'2-'3), and the other entitled "An act for the government of cities of the third class," approved June 11, 1893; and that under the provisions of the last-mentioned acts the property and franchise of this defendant was assessable for taxation for both State, county, and municipal purposes, and that if the reports were not made the penalties prescribed in such cases by the said acts would be enforced.

This defendant, protesting against the said acts as illegal in their application to it, made the said reports under protest and duress as aforesaid.

It avers that the constitutional provisions, and the said two acts of the legislature in so far as they or either of them were intended to apply to the taxation of this defendant, its property or — are unconstitutional and are a violation of the Constitution of the United

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States, and especially the section thereof providing that no State shall pass any law impairing the obligation of contracts; that the defendant-, the auditor, treasurer, and secretary of state, nor any or either of them had any warrant or authority in law, from said statement made by the defendant to the auditor or any other evidence, to ascertain or fix the value of this defendant's franchise for taxation under levies of 1895, or any other, or for any other purpose. And this defendant is not bound by any value of its franchise so ascertained or fixed.

It avers that the defendant auditor has no right or authority in law, and is not required by section 4084 of the Kentucky Statutes, which is section 8 of article 3 of chapter 103 of the Acts of 1891-'2-'3 (act of November 11, 1892), to certify to the county clerk of Franklin or any other county any assessment of this defendant's franchise or property, nor the amount thereof liable for county, city, town, or district tax; and that the board of valuation and assessment has no right or authority in law, and is not required by section 4077 of the Kentucky Statutes, which is a section of article 3 of the said act of November 11, 1892 (sec. 1, art. 3, chap. 103, Acts 1891-'2-'3), to ascertain the value of this defendant's franchise or to apportion the same in or among any localities for the purpose of local taxation, or for any purpose; nor is this defendant's franchise by law subject to valuation or assessment for taxation for local or any purpose; because the defendant says that the said section and provisions
127 in said section are as to this defendant unconstitutional and void. The defendant further states that heretofore, to wit, on the 6th day of September, 1894, it filed its petition in equity in this honorable court, wherein it made The Board of Councilmen of the City of Frankfort defendant, and therein alleged its incorporation, the provision of its charter in regard to taxation, the facts and circumstances connected with its said contract with the State of Kentucky under what is commonly known as the "Hewitt law" aforesaid; and alleged that the provisions of the constitution of the State of Kentucky now in force and then in force, and all laws passed in the alleged pursuance thereof, which endeavor to subject this defendant (who was the plaintiff in that action) to any other or different mode or rate of taxation than that set out in the said Hewitt law was unconstitutional, void, and of no effect; and further alleged that the said Board of Councilmen of the City of Frankfort was endeavoring and threatening to assess, levy, and collect taxes upon the property of this defendant (the plaintiff in said action) other than upon real estate occupied and used in conducting its business, and prayed that the said Board of Councilmen of the City of Frankfort should be perpetually enjoined and restrained therefrom; that upon the said petition summons was duly issued and served upon and there was an appearance by the said Board of Councilmen of the City of Frankfort in said action, and such proceedings were had therein that when the cause came on to be heard upon its merits the petition of this defendant (plaintiff therein) was dismissed; whereupon this defendant prayed an appeal to the court

of appeals, which was granted; and the said appeal was prosecuted with effect, and so that the said judgment of this court in said cause was reversed, and the said cause was remanded with the direction to enter a judgment in conformity with the opinion of the court of appeals therein; and thereupon, the said cause having been duly docketed, the following judgment was entered therein; that is to say, to wit:

This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed reversing the former judgment of this court, and the court being sufficiently advised, it is adjudged that article 2 of the act of the General Assembly, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886 (General Stats., chapter 92, article 2), and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and of the act of November 11, 1892 (art. 3, chap. 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax, for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now hereby, made perpetual, and the defendant be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff's for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of plaintiff except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

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Defendant also states tha tthis honorable court, in said case of The Farmers' Bank of Kentucky *v.* The Board of Councilmen of the City of Frankfort, &c., also decided and perpetually enjoined the defendants from assessing any of the plaintiff's property for taxation, except the real estate used by plaintiff for banking purposes, wherefore defendant pleads and relies upon the above facts and judgment in bar of plaintiff's action, and is *res adjudicata*, or the matter in con-

troversy, and asks that plaintiff's petition be dismissed and to be dismissed with costs, and for all proper relief.

JOHN W. RODMAN,
Attorney for Defendant.

Thomas Rodman says he is the president of the Farmers' Bank of Kentucky, and he believes the foregoing statements are true.

—— ——.

Sworn to and subscribed before me this 22d day of January, 1896.

—— ——,
Examiner for Franklin County, Ky.

Franklin Circuit Court.

Filed February 5, 1896.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
versus
DEPOSIT BANK OF FRANKFORT, &c., Defendants.
} Answer of Deposit Bank of Frankfort.

For answer herein the defendant Deposit Bank of Frankfort says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, approved March 3, 1863, entitled "An act to incorporate the Deposit Bank of Frankfort," under which act this defendant was duly organized and constituted as such corporation under the corporate name and style of the "Deposit Bank of Frankfort," and has been continuously since the year 1868 doing business as a bank in the city of Frankfort under the authority conferred by said act and the several amendments thereof which are hereinafter set out.

129 By the terms of said act the defendant was authorized to do the general business of a bank in said city for the period of twenty years from March 3, 1863. But by the terms of another act of the General Assembly, entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 6, 1871, it is provided as follows: "That the tax or bonus now paid by said bank (meaning this defendant) in future shall be in full of all taxation. But this shall not apply to the city tax on real estate owned by it."

The tax or bonus above referred to was the fifty cents on each one hundred dollars' worth of its capital stock then paid by the defendant under the general law of the State then in force.

By another act of said General Assembly, approved February 23, 1882, entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to the defendant by said act of March, 1863, as amended by the act of March, 1871, were extended and continued in force for the period of twenty years from March 3, 1882.

Defendant avers that it paid annually to the State fifty cents on each $100 worth of its capital stock in lieu of all tax or bonus against it, until the act of the said assembly, approved May 17, 1886,

entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," went into effect.

The first section of article 2 of that act has this provision: "That shares of stock in State and national banks and other institutions of loan and discount, and in all other corporations required to be taxed by law upon their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall in addition pay upon each one hundred dollars of so much of their surplus, undivided profits, or undivided accumulations as exceed an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal."

Section 4 of said act reads as follows:

"That each of said banks, institutions, and corporations by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all rights under acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

Defendant avers that by its proper corporate authority and with the consent of a majority in interest of a quorum of its stockholders, at a called meeting thereof, held at said bank on the —day of July, 1887, it did give its consent to the levying of said
130 tax of 75 cents on each share of its capital stock equal in value to $100, and agreed to pay the same together with the same tax as is assessed on real estate upon so much of its surplus, etc., as exceeds an amount equal to 10 per cent. of its capital stock, as in said act provided, and further agreed to waive and release all rights under its charter to a different mode or smaller rate of taxation, which consent and agreement to and with the State was evidenced by writing under the seal of the defendant, and delivered by the defendant to the governor of the Commonwealth on the — day of July, 1887.

Defendant avers that it has annually, since the above-recited act became a law, through its cashier reported under oath on the 1st day of July in each year to the auditor of public accounts the true amount of its capital stock, surplus, undivided profits, and undivided accumulations, and how the same were invested, and has annually paid in July of each year since said act went into effect, up to and including July, 1892, into the State treasury the whole amount of tax due from defendant under terms of said act.

The defendant says it tendered to the auditor the amount due from it to the State under said act, on the first days of July, 1893, 1894, and 1895, but the tender was refused at the said times, but has since been accepted by the said auditor.

By all of which defendant avers that it has and holds a valid contract with the Commonwealth of Kentucky, by which it and its shares of stock are exempt from all other taxation, State, county, and municipal.

Defendant avers that in its said charter, as amended, and in the said act of 1886, hereinbefore set out, are stated all the rights and reservations intended to be retained by the State over the defendant as to taxation, and the intent that the State should not have the right to increase taxation upon it or its property for any purpose whatever beyond the annual tax required to be paid to the State, was clearly expressed. And defendant avers that in the action in this court wherein this defendant was plaintiff and the plaintiff city was defendant, pending in the common pleas court of Franklin county, and which was decided at the May term, 1884, of said court, and appealed to the court of appeals, and was adjudged by said court and affirmed by the court of appeals in its opinion—see 87 Ky., 370—it was held: That this defendant's charter, as amended, created and continued in force an irrevocable contract by the terms of which this defendant was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock, which was in full of all tax or bonus against defendant, and that no other tax could be exacted of defendant.

The records of said common pleas court have since been turned over to and become a part of the records of this court, and the said suit and all the papers therein are here referred to as part hereof. Defendant made the report to the auditor referred to in the petition, but at the time denied the right of the auditor to demand such report, and only made the report under the fear of a penal prosecution if it refused to do so. This defendant claimed at the time that it was protected and relieved from making said report by its
131 said charter exemptions and by the terms of its aforesaid contract under the act of 1886. But the auditor and the plaintiff city claimed that the said charter exemptions and the said act of 1886 had been repealed by the new constitution and acts of the legislature which went into effect November 11, 1892 (chap. 103, Acts of 1891-'2-'3), and another act entitled "An act for the government of cities of the third class," approved June 14, 1893, the plaintiff being a city of the third class; and that under the provisions of the said two last-mentioned acts, the property and franchise of the defendant was assessable for county and municipal purposes, and that if the said reports were not made the penalties imposed by said acts would be imposed.

The defendant avers that the provisions of the said two last-mentioned acts, and of the constitution, in so far as either of them was intended to apply to the taxation of this defendant, its property or franchise, are illegal and void, and in violation of the Constitution of the United States, and particularly that section thereof which

provides that no State shall pass any law impairing the obligation of contracts. Neither the auditor, treasurer, or secretary of state, nor all of them, had any warrant or authority of law from said report made by defendant to the auditor, or any other evidence, to ascertain or fix the value of this defendant's franchise for taxation under levies of 1895 or any other year or for any other purpose. And this defendant avers that it is not bound by any value of its franchise so ascertained or fixed.

It avers that the defendant auditor has no right or authority in law and is not required by section 4084 of the Kentucky Statutes to certify to the county clerk of Franklin county any assessment of this defendant's franchise or property, nor the amount thereof liable for county, city, or other tax; and that the board of valuation and assessment has no right or authority in law, and is not required by section 4077 of Kentucky Statutes to ascertain the value of this defendant's franchise or to apportion the same in or among any localities for the purposes of local taxation, or for any purpose whatever, because the defendant avers that said sections are as to this defendant unconstitutional and void.

This defendant further avers that the plaintiff Board of Councilmen of the City of Frankfort filed its petition in this honorable court on 22d day of August, 1894, against this defendant, and by said suit sought to enforce the collection from this defendant of municipal taxes upon its said franchise and property other than real estate. To which action this defendant made and filed its answer setting up and relying upon the charter exemptions, and the exemptions under the aforesaid act of 1886, hereinbefore set out at length, and such proceedings were had in that case, that the following judgment was rendered therein by this court:

132 Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

"It appearing to the court that this action has been continued and not heretofore submitted by agreement between the plaintiff and defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and The County of Franklin, &c., were defendants, and in the other The Commonwealth for the use of said county was plaintiff, and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases that the court of appeals has sustained the defense set up and relied on by the bank, in said two cases based upon the contract

made by bank under the Hewitt bill, which is the same contract relied on as the defense in this case: it is now ordered and adjudged that art. 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (Gen'l Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the defendant, constituted a contract between the defendant and the Commonwealth which the latter cannot alter or change without the consent of the former; by he terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the defendant's property, rights of property or franchise, except its said real estate, are in violation of, and repugnant to, the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the franchise of same or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this case at the commencement of the action be now, and the same is now hereby granted, and the plaintiff- be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant except upon its real estate. And it is further adjudged that the defendant recover of the plaintiffs its costs herein expended."

133 The aforesaid judgment was rendered at the January term, 1896, of this court, — together with the record in that suit and the opinion of the court of appeals aforesaid, are all referred to and asked to be taken as parts hereof.

And this defendant pleads and relies upon the aforesaid judgments as *res adjudicata* of the controversy attempted to be made in this action.

And having fully answered, defendant prays to be dismissed with its costs.

FRANK CHINN,
Attorney for Deposit Bank.

Franklin Circuit Court.

JANUARY 22, 1896.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Order.

The President, Directors, and Company of the Bank of Kentucky appeared by attorney and filed their answer herein, and this cause is set for the 16th day of this term.

Defendant, Farmers' Bank of Kentucky, appeared by attorney and filed its answer herein.

Franklin Circuit Court.

FEBRUARY 1, 1896.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Order.

Ten days' time is given defendant, Deposit Bank, to file its answer herein, to have the same effect as if filed now.

Franklin Circuit Court.

Offered to be filed April 9, 1897. Filed April 13, 1897.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Amendment to Original Petition and Petition of Franklin County.

The County of Franklin states that it is interested in the subject of the above-styled action of The Board of Councilmen of the City of Frankfort *v.* L. C. Norman, auditor, &c., and asks that it (Franklin County) be made a party plaintiff therein, and prays as in the original petition and first amendment thereto. Prays for costs and all proper relief.

W. H. JULIAN,
Attorney for Franklin County.

134 Franklin Circuit Court.

Offered to be filed April 9, 1897. Filed April 13, 1897.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Amendment to Petition.

The plaintiff, Board of Councilmen of the City of Frankfort, for amendment to original petition herein, states:

L. C. Norman is not now auditor. S. H. Stone is now auditor.

H. S. Hale is not now State treasurer. G. W. Long is now State treasurer. John Headley is not now secretary of state. Chas. Finley is now secretary of state. The reports to auditor mentioned and particularly set forth in original petition (as to 1895) have been also made by each of defendant banks in and for the year 1896, and defendants, auditor and secretary of state have failed to value the franchises of said banks or either of them or to apportion same or certify same to the county clerk of Franklin county as to either of the year 1896.

The County of Franklin is interested in the subject of this action and asks to be made a party plaintiff herein.

Wherefore, plaintiffs pray as in original petition, and also, that said Stone, auditor, Long, treasurer, and Finley, secretary of state, be made parties defendants herein, and that the mandamus prayed for in original petition be extended so as to apply to and embrace valuation, apportionment, and certification to county clerk for the year 1896. Prays for costs and all other proper relief.

W. H. JULIAN,
Attorney for Plaintiff.

Affiant says he believes the statements of the foregoing amendment are true.

IRA JULIAN, *Mayor.*

Sworn to before me by Ira Julian, mayor of the city of Frankfort, on this April 7, 1897.

T. P. TREMERE,
Examiner for F. C.

Franklin Circuit Court.

APRIL 9, 1897.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Order.

The plaintiff, by attorney, appeared and offered to file an amendment to its original petition herein, also the County of Franklin appeared and offered to file a petition to be made a party hereto.

135 Franklin Circuit Court.

APRIL 13, 1897.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *versus* L. C. NORMAN, Auditor, &c., Defendants. } Order.

Ordered, that the amended petition of plaintiff and the amended petition of Franklin County to be made a party herein, heretofore offered, are both now filed of record, and time, until the first day of

the next September term of this court, is given in which the parties may complete pleadings.

STATE OF KENTUCKY, *County of Franklin,* } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing 58 pages contain a true and complete transcript of all the pleadings, orders and proceedings had in the above-entitled action, as shown by the records of the Franklin circuit court.

Witness my hand as clerk of said court, and the seal thereof, this 11th day of June, 1897.

THOS. B. FORD,
Clerk Franklin Circuit Court.

Fee for copy, $16.25.

136 And on July 5th, 1897, came the complainant and filed its replications to the answer of the defendant City of Louisville and the joint answer of the City of Frankfort and Franklin County herein. Said replications are as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF KENTUCKY, Complainants,
vs.
SAMUEL H. STONE, &c., Defendants.

Replication of the Complainant to Answer of The City of Louisville, Defendant.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HUMPHREY & DAVIE, *For Com.*

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137 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

Replication of the Complainant to the Joint Answer of the Board of Councilmen of the City of Frankfort and Franklin County.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HUMPHREY & DAVIE. *For Com.*

138 And at another term of our said court, held for its February term, 1898, continued and held, to wit, on May 9th, 1898:

BANK OF KENTUCKY
vs.
SAMUEL H. STONE, &c.

Came this day the complainant in the above-styled case, wherein Samuel H. Stone is defendant, and filed herein an amended and supplemental bill of complaint, and complainant also filed herein notice duly served of the motion to be made this day, and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motion, and also came the City of Louisville and objected to the filing of said supplemental bill of complaint and said motion, and filed herein affidavit to be read in this case, and also came the City of Frankfort and Franklin County and objected to the motion made in this case, to which these defendants are parties, and, the court being advised, it is now ordered, adjudged, and decreed that the said several defendants in the above-styled case are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898 or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against the complainant on account of assessments heretofore made and certified for the years 1893 *or* 1894 or from attempting, by distraining or otherwise, from

collecting taxes on said assessments for either of said years. This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions.

To all of which defendants excepted.

139 The amended and supplemental bill above referred to it as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill of Complaint.

The complainant, by way of amended and supplemental bill of complaint, states that the defendants Stone, Finley, and Long are threatening and, unless restrained by this court, will proceed to value the franchise of the complainant in the manner set forth in the original bill of complaint under the act of November 11, 1892, for the year 1898, as well as for the several years mentioned in the nineteenth clause of the original bill of complaint, and are threatening to treat such assessment and valuation just as they are alleged to threaten to treat the assessment for the said years 1895, 1896, and 1897.

The complainant now desires to amend its bill of complaint by inserting the words "and 1898" after the words "1897" in the nineteenth clause of its bill of complaint, and the complainant reiterates all that is said in its original bill of complaint applicable to the years 1895, 1896, and 1897 as equally applicable to the year 1898.

The premises considered, the complainant now prays as in the original bill of complaint, so, however, as to expressly include the year 1898 within the scope of the said prayer, and the complainant prays for all other, further, and proper relief.

HUMPHREY & DAVIE,
For Complainant.

STATE OF KENTUCKY, *Jefferson County,* } *ss:*

140 Oscar Fenley says that he is president of the complainant; that the facts stated herein so far as stated from his personal knowledge are true, and so far as stated from opinion he believes to be true.

OSCAR FENLEY.

Subscribed and sworn to before me this 6th day of May, 1898.

HUSTON QUIN,
N. P. J. C., Ky.

Commission expires with next Kentucky legislature.

141 The affidavit above referred to is as follows:

The affiant, H. L. Stone, states he is city attorney and solicitor for the City of Louisville in the above-styled action, and as such objects to the motion for a restraining order to enjoin and restrain the board of valuation and assessment of the State of Kentucky, made defendant also to this action, from making valuations and assessments of the franchises of the complainant in the above-styled action for the years 1895, 1896, 1897, and 1898 or either of them and certifying the same, as required by the laws of the State of Kentucky, to the authorities of the defendant City of Louisville, for municipal taxation. He further states that, if the defendant City of Louisville shall eventually be adjudged entitled to collect its taxes from the complainant on the valuation and assessment by said State board of the franchises of the complainant, the defendant city, by the lapse of time and delay resulting from such restraining order in the above-styled action, will lose entirely the franchise taxes due the defendant city from the complainant for the years 1895, 1896, 1897, and 1898.

The affiant further states that if said State board is not restrained by this court from making said valuation and assessment against the complainant, as required by the statutes of the State of Kentucky, for the years aforesaid he is willing to enter of record in this action an agreement for and on behalf of the defendant, City of Louisville that the tax bills made out on such assessments as shall be certified by said State board to the city authorities of the defendant city shall not be sued on, and no steps to collect the same shall be made until the defendant city is finally determined in the

142 above-styled action to be entitled to sue on and collect said franchise taxes against complainant, and has heretofore made this proposition to complainant's counsel, and in addition thereto he has proposed to dismiss without prejudice the action brought by the defendant City of Louisville on May 6 and 7, 1898, in the Jefferson circuit court, State of Kentucky, on the franchise tax bill against the complainant due the defendant City of Louisville for the year 1894 and to take no further steps to collect the same until the rendition of the final judgment in the above-styled action.

H. L. STONE.

Subscribed and sworn to before me by said H. L. Stone this May 7, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,

[SEAL.] *Notary Public, Jefferson Co., Ky.*

And on another day of our said court, to wit, on June 4th, 1898:

It is ordered by the court that the preliminary injunction heretofore granted in the foregoing cause be, and the same is hereby, continued until 25th day of June, 1898.

And on another day of our said court, to wit, on Saturday, June 25th, 1898:

The court, being advised, files its opinion herein. It is therefore adjudged, ordered, and decreed as follows:

1. The demurrer of the defendant The City of Louisville to the bill of complaint is hereby overruled; to which the said City of Louisville excepts.

2. The demurrer of the Board of Councilmen of the City of Frankfort to the bill of complaint is overruled; to which
143 the said defendant excepts.

3. The demurrer of the County of Franklin to the bill of complaint is overruled; to which the said defendant excepts.

4. The demurrer of the defendants Samuel H. Stone, Geo. W. Long, and Charles Finley to the bill of complaint is overruled; to which the defendants excepts.

5. The plea of The Board of Councilmen of the City of Frankfort and The County of Franklin, defendants, to the bill of complaint is overruled; to which the said defendants except.

The defendants The County of Franklin and City of Frankfort offered to file an amended answer; to which complainant objected, and the motion to file is overruled; to which defendants except, and the amended answer is made a part of the record by this order.

6. And thereupon came the complainant, by Humphrey & Davie, counsel, and filed herein replications to the answers of the City of Louisville and the Board of Councilmen of the City of Frankfort and the County of Franklin—

And by consent this cause came on to be heard for final decree.

The complainant read upon the hearing its bill of complaint and its amended bill of complaint herein and several exhibits filed herein, viz:

Exhibit No. 1, being the record of the proceedings in the case of The Bank of Kentucky *vs.* The Franklin County Court and J. W. Gaines, sheriff.

Exhibit No. 2, being the record of the proceedings in the case of Bank of Kentucky *vs.* City of Frankfort.

Exhibit No. 3, also called in the bill Exhibit A, being the
144 resolutions of the stockholders of the complainant accepting the Hewitt bill. It is agreed that these resolutions were filed in due time and in accordance with law.

Exhibit No. 4, also called in the bill Exhibit B, being a record of the proceedings in the case of The Bank of Kentucky *vs.* Armstrong, sheriff, and The Franklin County Court.

Exhibit No. 5, also called in the bill Exhibit C, being the final judgment of the Franklin circuit court in the last-named cause.

Exhibit No. 6, being the record of the proceedings in the case of The Bank of Kentucky *vs.* City of Frankfort.

Exhibit No. 7, also called in the bill Exhibit D, being the final judgment of the Franklin circuit court, entered in pursuance of the mandate of the last-named cause.

Exhibit No. 8, also called in the bill Exhibit E, being the record of the proceedings in the case of The Bank of Kentucky *vs.* R. H. Thompson, &c.

The defendant The County of Franklin read on hearing its an-

swer and the defendant The City of Frankfort read on the hearing record of proceedings in the case of Board of Councilmen of the City of Frankfort *vs.* L. C. Norman, auditor, &c., being called in the record Exhibit 9, and the defendant The City of Louisville read its answer and the stipulation between the complainant and the defendant City of Louisville, filed herein June 25, 1898, together with the ordinances and special statutes therein mentioned and referred to.

And it is now adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and Geo. W. Long be, and they are hereby, perpetually enjoined and restrained from proceed-
145 ing to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898 or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Jefferson county, or to any officer of the city of Louisville, or to the county clerk of Franklin county, or to any officer of the board of councilmen of the city of Frankfort, or the county of Franklin; and the defendants The City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuation; and the complainant by making payments in accordance with the Hewitt law is discharged in full from all taxes to be exacted from it under any form or by any authority.

It is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata* relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitu-
146 tion of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article 11 of the said act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendants its costs in this action expended.

And came defendants and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed, and fixes the appeal bond herein at $1,000.

Supplemental answer of the Board of Councilmen of the City of Frankfort, above referred to, is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Kentucky
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort. } In Equity.

147 Supplemental answer of the above-named Board of Councilmen of the City of Frankfort, one of the defendants, to the bill of complaint of the above-named President, Directors, and Company of the Bank of Kentucky.

Reiterating its original answer to the said bill, and without waiving demurrer to the jurisdiction or its general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort, for supplement to its original answer to the said bill, says as follows:

On January 21st, 1898, the Board of Councilmen of the City of Frankfort filed in the clerk's office of the Kentucky court of appeals a certified copy of the judgment of the Franklin circuit court, rendered on January 21st, 1896, in the case of President, Directors, and Company of the Bank of Kentucky against The Board of Councilmen of the City of Frankfort (set forth on pages 119 and 120 of the printed record herein and relied upon by complainant bank as conclusive of this defendant's rights herein), and prayed an appeal from said judgment to the court of appeals of Kentucky, which appeal was granted and process thereon to Franklin county was issued by the clerk of said court of appeals of Kentucky on January 21st, 1898, which process (summons) was duly executed by the sheriff of Franklin county upon complainant bank on January 21st, 1898. By said summons the complainant bank was duly notified of the pendency of said appeal and was thereby warned to appear before the said court of appeals at its then approaching April term (1898) and show cause why said judgment of the Franklin circuit court should not be reversed for errors therein contained.

148 Said appeal is now pending in the Kentucky court of appeals and will be duly prosecuted to decision in said court by this defendant, and same will stand for hearing in said court of appeals at its next September term.

A certified copy of the said proceedings in the Kentucky court of appeals for reversal and vacation of said judgment is attached hereto and filed herewith as part hereof.

This defendant, Board of Councilmen of the City of Frankfort, submits that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and prays that said bill be dismissed with cos's.

T. HITER CROCKETT, *City Att'y.*
IRA & W. H. JULIAN,
Att'ys for City of Frankfort.

The undersigned, W. S. Dehoney, says that he is the duly elected and qualified and acting mayor of the city of Frankfort, Ky., and that the statements of the foregoing supplemental answer of the board of councilmen of said city are true.

W. S. DEHONEY, *Mayor.*

Subscribed and sworn to before me by W. S. Dehoney, mayor of the city of Frankfort, on this 21st day of June, 1898.

GUY H. BRIGGS,
Ex. Franklin Co.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable judges of the court of appeals of Kentucky.

Kentucky Court of Appeals.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Appellants,
vs.
149 THE PRESIDENT, DIRECTORS, & COMPANY OF THE BANK of Kentucky, Appellees.

Be it remembered that heretofore, to wit, on the 21st day of January, 1898, the appellants filed on the clerk's office of said court a copy of a judgment, which is in the words and figures following:

Franklin Circuit Court.

PRESIDENT, DIRECTORS, & COMPANY OF THE BANK OF Kentucky, Plaintiff,
vs.
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Defendants.
} Judgment.

This day came the parties, by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886 (Gen.

Stats., chap. 92, art. 2), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former, by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal
150 purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and of the act of November the 11th, 1892 (art. 2, chap. 103, Acts 1891–'2 and '3), in so far as they were intended to provide for any assessment or taxation of plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation or the auditor to apportion or certify the same or any part of same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of this action is now hereby made perpetual, and the defendant- be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business; and it is further adjudged that the plaintiff recover of the defendant its costs in this action expended.

A copy.
Attest:

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

(Upon the filing of said copy of judgment the appellants, by counsel, endorsed thereon the following statement, to wit:)

Court of Appeals, Ky.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
151 *vs.*
THE PRESIDENT, DIRECTORS, & Co. of the Bank of Kentucky, Appellee.
} Application for Appeal.

The Board of Councilmen of the City of Frankfort, filing herewith a copy of the judgment of the Franklin circuit court in the case of President, Directors, & Co. of the Bank of Kentucky *vs.* Board of Councilmen of the City of Frankfort, rendered at the January term of said circuit court, 1896, hereby make application to the clerk of

the court of appeals for an appeal from said judgment, with process to Franklin.

T. HITER CROCKETT, *City Att'y.*
W. H. JULIAN,
Att'y for Board of Councilmen of the City of Frankfort.

(Whereupon an appeal was granted in accordance with said statement and the following summons issued:)

Summons on Appeal.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

We command you to summon the President, Directors, and Company of the Bank of Kentucky to appear before the judges of the court of appeals of Kentucky, at the capitol, in Frankfort, on the first day of their next April term, to show cause, if any it can, why a judgment obtained by it in the Franklin circuit court against the Board of Councilmen of the City of Frankfort at its January term, 1896, should not be reversed for the errors therein contained, as we from its complaint are informed, and have then and there this writ.

Witness A. Addams, clerk of our said court, at the capitol
152 aforesaid, this 21 day of January, 1898.

A. ADDAMS, *C. C. A.*
—— ——, *D. C.*

(Here is the officer's return on the foregoing summons:)

Executed on the Bank of Kentucky by delivering to D. W. Lindsey, president of said bank, a true copy of the within summons January the 21, 1898.

B. F. SUTER, *S. F. C.*,
By P. C. TOWLES, *D. S.*

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, do certify that the foregoing is a full and complete transcript of the proceedings had upon copy of judgment in the case wherein The Board of Councilmen of the City of Frankfort are appellants and The Pres't, Directors, & Co. of Bank of Kentucky is appellee, as shown by the records of my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of my office. Done at Frankfort, Kentucky, this 10th day of June, A. D. 1898.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

153 Opinion above referred to is as follows:

Received and filed June 23rd, 1898. Thos. Speed, clerk.

Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, CITY of Louisville, County of Franklin, and The Board of Councilmen of the City of Frankfort, Defendants. } No. 6555.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

This is a bill in equity filed by the Bank of Kentucky, a corporation organized under the laws of Kentucky, to restrain the assessment and collection of certain taxes for the benefit of the defendants The City of Louisville, The County of Franklin and The City of Frankfort. Samuel H. Stone is the auditor of public accounts for the State of Kentucky, Charles Finley is the secretary of state, and George W. Long, is the State treasurer; and these three officers, also made defendants herein, constitute the State board of valuation and assessment. The bill avers that the complainant has an irrevocable contract with the State of Kentucky, by which taxes are limited to a certain amount per share upon its stock, and the usual local taxes on its real estate, but that the revenue act of the legislature of Kentucky passed November 11, 1892, impairs that contract and is in violation of the Constitution of the United States.

The case made by the bill is as follows:

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky approved February 2, 1834. The term of its corporate existence was fixed at thirty years from the date of its incorporation. It was organized to do a banking business and to issue bank notes; it was directed to keep its principal office of discount and deposit in the city of Louisville and to locate a branch at Frankfort, the seat of the government,
154 to aid and manage the fiscal affairs of the State. The State was given a voice in the control of the bank by a provision that the government of the Commonwealth should appoint three of the bank's directors.

By the fifteenth section of the original charter, it was provided that the bank should pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which should be in full of all tax and bonus, provided that the legislature might increase or diminish the same; but that at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank. By an act of February 12, 1836, the tax was increased to 50 cents a share. By the act of February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from October 1, 1864, but this extension was declared to be granted

on certain conditions. The extension was duly accepted by complainants.

On March 18, 1886, an act called the Hewitt act was passed to make taxation equal and uniform. It provided that all State and national banks should pay into the State treasury seventy-five cents on each share of their capital stock and should in addition, pay into said treasury on their surplus, undivided profit and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as that assessed on real property; and that the said taxation should be in full of all tax—State, county and municipal—except that the real estate and buildings, owned and used by the banks in conducting their business should not be exempted from taxation for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed.

The fourth section of the act provided that each of the banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, might give its consent to the levying of said tax, and agree to pay the same and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation, which consent and agreement to and with the State of Kentucky should be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth before the next meeting of the legislature; and said agreement and consent being delivered and in consideration thereof, such bank and its
155 shares of stock should be exempt from all other taxation whatsoever, so long as said taxation should be paid, during the corporate existence of the bank.

On June 25, 1887, within the proper time, at a stockholders' meeting by a vote of the stockholders, the complainants gave their consent to the levying of said tax, and to the waiver and release of all right under their charter to a different mode and a lower rate of taxation, and this consent was duly certified by the governor of the Commonwealth. Since 1887 the complainants have paid this tax under the so-called Hewitt act.

On November 11, 1892, the legislature of Kentucky, under a constitution adopted in 1891, passed an act dealing with the assessment of certain corporations, among others, banks. The act provided that every incorporated bank should, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise might be exercised. The auditor, treasurer and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. The board is required to apportion the value of the franchise among the several taxing jurisdictions entitled to a share of such tax, and for such apportionment the auditor of State is required, at the expiration of thirty days, to certify to the county clerks of the counties where any portion of the corporate franchise

of such banks shall be liable to local taxation the amount thereof liable for county or State taxes; and the county clerk is required to certify the same to the collecting officer of the county and city for collection. If a bank fails to pay its taxes, penalties and interest after thirty days' notice, it is to be deemed guilty of a misdemeanor and upon conviction is to be fined $50 for each day during which the tax remains unpaid—to be recovered by indictment or by civil action—of which the Franklin circuit court shall have jurisdiction. The bill avers that the amount of tax which the complainant would have to pay to the board of valuation and assessment over and above what it has to pay under the Hewitt law would be more than $20,000 per annum.

The complainant avers that the defendants are conclusively estopped by previous litigation to contend in this suit that the complainant has not an irrevocable contract with the State limiting its taxes to those fixed in the Hewitt act; that on February 28, 1894,
156 the complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the County Court of Franklin and R. D. Armstrong, sheriff of said county, setting forth the contracts between complainant and the State in regard to taxes under its original charter, and under the Hewitt law, claiming that no taxes could be collected from the complainant except under the Hewitt law during its charter life, and further that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of its contracts aforesaid; that the prayer of the petition was that the court should establish the contracts and should enjoin Franklin county and Armstrong, its sheriff, from attempting to collect any taxes contrary to said contracts; that a decree was entered upon this petition in the Franklin circuit court, adjudging that the act of November 11, 1892, did not violate any contract between the complainant and the State, and the petition for injunction was denied; that the complainant thereupon appealed from the decree to the court of appeals of Kentucky, which court reversed the judgment of the lower court and remanded it to the circuit court of Franklin county for judgment in conformity to its opinion; that the circuit court entered the following judgment on January 21, 1896, which is still in full force and effect:

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be as-

sessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and the act of November 11, 1892 (article 3, chapter 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of
157 November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now, made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property of the plaintiff, except taxes upon its real estate in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended;"

that a similar suit was filed in the same court by the complainant against the Board of Councilmen of the City of Frankfort, to enjoin it from attempting to collect municipal taxes on the apportioned valuation of the franchise certified to the city by the board of valuation and assessment, setting forth exactly the same objection to the validity of the tax; that the court entered a decree for the defendants, and an appeal was taken to the court of appeals, which reversed the decree of the circuit court and directed that a new decree be entered in conformity with the opinion transmitted; that thereupon the Franklin circuit court entered a judgment enjoining the City of Frankfort in exactly the same terms as that already set forth above in the case against the county court of Franklin; that in February, 1894, the city of Louisville, claiming to act under authority given it by an act of the Kentucky legislature affecting the government of cities of the first class, of which the city of Louisville was the only one, passed an ordinance requiring the banks of the city of Louisville to pay to the city an annual tax of 4 per cent. upon their annual gross earnings; that the complainant failed to pay the tax and thereupon, under the act referred to, a warrant was sued out in a criminal prosecution against the complainant in the city court of Louisville; that the complainant then, in the manner provided by law, filed its petition in the Jefferson circuit court for a writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in

apt terms its incorporation, its original charter, the extensions thereof, the passage of the Hewitt law, the contract entered into in conformity therewith, and claiming the benefit of its said contractual relations with the State; that the petition alleged that the said ordinance of the city of Louisville was void because impairing the obligation of the complainant's
158 contract, and any authority given to the city of Louisville to pass such ordinance was likewise void for the same reason, and prayed that the judge might be prohibited from taking jurisdiction of the proceeding against the complainant for a violation of the ordinance; that issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville; that the City of Louisville, though not a party in name, in that court, was, in reality, the party defendant and appeared by counsel; that the court found the issues in favor of the complainant, entered a judgment accordingly, and, thereupon, the defendant, The City of Louisville, caused an appeal to be taken in its name from the judgment to the court of appeals of Kentucky, in which court the cause was argued by counsel for the City of Louisville and for the Commonwealth of Kentucky; that the court of appeals affirmed the judgment of the Jefferson county circuit court, and sent a mandate of affirmance to the court of original jurisdiction, where it was duly entered; that the averment of the petition in that case upon which issue was joined and which presented the only point for adjudication was as follows:

"The plaintiff states that the said act granting a charter to cities of the first class, and the said ordinance passed in pursuance thereof, are both unconstitutional and void, in that they impair the obligation of the contract between the plaintiff and the Commonwealth of Kentucky, as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the revenue law of May 17, 1886, and are a violation of the Constitution of the United States, and especially the section thereof, providing that no State shall pass any law impairing the obligation of a contract.

The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance as aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter, and the several acts extending and continuing the same, which were accepted and acted upon by said bank, constituted a contract between the State on the one part and the bank and its stockholders on the other part, continuing during the legal existence of the corporation and, the State never had, and has not now, the right to repeal or annul said agreement or the rights conferred by said charter, limiting the right of the State to impose a tax on said bank without the consent of said bank.

The plaintiff further states that it did give its consent to said act of May 17, 1886, and did, upon the considerations therein recited, waive and release its right under its charter to a different mode or a smaller rate of taxation than is therein provided. Said consent and waiver was made on the belief that the said act was in-
159 tended to put in operation a permanent legislative policy governing the taxation of all banks then existing, which

would accept its provisions, to endure at least during the corporate existence of all said assenting banks. The plaintiff submits that such is the true construction of said act, and that said act and its acceptance constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments."

That the petition was demurred to, the demurrer was overruled, and judgment given for plaintiff, and the police judge was prohibited from proceeding with the criminal prosecution against complainant.

The suits of The Bank of Kentucky against The Franklin County Court, against The Board of Councilmen of the City of Frankfort, and against The Judge of the Police Court of the City of Louisville, were argued and heard at the same time by the court of appeals of Kentucky, and were decided by that court in one opinion, filed June 1, 1895, and reported as the bank-tax cases, 97 Ky. Rep., 590. A majority of the court of appeals held that the complainants here had an irrevocable contract with the State, and all its agencies, by virtue of its charter and the extensions thereof, and its due acceptance of the provisions of the Hewitt act and that the act of 1892 impaired the obligation of that contract in violation of the Constitution of the United States, and was, therefore, null and void.

The 19th clause of the bill in the case at bar is as follows:

"The complainant says that the defendants, Samuel H. Stone, Charles Finley, and George W. Long, are threatening and unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896, and 1897 and certify such value to the county clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville and to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such assessments will be illegal; in violation of the complainant's contract, as has been heretofore in causes between the complainant and the said several defendants adjudged and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise; cause a multiplicity of suits to be brought against complainant and damage it in a way that cannot be repaired or estimated at the common law; and from these threatened wrongs the complainant has no remedy at the common law, but its only remedy is by a bill in equity; and unless restrained by this honorable court, the
160 defendants, The City of Louisville, The County of Franklin and The Board of Councilmen of the City of Frankfort, will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the embarrassment of many suits, and cast a cloud upon its franchises and property and an effort will be made to enforce penalties against this complainant, as hereinbefore set out."

It further appears that after the decision in the bank-tax cases,

97 Ky., 590, the personnel of the court of appeals changed somewhat, and when a new series of bank-tax cases, presenting the same question, came to that court, a different conclusion was reached. A majority of the court overruled the prior decision, rendered in 1895 and held that the banks, by accepting the provisions of the Hewitt act, did not acquire any contract rights with the State with reference to the mode or right of taxation and that the act of November 11th, 1892, was valid.

Deposit Bank v. Daviess County, 39 S. W. R., 1030.

The defendants, The Franklin County Court, and The Board of Councilmen of the City of Frankfort, have filed a general demurrer to the bill. The defendants, Stone, Finley and Long, and The City of Louisville, have filed a demurrer, first, to the jurisdiction, and second, for want of equity. By stipulation of counsel for the complainant, defendants were also permitted to file answers without waiving demurrer. The only averment of the answer that is material, is as follows:

"These defendants allege that to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers from executing the State constitution and the present revenue law of the State as construed by the court of last resort of the State. These defendants allege that to grant the injunction prayed for would be (in effect and in fact) to enjoin all proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the State board of assessment to value and apportion complainant's franchise and the auditor to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to — collection of the taxes now in controversy herein between these defendants and the complainant."

The cause came on for hearing upon the demurrer to the bill, and upon a motion for a preliminary injunction.

161 TAFT, circuit judge, delivered the opinion of the court.:

The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids a State to pass a law impairing the obligation of a contract. The case is, therefore, one arising under the Constitution of the United States and as it involves more than $2,000 it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of the court? It is well settled that in the Federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void and independently of every other consideration. See *Rich v. Braxton*, 158 U. S., 375, 405. It must ap-

pear from the special circumstances averred that there is no adequate remedy at law and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. *Ogden City v. Armstrong*, 168 U. S., 224, 236; *Pacific Express Co. v. Seibert*, 142 U. S., 339; *Allen v. Pullman's Palace Car Co*, 139 U. S., 658, 661; *Shelton v. Platt*, 139 U. S., 591; *Union Pacific R'y Co. v. Cheyenne*, 113 U. S., 516, 525; *Hannewinkle v. Georgetown*, 15 Wall., 547; *Dows v. Chicago*, 11 Wall., 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may under the duress of the threatened trespass, pay the taxes alleged to be illegal and then sue the city of Louisville, the county of Frankfort, and the city of Frankfort to recover them back. *Railroad Company v. Commissioners*, 98 U. S., 541. It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy as there was in Tennessee in the case of *Shelton v. Platt*. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint, they may resort to a simple suit at law for them. In that case, the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy except where the taxes are a cloud upon real estate, would ordinarily be adequate, but under
162 the provisions of the revenue law of Nov., 1892, we do not think it is. By that law the bank on failing to pay the taxes assessed, according to its provisions within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent. and to a fine of fifty dollars a day for every day of the delinquency to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay fifty dollars a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant because by the terms of the act they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk which is absent in an action in equity. The remedy at law is, therefore, entirely inadequate. *Smyth v. Ames*, 169 U. S., 466, 518; *Pacific Company v. Seibert*, 44 Fed. Rep., 315. It is no answer to say that the payment of the tax and the action to recover it back constitutes an adequate remedy because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer by not distraining may wholly deprive the tax-payer of this remedy. Indeed, the counsel for the city of Louisville vigorously contends that the collecting

officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity, upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 210, 215; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S., 806, 811. And the application of the rule depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall., 74, 79.

The practice of the State courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity jurisdiction in the Federal courts in such cases; for it is
163 settled that if a case "in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction." *Smyth v. D. Ames*, 169 U.S., 466, 516. But it is worthy of note that the court of appeals of Kentucky has held that in the absence of a statute allowing an action to recover back from the State taxes illegally collected, the remedy by injunction is the only adequate one. In *Gates v. Barnett*, 79 Ky., 295, 296, the court in a suit to enjoin a distraint upon certain tobacco for the collection of taxes said:

"The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this State that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon the ground of the inadequacy of the remedy at law. The officer acting in good faith and under color of right is justified by his process, and is not liable as a trespasser; and as a suit would not lie against the State directly, the only complete remedy is by injunction."

It is by no means clear that distraints or threatened distraints against a bank in view of the character of its business may not involve such serious detriment to its business and incidentally to the public, as to justify equitable intervention. In the case of *Lenaure County Savings Bank v. The City of Adrian*, 66 Mich., 273, 276, a levy upon, and seizure of the bank furniture and fixtures was in progress when an injunction was issued.

Mr. Justice Campbell, speaking for the court, said:

"No point was made in the pleadings or on the argument against the jurisdiction of equity in this case. As the bank was not liable to taxation at all on its personal property and the levy was made in such a way as to directly interfere with its business, the case comes within the analogies of the cases represented by *Osborn v. Bank of U. S.*, 9 Wheat., 738, from which it cannot be readily dis-

tinguished. The court below does not appear to have doubted the jurisdiction, although deciding in favor of defendants on the merits."

In *Union Pacific Railway Co. v. Cheyenne*, 113 U. S., 516, 525, Mr. Justice Bradley said:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed, have been frequently sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be
164 presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied."

The interference with the business of a bank and the injury to its credit caused by a distress against its personal property would seem to be a mischief equally hard to be remedied by a mere suit to recover the money back when thus collected.

If it were necessary we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it? In *Osborn v. Bank of the United States*, 9 Wheat., 738, 742, Chief Justice Marshall said: "The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege." See also *Morris Canal and Banking Co. v. Jersey City*, 1 Beasley, 227; High on Injunction, sec. 530. In addition to the suits for future taxes there is also danger of harrassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief.

The second question in the case is that raised by the averment of former adjudication. The case of *New Orleans v. Citizens' Bank*, 167 U. S., 371, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' bank, in New Orleans, was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the

district court of New Orleans to enjoin the collection of a tax
165 against it, on the ground that it had by legislative contract, exemption from the same. The district court sustained the claim, and enjoined the collection of the tax. A second suit, brought to enjoin another year's taxes, resulted in a similar judgment. Some years later the city of New Orleans having attempted to collect a tax, for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the circuit court of the United States for the eastern district of Louisiana, to enjoin the officers of the State and the city from proceeding to collect the tax and set forth the former adjudication as a conclusive estoppel upon the defendants as to the point of the previous litigation, namely, that there was a contract between the State and the bank, forbidding such taxation. The causes of action were not the same in the case brought in the Federal court and the cases adjudged in the State courts, because they involved taxes for different years, but the thing adjudged, to wit, the existence and binding effect of the contract for the exemption from the particular taxation was the same. The Supreme Court of the United States in this case held that the city of New Orleans and the State taxing authorities were conclusively estopped by the judgments in the State courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation and held that the contract having been thus established, the bank was entitled to relief from a violation of that contract by any acts of the State officials acting under the authority of State legislation. It had, theretofore been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a State or any agency of the State for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court, in a most elaborate opinion, said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore, *res judicata*, cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions been previously concluded by a
166 judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court." * * *

"It follows then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case before us there can be no question, from the statement of facts and an examination of the records in previous cases as set

forth therein, that the question which was adjudged in them was the identical question presented in the same way and for the same purpose as in the case at bar, to wit; whether there was a contract between the bank and the State which forbade the imposition of higher taxes than those imposed under the Hewitt act. It was distinctly adjudged, in behalf of the complainant against Franklin county and the city of Frankfort, by the court of appeals by the decision rendered in 1895, and by a mandate issued from that court to the Franklin circuit court, that such a contract in fact existed and rendered null and void the provisions of the revenue act of November 11th, 1892, under which the defendants now seek to impose taxes upon the complainant.

It is vigorously pressed upon us, however, that the judgment in the prohibition suit cannot be relied upon by the complainant bank to establish the existence of a contract of exemption between it and the city of Louisville, because there is nothing in the record to show that the issue made by the demurrer to the petition in that suit was the existence of such an exemption and its violation. Neither the mandate of the court of appeals nor the judgment of the Jefferson court states the ground for holding the ordinance void. It is said that some thirty days before the decision of the prohibition case by the court of appeals that court in *Levi v. City of Louisville*, 97 Ky., 394, held that the city of Louisville had no power under the constitution to substitute a license tax for *ad valorem* tax on personal property, and that this ruling must have led to overruling the demurrer to the petition in the prohibition suit, because it necessarily rendered the license tax upon the banks void. The Levi case was a suit by an owner of real estate to enjoin the collection of an *ad valorem* tax on his land on the ground that the city had not imposed such a tax on personalty, but had substituted therefore a license tax upon it,
167 and so had discriminated in favor of personal property and against realty. The court of appeals held that it was the duty of the city to impose an *ad valorem* tax on personalty, and that it could only impose a license tax on a business in addition to an *ad valorem* tax on property. We confess we cannot see how this decision would have determined the question at issue between the complainant bank and the city of Louisville, in the prohibition suit. There was nothing in the petition for prohibition to show that the license tax was a substitute for an *ad valorem* tax upon the personal property of the bank. There was nothing to show that the city of Louisville had not, under the revenue act of 1892 assessed an *ad valorem* tax on the bank's personalty. The license tax was graduated by a percentage, not of the bank's personal property, but of the bank's gross receipts, and did not, therefore, purport to be a taxation on its personal property. The petition was not, therefore, demurrable under the Levi case. When we further consider that the sole ground stated in the petition for a prohibition was that the license tax was void, because it impaired the bank's contract of exemption and so violated the Constitution of the United States, and we find that this was the sole ground considered by the court of

appeals in its opinion, we can have no doubt what was the point adjudged.

The case of *New Orleans v. The Citizens' Bank*, 167 U. S., 371, is relied on to support the contention that a judgment that a license tax violated the bank's contract of exemption cannot be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the New Orleans case, the language of the exemption was "the capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter." It was held that a judgment holding this to be a valid exemption and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract so as to exempt capital and business property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock and
168 upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that "*such bank and its shares of stock* shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, *a fortiori* does it prevent a direct tax upon its property, tangible and intangible. The tax imposed by the revenue act of 1892 was called a franchise tax, but it has been held, both by the Supreme Court of the United States and of the court of appeals of Kentucky to be in fact nothing but an *ad valorem* property tax. *Henderson Bridge Company v. Kentucky*, 166 U. S., 150; *Adams Express Co. v. Kentucky*, 166 U. S., 171; *Henderson Bridge Company v. Commonwealth*, 99 Ky., 623.

Nor can there be any doubt that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin County, the City of Frankfort and the City of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated value of the franchise and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by the prior litigation, certainly the agencies acting for them under the law are equally bound. In this

light the board of valuation and assessment is in respect to the former judgments privy to the city of Louisville and county of Franklin and the city of Frankfort. There is no dispute that the county of Franklin and the city of Frankfort were parties to the respective suits pleaded as former adjudications. The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its
169 jurisdiction, because proceeding under a void law. To that writ of prohibition, the city of Louisville was not formally made a party in the Jefferson circuit court, but the litigation before the Jefferson circuit court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson circuit court to the court of appeals, the appellants were the City of Louisville and the Judge of the Police Court. By this means the city of Louisville formally made itself a party to the record and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution it might have been attached for contempt. Bacon's Abridgement, Prohibition M. It is urged that the litigation was really a criminal litigation and that a judgment in a criminal case cannot be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil and the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. *Armstrong v. Taylor County Court*, 15 W. Va., 190; *Walton v. Greenwood*, 60 Me., 356. However this may be, the city of Louisville, admitting its interest, did appear as appellant and so made itself a party to the whole litigation, and was so treated by the court of appeals of Kentucky. As the parties to this litigation are the same as those in the former suits except the board of assessment which is in privity with the other defendants and as the point adjudged is exactly the same, we can see no escape from the conclusion that the defendants here are estopped from asserting that the complainant has not a contract exempting it from any other taxation than that provided in the Hewitt law, and, therefore, that the act of November 11, 1892, is an infringement of that contract and impairs its obligation in violation of the Constitution of the United States.

It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does

not arise under the laws or Constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the Commonwealth in respect to taxa-
170 tion, the obligation of which the city of Louisville, the city of Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State are seeking to impair. The defendants deny the existence of such a contract and we must determine whether, as between the parties such a contract exists. It appears that as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties, but it does not free the court from the obligation to enforce the Constitution of the United States, in favor of the complainant by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of *New Orleans v. Citizens' Bank*, 167 U. S., 371, which presented precisely this aspect was begun in the circuit court of the United States and was carried to the Supreme Court of the United States and the jurisdiction by the circuit court was not even questioned.

It is argued that the Federal courts, in considering the question whether a State law impairs the obligation of a contract, will not accept as conclusive the construction which the supreme court of the State has put upon its constitution or laws in determining the existence of a contract and its violation. This is true and is settled by a long line of authorities. *Shelby Co. v. Union Bank*, 161 U. S., 149; *Mobile & Ohio R. R. Co. v. Tennessee*, 153 U. S., 492-'3; *Bryan v. The Board of Education*, 151 U. S., 650; *L. & N. R. R. Co. v. Palmes*, 109 U. S., 256; *Douglas v. Kentucky*, 168 U. S., 488, 502, and cases cited. But the rule has application only where the judgment of the State court is under direct review or in cases in which the opinion of the State court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the State court between the same parties is pleaded or is offered in evidence in a subsequent suit in a Federal court as *res judicata* binding the parties. The State court is as much bound by the Constitution of the United States as a Federal court and is vested with as complete jurisdiction in causes otherwise within its cognizance to decide between the parties before it whether a statute of the State impairs the obligation of a contract. *Robb v. Connolly*, 111 U. S., 624, 637. Such decision embodied in a judgment unreversed is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the supreme court to decide for itself the question of contract or no contract without regard to the State decisions, and its obligations to respect the bar of *res*
171 *judicata* as between the parties, is quite clearly made in *Douglas v. Kentucky*, 168 U. S., 488, 503, although not expressly commented on. In that case, after maintaining in the strongest terms the obligation of the supreme court to exercise an independent judgment in determining the existence of a contract

and its impairment, and after declining to follow a prior decision of the State court upon the subject, the court considered as a distinct matter the question whether the point had not been formerly adjudged in a State court between the same parties and pointed out with much care that the point of the former adjudication was not the same as that then before the court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of *res judicata* has no application in the Federal courts when the former adjudication is that of a State court upon a question arising under the Federal Constitution.

One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a State court by the city of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration and is pending, and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the State court. We do not think so. It is settled that the pendency of a suit in a State court is no bar to a suit upon the same subject-matter in this court. *City of North Muskegon v. Clark*, 22 U. S. App., 522, and cases therein cited. The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. We do not enjoin any suit at all, by our order; all we do enjoin is the certification of the taxes. That does not require the defendants to disobey an order of any other court or restrain their prosecution of a suit therein.

The demurrer to the bill must therefore be overruled and the preliminary injunction prayed for must issue.

172 Stipulation above referred to is as follows:

In the United States Circuit Court for the Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK of Kentucky, Complainant, *vs.* S. H. STONE, &c., Defendants.	#6555. Stipulation.

It is stipulated and agreed between the complainant and the defendant City of Louisville that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 219-222).

2. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

3. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance referred to in complainant's bill requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4%) on its gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

4. An ordinance entitled "An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

173 5. An ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

6. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

7. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

It is further stipulated and agreed between the complainant and the defendant City of Louisville that the complainant, Bank of Kentucky, did not pay any sum for license under the said license ordinance approved January 29, 1894, but loaned to the commissioners of the sinking fund of the city of Louisville $8,063.48, for which said commissioners executed their note to complainant March 13, 1894, bearing interest at the rate of four per cent. (4%) per annum, which note said commissioners paid in full to complainant February 21, 1896, with $625.33 accrued interest thereon.

III. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorpo-

174 rated and organized, and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, an act concerning the deposits of the sinking fund of the city of Louisville, approved May 15, 1886 (Session Acts 1885–'6, vol. 2, p. 677), which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024 Kentucky Statutes, edition of 1894.

IV. It is further stipulated and agreed that during the time the complainant's action against R. H. Thompson, judge mentioned in complainant's bill, was pending in the Jefferson circuit court and in the court of appeals of Kentucky on appeal Hon. Henry S. Barker, who appeared as counsel for the defendant in said action, was the employed attorney of the commissioners of the sinking fund

of the city of Louisville on an annual salary, as well as the city attorney of said city.

V. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act on May 17, 1886, was required by statute at the latter date to be and was in fact on Friday, December 30, 1887.

HUMPHREY & DAVIE,
Solicitors for Complainant, Bank of Kentucky.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

175 Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.
} Petition for Appeal and Assignment of Errors.

The defendant- Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer of the Commonwealth of Kentucky; The Board of Councilmen of the City of Frankfort, Ky., and The County of Franklin, conceiving themselves aggrieved by the decree made and entered on the 25th day of June, 1898, in the above-entitled cause, do hereby appeal from said order and decree to the United States Supreme Court for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

And the said defendants further say that said decree is erroneous and against the rights of said defendants for the following reasons:

First. Because the court erred in overruling the demurrers of each of said defendants to the plaintiff's petition herein.

Second. Because the court erred in overruling the plea of defendants Board of Councilmen of the City of Frankfort and Franklin County to the jurisdiction herein.

Third. Because the court erred in refusing to permit defendants The Board of Councilmen of the City of Frankfort to file the amended answer offered by them herein on the 25th day of June, 1898.

Fourth. Because the court erred (after deciding that complainant did not have any irrevocable contract under and by virtue of article
176 2 of the act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886) in adjudging and decreeing, nevertheless, that by reason of the several pleas of *res adjudicata* relied on by complainants in its bill the complainant has established a contract with the Commonwealth of Kentucky under the provisions of the act aforesaid.

Fifth. Because the court erred in enjoining and restraining the defendants Samuel H. Stone, auditor; Charles Finley, and George W. Long from proceeding to value the franchise of the complainant under the act of Nov. 11th, 1892, for the years 1895, 1896, 1897, 1898, and for all subsequent years until the expiration of complainant's charter, and also erred in enjoining and restraining the County of Franklin and Board of Councilmen of the City of Frankfort from endeavoring to collect any tax upon any valuation from the complainant, and also erred in adjudging that complainant, by making payment of taxes to the State only in accordance with the Hewitt law, is discharged in full from all taxes, and also erred in adjudging that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11th, 1892, in so far as intended to provide or do provide for any assessment or taxation of complainant's property, rights of property, or franchise, except under said Hewitt bill, are repugnant to the Federal Constitution and void.

Wherefore the said defendants pray that the said decree be reversed and that the said court may be directed to enter a decree in accordance with the prayer of defendant's answer herein.

W. S. TAYLOR,
Att'y General of the Commonwealth of Kentucky.
IRA AND W. H. JULIAN AND
JAMES POLSGROVE,
Att'ys for Defendants County of Franklin and Board of Councilmen of the City of Frankfort, Ky.

177 The petition for appeal and assignment of errors above referred to are as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF KENTUCKY, Complainant,
versus
S. H. STONE, &c., Defendants. } No. 6555.

Petition and Assignment of Errors of the City of Louisville.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant City of Louisville and states that the record, proceedings, and decree of the court rendered herein June 25, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this

court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Bank of Kentucky, against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, July 24, 1894, affirmed by the court of appeals of Kentucky June 1, 1895, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville in violation of the ordinance of the city
178 of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction, enjoining and restraining them from valuing and assessing the franchise or intangible property of complainant, and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897, and 1898, and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed and that said errors may be corrected, and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

The bond above referred to is as follows:

179 Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY,
vs.
S. H. STONE ET AL.

Know all men by these presents that we, Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, County of Franklin, & the

Board of Councilmen of the City of Frankfort, & Fidelity & Deposit Company of Maryland, are held and firmly bound unto the President, Directors, & Company of the Bank of Kentucky in the sum of one thousand dollars, to be paid to the said President, Directors, & Company of the Bank of Kentucky, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1898.

Whereas the above-named Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, County of Franklin, Board of Councilmen of the City of Frankfort hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, County of Franklin, & Board of Councilmen of the City of Frankfort shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND,
By WILLIS S. MULLEN,
Gen'l Ag't & Att'y-in-fact. [SEAL.]

Sealed and delivered in the presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

180 And on the 25th day of June, 1898, came the parties, by counsel, and filed the following agreement:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK of Kentucky, Complainant,
vs.
S. H. STONE, &c., Defendants.
} No. 6555. Agreement for Record on Appeal to Supreme Court.

In order to prevent unnecessary expense and the making of the record larger than is useful, the complainant and the defendants have agreed as follows:

In copying the record in this case on appeal to the Supreme Court of the United States the clerk may omit the following parts thereof:

1. So much of the record in the case of President, Directors, and

Company of the Bank of Kentucky *vs.* City of Frankfort, lately pending in the Franklin common pleas court and being Exhibit No. 2 filed with complainant's bill, as embraces the depositions in said cause. The part to be omitted is this: Beginning on printed page 36, at the words "The following are the depositions on file and read as evidence in this cause," and running down to the words "W. H. Posey, commissioner for Franklin county, Kentucky," on page 48 of the said printed record.

2. The clerk may omit the copy of the opinion of the court of appeals delivered by Justice Bennett, and which begins on printed page 49 of the record and runs through the words "To continue in force an irrevocable contract," on page 56 of the record.

181 This opinion is omitted because it appears in the regular series of reports of Kentucky under the style of Franklin County Court *vs.* Bank of Kentucky, 87 Ky., page 370.

3. The opinion of Chief Justice Pryor and the dissenting opinion by Judge Paynter, beginning on printed page 74 and running through to the words "In this view I cannot concur," on page 100. This opinion and dissenting opinion are omitted because they are printed in the regular series of the Kentucky reports under the style of Commonwealth *vs.* Farmers' Bank of Kentucky, 97 Ky., 590.

4. The clerk need not copy the special acts relating to the sinking fund commissioners of the city of Louisville, nor the ordinances recited and referred to in the stipulation filed herein. The appellants' counsel may print such parts of these acts and ordinances as seem to them relevant in an appendix to their brief.

5. The issue and service of citation on the appeal is hereby waived.

HUMPHREY & DAVIE, *For Com.*
H. L. STONE,
City Attorney, for Defendant City of Louisville.

182 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 181 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,941. Kentucky C. C. U. S. Term No., 356. Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, *et al.*, appellants, *vs.* The President, Directors, & Company of the Bank of Kentucky. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 357.

CITY OF LOUISVILLE, APPELLANT,

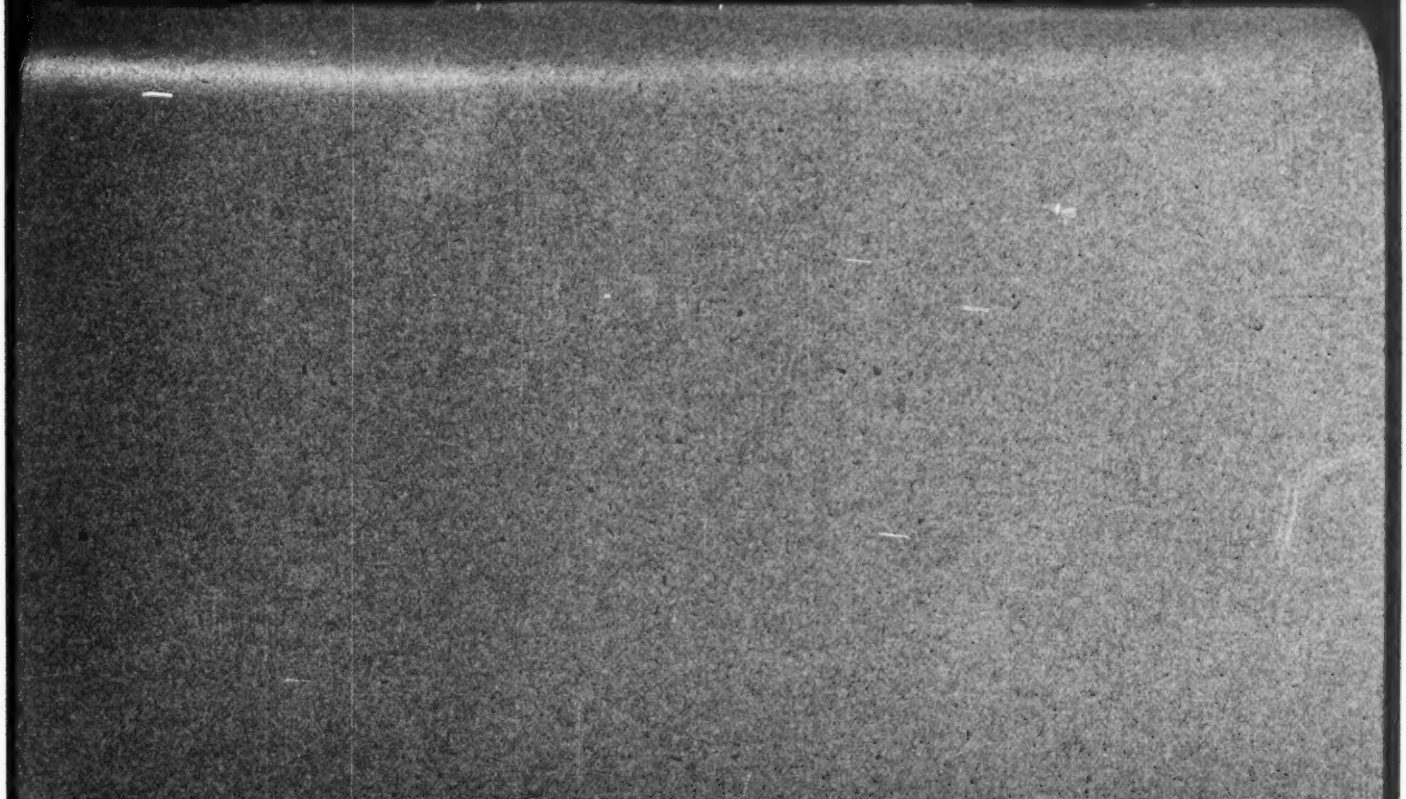
vs.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1898.

(16,942.)



(16,942.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 357.

CITY OF LOUISVILLE, APPELLANT,

vs.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on February 21, 1898.

Present: Honorable John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } 6556.

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The president, directors, and company of the Bank of Kentucky bring this, their bill of complaint, against the City of Louisville; and thereupon the complainant says:

I.

The complainant is a corporation duly created by and organized under the laws of the State of Kentucky, and a citizen of said State.

II.

The defendant, The City of Louisville, is a municipal corporation, duly created by and organized under the laws of the State of Kentucky.

III.

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky, approved February 2, 1834. By this act it was given full power and authority to
2 acquire, hold, possess, and enjoy all such real estate, goods, effects, and chattels as should be convenient for the transaction of its business, and which might be conveyed to it as surety for any debt. It was directed that it should have and keep its principal office of discount and deposit in the city of Louisville, and that it might have offices of discount and deposit in other parts of the State. Its business was declared to be that of loaning money, discounting promissory notes and bills and dealing in exchange, and it was given authority to issue bills or bank notes, payable to the bearer, on demand, at any of its offices of discount and deposit, but not of less denomination than five dollars. It was given the general powers of a banking corporation. It was provided that it should locate a branch at the seat of government, to aid in the management of the fiscal affairs of the State.

It was provided that the State of Kentucky should subscribe to its capital stock, and that the governor of the Commonwealth should annually nominate, and, with the advice and consent of the senate, appoint three directors on the part of the Commonwealth, who

should hold their office until their successors should be duly appointed and qualified. The said corporation was duly organized under the terms of the said act of incorporation, and its corporate life has ever since continued; and it has performed all of the duties imposed upon it by its acts of incorporation and the amendments thereto, and the laws of the land. It duly established and has ever since maintained a branch at Frankfort, and has fully performed all its duties as fiscal agent of the State.

IV.

By its original charter, which, as aforesaid, was approved February 22, 1834, it was provided that the complainant should continue a body politic and corporate until the 1st day of October, 1864.

By an act of the General Assembly of Kentucky, approved February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from the 1st of October, 1864; but this extension was declared to be subject to certain restrictions, among others (1) that the bank should be subject to all the restrictions, limitations, penalties, conditions, and duties imposed upon it by this act of incorporation and the acts amendatory thereto; (2) that the legislature should at all times have the power to prohibit the issue of bank notes under the denomination of five dollars; and after 1875, of notes under the denomination of ten dollars; (3) that the stockholders should within one year from the 10th of May, 1858, by a vote of a majority given at a stated or called meeting, determine whether they would accept the proposed extension; and the said bank accepting the provisions of the act, was required to notify the governor of the Commonwealth of the acceptance, by the certificate of the president and directors of such bank, and when such notice was thus given, the act was to be considered in full force and effect.

There were other provisions in this act of extension not necessary to be here mentioned, but the complainant fully complied
3 with all of them, and, among other things, complied with the requirement of the acceptance of the act by its stockholders, and of the certificate of the president and directors of such fact.

By another act approved February 1, 1872, it was provided that the complainant was authorized and empowered to purchase from commissioners of the sinking fund, the stock of the bank owned by the State; and that from and after the purchase of this stock the right of the State of Kentucky to appoint and retain directors in said bank should cease.

This stock was purchased as provided in this act.

It was further provided that its charter should be, and thereby was, extended twenty-five years.

The complainant complied with all of the provisions of this act of February 1, 1872, and, so it is, that its charter life will not expire until October 1, 1909.

V.

By the 15th section of its original charter it was provided as follows:

"SECTION 15. It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1836, and on the 1st day of July in each succeeding year, during the continuance of this charter, to pay to the treasurer of this Commonwealth 25 cents on each $100 of stock held and paid for in said bank, which shall be in full of all tax and bonus, provided that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each $100 of stock paid for in said bank."

By an act approved February 12, 1836, entitled, "An act to increase the revenue," the legislature exercised the right reserved in the above section, and imposed a tax of 50 cents on each share of stock of the complainant—a taxation then largely in excess of the ordinary rate of taxation paid by other moneyed capital or property in the State of Kentucky.

By the act approved February 1, 1872, it was provided that the bank should annually, on the 1st day of January, pay into the treasury, to go into the revenue proper, a tax of 50 cents on each share of $100 of its increased capital stock; which should be in full of all tax and bonus on such increased capital stock.

The complainant says, however, that its stock, as it now exists, is very much less than that originally authorized by its charter. The original amount authorized was $5,000,000, whereas its present capital stock is only $1,650,000.

The complainant paid each year the tax thus levied upon it down to July 1, 1886, from which time it has paid a different amount, as will be hereinafter explained.

VI.

The complainant says that by the settled course of decision of the highest court of this State the meaning of these provisions in its charter has been fixed and determined; that on November 1,
4 1838, it was determined by the court of appeals of Kentucky (which is the highest court of said State) that this language prevented the Commonwealth from taxing the stockholders of the bank, and constituted a contract with the State, which was inviolable, and a limitation on the legislative power to tax the stock of the bank or its property; that by a decision rendered by the said court of appeals on the 24th of November, 1869, it was determined that this language meant to include taxation by any of the municipal subdivisions of the State, and prevented such municipal subdivisions from taxing the real estate of the bank, although situated within their boundaries.

By a decision rendered by the same court on June 5, 1888, it was determined (confirming the judgment of the Franklin circuit court) that the said 15th section as aforesaid constituted a contract between the complainant and the State, by which the State would not tax the complainant at a greater rate than 50 cents on each

$100 of stock; that this included all taxation of all kinds—State, county, and municipal—and upon all kinds of property of the said bank.

VII.

By an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually, on the 1st day of July of each year, make report of their condition to the auditor, and should pay into the State treasury 75 cents on each share of their capital stock, and should, in addition, pay into said treasury, on their surplus, undivided profits and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as the real property should be assessed; and it was distinctly provided by the act that the said taxation should be in full of all tax—State, county, and municipal—except that the real estate and buildings owned and used by the banks in conducting their business should not be exempted from tax for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed. As a condition to its operation upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. Each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as hereinafter provided, and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation, which consent and agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth; and said agreement and consent being delivered, and in consideration thereof such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said taxation shall be paid during the corporate existence of the bank."

5 The consent provided for by this act and the notice to the governor were further required to be given before the next meeting of the General Assembly; provided, the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the complainant on June 25, 1897, a quorum of the stockholders and a majority thereof being present, such stockholders, and a majority in interest thereof, did give their consent to the levying of said tax, and to the waiver and release of all right under its charter to a different mode of and a lower rate of taxation; and said consent of the complainant to the waiver and release aforesaid, and the said agreement, was certified in writing, under the seal of the bank, by the proper corporate authority, to the governor of the Commonwealth, and delivered to him before the next meeting of the General Assembly after the passage of said act. The complainant files herewith as part hereof

a duly certified copy of such resolution, consent and agreement marked "Exhibit —."

VIII.

The complainant, through its cashier, made its report and paid into the State treasury, on July 1, 1886, the full tax required by the act described in the foregoing paragraph, and which is commonly known as the "Hewitt act;" and, in conformity with said Hewitt act, has made its reports in proper form to the auditor of public accounts on the 1st day of July in each and every year up to this time; and, until the year 1893, paid into the State treasury, on or about the 1st day of July of every year from 1886 the full tax required by the said Hewitt act, being 75 cents on each share of its capital stock, and a tax, at the same rate as real property was assessed by the State, upon its surplus, undivided profits, and accumulations in excess of 10 per cent. of its capital stock. These reports continued to be made by the complainant, but on July 1, 1893, the auditor refused to receive the tax under the Hewitt law, although the complainant tendered the same. He refused to receive it on the 1st of July, 1894, although the complainant again tendered the same. The complainant paid the same about the 1st of July, 1895, and on or about the 1st of July, 1896, and in the spring of 1896, at the request of the auditor, and after certain litigation hereinafter mentioned had been determined in its favor, paid to the auditor the difference between the amount paid by it on July 1, 1893, and July 1, 1894, and the amount which it tendered at these times, and which was the amount due under the Hewitt law; so that it is now true that the complainant has every year, down to and including 1885, paid the full tax called for under its charter; and from 1886 to 1896, the full tax called for under the Hewitt law. It has, also, during this period (1886 to 1896) paid in full to the municipalities where its banking-houses are situated, the full county and municipal tax thereon.

The legislature of Kentucky passed an act which went into force on November 11, 1892. The third article of said act dealt with the assessment of certain corporations, among others, banks. By this act it is provided in substance that every incorporated bank
6 shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. The auditor, treasurer, and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is provided that in order to determine the value of the franchise the banks shall each file reports on or before the 1st day of March in each year, which reports shall be made up to include the 31st day of the preceding December. These reports are to be verified by a chief officer of the bank, and show the following facts: The name and principal place of business of the bank, the amount of capital stock, number of shares, amount of stock paid up, nominal and real value thereof; highest price at which such stock was sold at a

bona fide sale within twelve months next before the 15th day of September of the year in which the statement is required to be made, amount of surplus funds and undivided profits and the value of all other assets; total amount of indebtedness as principal; amount of gross or net earnings or income, including interest on investments, and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized and directed to fix the value of the capital stock of the bank, and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the State or in the counties where situated; and the remainder thus found is to be the value of the corporate franchise subject to taxation under the said act.

It is further provided that the said board shall apportion the value of such franchise among the several taxing jurisdictions entitled to a share of such tax.

It is further provided that the auditor of the State, at the expiration of thirty days after the final determination of such values, shall certify to the county clerk of the counties where any portion of the corporate franchise of such banks shall be liable to local taxation, the amount thereof liable for county or State taxes; and such certificate is, by the county clerk, to be filed in his office, and by him certified to the collecting officer of the county and city for collection.

It is further provided that the taxes assessed by the State board of valuation and assessment shall be due and payable on July 1st succeeding such report.

It is further provided that in the event the banks fail to make such report and pay such tax, a penalty of 10 per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum; and any bank or trust company failing to pay its taxes, penalties, and interest after becoming delinquent, is to be deemed guilty of a misdemeanor, and upon conviction is to be fined for each day it remains unpaid; to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction.

7 IX.

The complainant further states that the defendant, The City of Louisville, claiming to act under authority given it by the legislature of Kentucky under an act providing for government of cities of the first class (of which the city of Louisville is the only one), passed an ordinance which was approved February, 1894, requiring the banks located in the city of Louisville to pay to said city an an-

nual tax of 4 per cent. upon their gross earnings. The gross earnings of the complainant are about $200,000 annually, so that the said tax would have been $8,000. The complainant failed to pay said tax, and thereupon, under the provision of law, a warrant was sued out against the complainant in the city court of Louisville. The complainant thereupon, in the manner provided by law, filed its petition in the Jefferson circuit court for writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in apt terms its incorporation, its original charter, the extensions thereof, the circumstances of the Hewitt law, the contract entered into in conformity therewith, and claiming the benefit of its said contractual relations with the State, alleged that the said ordinance of the city of Louisville was void as impairing the obligation of the complainant's contract, and any authority given to the city of Louisville to pass such ordinance was likewise void as impairing the obligation of a contract, and asking that the said judge be prohibited from taking jurisdiction under the complaint against the plaintiff for the violation of the said ordinance. Issue was joined on this petition, the defendant being in name The Judge of the Police Court of the City of Louisville, but being in reality The City of Louisville; and the City of Louisville appearing by counsel, the court found the issues in favor of this complainant, and entered a judgment accordingly, establishing the contract of the complainant and its terms and duration.

And thereupon the defendant, The City of Louisville, caused an appeal to be taken from said judgment to the court of appeals of Kentucky, where the cause coming on to be heard, was argued by counsel for the City of Louisville, and for the Commonwealth of Kentucky, both of whom urged that the said contract was not enforceable and had ceased to exist. But the court of appeals, having duly considered the controversy, confirmed the said judgment, and sent its mandate of affirmance to the court of original jurisdiction, where it was duly entered. A duly certified copy of the proceedings in the said cause *are* filed herewith as part hereof, marked "Exhibit E."

X.

The complainant states that the amount of the value of its capital stock, as fixed by the board of valuation and assessment as of December 31, 1892, for taxation for the year 1893, was $2,671,559.58, of which there was apportioned to the city of Louisville $2,476,559.58; that the valuation by the board of valuation and assessment as of December 31, 1893, for taxes for 1894, was substantially the same,
8 the amount apportioned to the city of Louisville being $2,486,351.07; that the tax rate for the city of Louisville for the fiscal year 1893–1894 was $1.88 per cent. on the one hundred dollars; and for the year 1894–1895, $1.88 per cent. on the one hundred dollars; and this amount was in each instance certified by the board of valuation and assessment to the clerk of the Jefferson county court, and has been returned by the said clerk to the collecting officer of the city of Louisville.

The complainant says that the amount of taxes that it would have to pay under these assessments, over and above what it would have to pay under the Hewitt law, would be more than $20,000 per annum.

XI.

Complainant further states that this scheme of taxation violates the contract made between it and the State in its charter and the amendments thereto, and violates the contract made between it and the State under the Hewitt law, and is very largely in excess of the taxation provided for by its charter, or by said Hewitt law, and the act of the legislature of Kentucky instituting such a method of taxation is violative of the Constitution of the United States, and particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract, and is void.

XII.

The said method of taxation is also violative of the constitution of the State of Kentucky, in this: that by the said constitution of the State of Kentucky it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof respectively the power to assess and collect such taxes; in this, that the said law provided for an assessment of the capital stock of corporations, among others, banks, by a State board of valuation and assessment, and provided for the certification of such value by the State board to the counties and municipalities where any of such capital stock is situated or franchises employed, giving to the said State board the right to apportion the same among the taxing districts, and providing that the corporation shall pay to such taxing districts local taxes thereon; and the said defendant, The City of Louisville, has no power to impose any taxes whatever upon the franchise of the complainant, and has never caused any valuation to be made of the complainant's intangible property or of its franchise.

XIII.

The complainant further states that it having complied with the provisions of the said Hewitt law, under an adjudication of the court of appeals, for both the years hereinbefore mentioned, it is inequitable now to allow the defendant to collect any taxes from it, even though there may be, subsequent to the date of complainant's payments as aforesaid, a change in the ruling in regard to the law of Kentucky on these subjects.

9 XIV.

The complainant further states that the said defendant has power, under its charter, where taxes are due, to cause a warrant to issue and distraint to be made by one of its officers, and under such distraint personal property of the tax-payer to be taken and sold and

processes of garnishment served upon all persons debtors to such tax-payer; and in this way the complainant says that the defendant has power, under the law, to harass and vex the complainant in order to coerce its unjust demands, and to throw into confusion its transactions, and to cast a cloud upon its title to its personal property, and to create great disturbance and confusion in regard to the indebtedness to it of the various persons with whom it has had dealings and to whom it has loaned money.

XV.

The complainant has always been ready to and has always paid all the taxes due by it under the provisions of the Hewitt act; among other things, has paid to the defendant, The City of Louisville, taxes upon the real estate used for its banking purposes, and it will be ready whenever any further taxes become due, to pay the same in accordance with the law.

XVI.

The premises considered, the complainant says that the defendant, The City of Louisville, is threatening to, and, unless restrained by this honorable court, will proceed to endeavor to collect the said taxes for the years 1893 and 1894 under the valuation of the complainant's capital stock made by the State board of valuation and assessment as aforesaid, and will put into operation against the complainant the provisions of law authorizing it to make collections; all of which will be illegal, in violation of complainant's contract, and to the great detriment of the complainant in its property and franchises; and from these threatened wrongs the complainant has no remedy at the common law, and its only remedy is by a bill in equity.

XVII.

The premises considered, complainant prays that the said city of Louisville be perpetually enjoined and restrained from endeavoring to collect any taxes upon the said returns of the board of valuation and assessment as hereinbefore set out, and from taking any proceedings to that end, by way of distraint or bringing suits or otherwise; and that the said complainant be declared as not indebted to the said defendant on account of such taxes; and the complainant prays that its contract may be fully established, and that it be declared that, having conformed to its said contract as hereinbefore set out, by making the payments under the Hewitt law, no other or further taxes can be exacted from it under any form or by any authority.

May it please your honors to grant unto your complainant a writ of subpœna, under proper authority, to be issued against the said City of Louisville, commanding it, under suitable penalty to be therein fixed, and upon a day therein named, to appear and answer to this bill of complaint, but not under oath, answer under oath being waived; and to stand to and abide by all orders

and decrees that the court may enter in the premises; and your orator will ever pray for this and all other appropriate relief.

HUMPHREY & DAVIE,
For Complainant.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Oscar Fenley states that he is vice-president of the complainant; that the facts stated herein, so far as they are stated from his personal knowledge are true; and, so far as stated upon information, are by him believed to be true.

OSCAR FENLEY.

Subscribed and sworn to before me this 19th day of April, 1897.
THOMAS SPEED, *Clerk.*

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to the City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by the President, Directors and Company of the Bank of Kentucky, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest: THOS. SPEED, *C. C. C., K. D.*,
By HENRY F. CASSIN, *His Deputy.*

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office, on or before the 7th day of June next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *His Deputy.*

11 Upon which subpœna the marshal made the following return:

Executed April 24th, 1897, on the City of Louisville, by delivering a copy of within spa. in chancery to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAINES, *D. M.*

Fees, $2.00.

And on another day of said term of said court, to wit, on the 27th day of May, 1897, came the parties by their counsel and filed their written stipulation herein, which is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6556. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill, and an answer at the same time, without waiving the demurrer.

HUMPHREY & DAVIE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Came again the defendant and filed its demurrer to the bill of complaint herein.

The demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6556. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Kentucky, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer, states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

12 2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville,

in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JOHN F. GROENE,
Notary Public, Jefferson County, Kentucky.

Came again the defendant by counsel and filed its answer herein: The answer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6556. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Kentucky, Complainant.

This defendant now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception, which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised
13 it is material or necessary for it to make answer unto, answering, states that the limit on the rate of taxation to be paid to the State, provided for in section fifteen (15) of complainant's original charter, approved February 2, 1834, and that the same should be in full of all tax and bonus, was an immunity from local taxation, which expired with the complainant's original charter life on October 1, 1864, and the amendments to complainant's original charter, approved subsequent to February 14, 1856, whereby extensions of its charter life, and like immunity from local taxation, were granted unto the complainant for twenty and twenty-five years, respectively, came within the purview of the act of the legislature of the State of Kentucky, approved February 14, 1856, and were by the provisions of the last-named act subject to amendment or repeal at the will of the legislature.

This defendant denies that the tax of fifty cents on each share of stock of the complainant was, when fixed by the act of February 12, 1836, referred to in complainant's bill, or at any time since, largely or at all in excess or as much as the ordinary rate of taxation, State and local, paid by other moneyed capital or property in the State of Kentucky.

This defendant denies that by the settled course of decision of the highest court of the State of Kentucky, the meaning of the provisions in complainant's charter, and the amendments thereto, has been fixed and determined, or that by reason thereof the complainant has an inviolable contract with said State, or that said provisions constitute a limitation on the legislative power of said State to provide for the taxation of plaintiff's property by the municipal subdivisions of said State, or that said provisions prevented such municipal subdivisions from taxing the real estate, or other property of the complainant.

This defendant denies that the complainant has since November 11, 1892, paid in full to this defendant the municipal tax on its real estate and other property.

The defendant states section six (6) of article two (2) of said act of May 17, 1886, referred to in complainant's bill, pertaining to the taxation of banks, expressly provided that said act (meaning article two (2) therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6) of article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal, at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks from county and municipal taxation therein provided for, and a contrary intent was not therein plainly expressed.

14 This defendant further states that by section five (5), of article twelve (12), of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was

claimed such authority existed under said act when said ordinance was adopted.

This ordinance was held to be in violation of the State constitution and void by the court of appeals of Kentucky, May 5, 1895, in the case of Levi, &c., *v.* City of Louisville, 97 Ky. Rep., 394.

This defendant denies that the defendant in the action of the complainant against R. H. Thompson, judge of the police court of the city of Louisville, was in reality the city of Louisville, or that this defendant appeared in said action by counsel, either in the Jefferson circuit court or in the court of appeals of Kentucky; but it is true the city attorney of this defendant appeared and represented in said action the defendant therein, the said police judge, and also indirectly the commissioners of the sinking fund of the city of Louisville, for whom he was the regularly employed attorney, which was and is a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto, and to which commissioners of the sinking fund the license tax against banks under the ordinance mentioned in the complainant's bill was to be paid.

This defendant states the record in said action will show what questions were submitted to the said circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts; and this defendant denies all the statements in complainant's bill inconsistent with said record referred to as "Exhibit E" and made part of the complainant's bill.

This defendant denies that the amount of taxes the complainant would have to pay under the assessments of the State board, over and above what it would have to pay under the Hewitt bill, would be as much or more than $20,000 per annum.

This defendant denies that the scheme of taxation provided for in the general revenue law of November 11, 1892, violates the alleged contract, alleged to have been made between the complainant and the State in its charter and the amendments thereto, or violates the alleged contract, alleged to have been made between it and the State under the Hewitt bill; or that there was any irrepealable contract made between the complainant and the State in the complainant's charter and the amendments thereto, or under the Hewitt bill, or
15 that the act of the legislature of Kentucky, of November 11, 1892, instituting such method of taxation, is violative of the Constitution of the United States, or particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract, or that said act is void, or that it is violative of the constitution of the State of Kentucky in that, by the said constitution, it is expressly provided that the General Assembly shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof respectively the power to assess and col-

lect such taxes, or, in that, the said law of November 11, 1892, provides for an assessment of the capital stock of corporations, among others, banks, by a State board of valuation and assessment, and provides for the certification of such value by the State board to the counties and municipalities where any such capital stock is situated or franchises employed giving said State board the right to apportion the same among the taxing districts and providing that the corporation shall pay to such taxing districts, local taxes thereon; or that this defendant has no power to impose any taxes whatever upon the franchise or intangible property of the complainant.

This defendant states that the court of appeals of Kentucky has construed said provision of the constitution of said State, which is section one hundred and eighty-one (181) thereof, as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation, and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that by reason of the complainant's compliance with the provisions of the said Hewitt bill, under an alleged adjudication of the court of appeals for both of the years, or any year mentioned in complainant's bill, it is now inequitable to allow this defendant to collect any taxes from it, even though there may be, subsequent to the date of complainant's alleged payments as aforesaid, a change in the ruling in regard to the law of Kentucky on these subjects.

This defendant denies it has power under the law to harass or vex the complainant in order to coerce any alleged unjust demand or demands, or to throw into confusion complainant's transactions, or to cast a cloud upon its title to its personal property, or to create great or any disturbance or confusion in regard to the indebtedness to it of the various persons, or any person, with whom it has had dealings, or to whom it has loaned money.

This defendant denies that it was at the institution of this action, or is now, threatening to collect the said taxes for the years 1893 and 1894, under the valuation of the complainant's capital stock, or intangible property, made by the State board of valuation and
16 assessment, or will put into operation against the complainant the provisions of the law authorizing it to make collections, or that it will collect, or attempt to collect, from the complainant the taxes aforesaid, or any taxes held to be unlawful by said decision of the court of appeals of June 1, 1895, affirming the judgment of the Jefferson circuit court in said case of The Bank of Kentucky against R. H. Thompson, judge of the police court of the city of Louisville, or under the revenue law of November 11, 1892, so long as said decision shall be not overruled and remain in full force and effect,

or that it has threatened or is threatening to do any illegal act, or act in violation of complainant's alleged contract, or to the great or any detriment of the complainant in its property or franchises, or that complainant has such alleged contract with the State of Kentucky, or that from these alleged threatened wrongs, or any threatened wrong, the complainant has no remedy at the common law, or that its only remedy is by a bill in equity.

This defendant denies it has threatened, or is threatening, the complainant with any wrong or wrongs.

This defendant for further answer and defense to complainant's bill states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank-tax cases, wherein the same legal questions were involved and issues were made as in the case referred to in the complainant's bill of complaint against R. H. Thompson, judge, etc., rendered a decision in which the former decisions of said court in said case delivered June 1, 1895, and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank-tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution, in the State of Kentucky had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of or compliance with those provisions, and that the same with respect to all said banks and similar institutions in the State were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and all banks were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent
17 to February 14, 1856, amending the original charters of the four old banks, originally chartered prior to the last-named date, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, hereinabove referred to as section eight (8), chapter sixty-eight (68), of the General Statutes of the State of Kentucky, and were all subject to amendment or repeal by and at the will of the legislature.

This defendant states that by the concluding section of said

revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to bank taxation were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have already been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose on its part to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897, with the auditor or State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not at the institution of this action, and is not now, being subjected to any false or illegal claim or claims, nor to any suit or suits, nor will it suffer any irreparable injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant, until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

18 Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant, City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson Co., Ky.

19 United States Circuit Court for the Sixth Circuit, District of Kentucky, at Louisville.

BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

LOUISVILLE TRUST COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

FIDELITY TRUST & SAFETY VAULT CO., Complainant,
versus
CITY OF LOUISVILLE, Defendant.

GERMAN SECURITY BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

CITIZENS' NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

FARMERS' & DROVERS' BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

BANK OF COMMERCE, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

LOUISVILLE CITY NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

UNION NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

LOUISVILLE BANKING COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

WESTERN BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

BANK OF LOUISVILLE, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

20 This day came the complainants in each of the above-entitled causes, and filed herein notices duly served on the defendant, and moved the court to grant to them severally an injunction, until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in the said bill of complaint.

And came the said City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same coming on to be heard, was submitted, and the court, not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by said City of Louisville; and the same were argued by counsel and submitted to the court, and the court, not being advised, takes time.

WM. H. TAFT,
Circuit Judge.

May 28, 1897.

And on another day of said term of said court, to wit, on the 5th day of June, 1897, came the complainant, by its counsel; came also the defendant, The City of Louisville, by its counsel, and thereupon the said parties filed their written stipulation herein.

The stipulation above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.

It is agreed herein that the resolution of acceptance by the stockholders of the Bank of Kentucky of the Hewitt law, and the record

of the case of Bank of Kentucky *v.* R. H. Thompson, each of which is filed as an exhibit to the bill of complaint in the cause pending in this court styled President, Directors, and Company of the Bank of Kentucky *v.* Stone, &c., may be considered and read as if likewise filed in this case.

H. L. STONE, *City Attorney.*
HUMPHREY & DAVIE,
For Complainant.

21 And on July 5th, 1897, came the complainant and filed its replication to the answer of the defendant herein.
Replication above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF KENTUCKY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

Replication of the Complainant to Answer of the City of Louisville.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HUMPHREY & DAVIE, *For Com.*

And on June 4th, 1898, the following order was entered:
It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

22 And on June 25th, 1898, the following decree was entered:

PRESIDENT, DIRECTORS, & COMPANY, BANK OF KENTUCKY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
} Decree.

The court, being advised, filed its opinion herein. It is therefore adjudged, ordered, and decreed as follows:
I. The demurrer of the defendant, The City of Louisville, to the bill of complaint is hereby overruled; to which the said City of Louisville excepts.

II. And thereupon came the complainant, by Humphrey & Davie, counsel, and filed herein its replication to the answer of the City of Louisville, and by consent this cause came on to be heard for final decree. The complainant read upon the hearing its bill of complaint and the following exhibits, which are on file in the case pending in this court styled The President, Directors, and Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c., viz:

Exhibit No. 1, being the record of the proceedings in the case of Bank of Kentucky *vs.* Franklin County Court and J. W. Gaines, sheriff.

Exhibit No. 2, being the record of the proceedings in the case of Bank of Kentucky *vs.* City of Frankfort.

Exhibit No. 3, also called in the bill Exhibit A, being the resolutions of the stockholders of the complainant accepting the Hewitt bill. It is agreed that these resolutions were filed in due time and in accordance with law.

Exhibit No. 4, also called in the bill Exhibit B, being a record of the proceedings in the case of Bank of Kentucky *vs.* Armstrong, sheriff, and the Franklin County Court.

Exhibit No. 5, also called in the bill Exhibit C, being the final judgment of the Franklin circuit court in the last-named cause.

Exhibit No. 6, being the record of the proceedings in the case of Bank of Kentucky *vs.* City of Frankfort.

Exhibit 7, also called in the bill Exhibit D, being the final judgment of the Franklin circuit court entered in pursuance of the mandate of the last-named cause.

23 Exhibit 8, also called in the bill Exhibit E, being the record of the proceedings in the case of Bank of Kentucky *vs.* R. H. Thompson, &c.

The defendant, The City of Louisville, read its answer and the stipulation between the complainant and the defendant, filed herein June 25, 1898, together with the ordinances and special statutes therein mentioned and referred to; and it is now adjudged, ordered, and decreed that the defendant, The City of Louisville, is perpetually enjoined and restrained from proceeding to collect the taxes for the years 1893 and 1894 upon the franchises of the complainant under the act of November 11, 1892.

And it is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata* relied on by complainant in its bill and as shown by the exhibit therewith, the said complainant has an established contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of complainant; that by the terms of said contract the complainant and its shares of stock cannot during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and munici

pal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article 2 of the said act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

It is further adjudged that the complainant recover of the defendant its costs in this action expended; and now comes the defendant and prays an appeal in open court and tenders its assignment of errors; whereupon the court allows the appeal, and orders the assignment of errors to be filed, and fixes the appeal bond herein at one thousand dollars.

24 Stipulation above referred to is as follows:

In the United States Circuit Court for the Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK of Kentucky, Complainant,
vs.
CITY OF LOUISVILLE, &c., Defendants.
} Stipulation. #6555.

It is stipulated and agreed between the complainant and the defendant City of Louisville that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 219–222).

2. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

3. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance, referred to in complainant's bill, requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on *its* gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

4. An ordinance entitled "An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

5. An ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to
25 the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

6. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

7. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

It is further stipulated and agreed between the complainant and the defendant City of Louisville that the complainant, Bank of Kentucky, did not pay any sum for license under the said license ordinance approved January 29, 1894, but loaned to the commissioners of the sinking fund of the city of Louisville $8,063.48, for which said commissioners executed their note to complainant March 13, 1894, bearing interest at the rate of four per cent. (4 %) per annum; which note said commissioners paid in full to complainant February 21, 1896, with $625.33, accrued interest thereon.

III. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated and organized and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in
26 chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, an act concerning the deposits of the sinking fund of the city of Louisville, approved May 15, 1886 (Session Acts 1885–'6, vol. 2, p. 677), which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

IV. It is further stipulated and agreed that during the time the complainant's action against R. H. Thompson, judge, mentioned in complainant's bill, was pending in the Jefferson circuit court and in the court of appeals of Kentucky on appeal, Hon. Henry S. Barker, who appeared as counsel for the defendant in said action, was the employed attorney of the commissioners of the sinking fund of the city of Louisville on an annual salary, as well as the city attorney of said city.

V. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act, on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

HUMPHREY & DAVIE,
Solicitors for Complainant, Bank of Kentucky.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

And on the 25th day of June, 1898, came parties, by counsel, and filed the following agreement:

27 In the Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF KENTUCKY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
} Agreement. # 6556.

The defendant, The City of Louisville, having taken an appeal in this case to the Supreme Court of the United States, this agreement is now made to avoid the cost of copying and printing unnecessary parts of the record. It is therefore agreed as follows:

1. The clerk, in making up the record, need not copy any paper in this record which he has already copied in the record of the case of same complainant *vs.* Samuel H. Stone, &c.

2. The two cases presenting questions so similar, it is agreed that either party may refer in this case to the record in the other case to the same effect as if such record was a part of this case.

3. The issue and service of a citation in this case upon appeal is hereby waived.

HUMPHREY & DAVIE,
For Comp't.

H. L. STONE,
City Attorney, for Defendant, City of Louisville.

28 The opinion above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY
vs.
CITY OF LOUISVILLE.
} No. 6556.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The bill filed herein presents the same questions as those already considered in the case of the *Bank of Kentucky v. Samuel H. Stone, etc.*, but it relates to the taxes for 1893–'94, which were certified down by the State board of valuation and assessment to the city of Louisville for collection. We do not think that the questions differ in any respect from those already considered, and must, therefore, hold that the city of Louisville is estopped by the former judgment between the Bank of Kentucky and it, in which it was held by the court of appeals of Kentucky that the Bank of Kentucky had an irrevocable contract under the Hewitt act for the exemption of the property and franchise of the Bank of Kentucky from any other taxation than as therein imposed; and, therefore, that the bank is entitled to the preliminary injunction against the collection by the city of Louisville and its agents of the taxes provided in the revenue act of November, 1892.

The demurrer to the bill is overruled, and the motion for an injunction granted.

29 The petition for appeal and assignment of errors above referred to are as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6556.

Petition and Assignment of Errors of the City of Louisville.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant, City of Louisville, and states that the record, proceedings, and decree of the court rendered herein June 25, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Bank of Kentucky, against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, July 24, 1894,
30 affirmed by the court of appeals of Kentucky June 1, 1895, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant, City of Louisville, to ad valorem taxes on the assessments of complainant's franchise or intangible property, made for the years 1893 and 1894, by the board of valuation and assessment of the State of Kentucky, under the act of No-

vember 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant, City of Louisville, enjoining and restraining it from collecting its taxes on said assessments of the franchise or intangible property of complainant and from taking any steps to collect its said taxes for said years and during the corporate existence of the complainant, as provided by said act of November 11, 1892, and in decreeing that the latter act impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

31 The appeal bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF KENTUCKY,
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, The City of Louisville & Fidelity & Deposit Company of Maryland, are held and firmly bound unto the President, Directors, & Company of the Bank of Kentucky in the sum of one thousand dollars, to be paid to the said President, Directors, & Company of the Bank of Kentucky, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1898.

Whereas the above-named City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named City of Louisville shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO.
OF MARYLAND,
By WILLIS S. MULLEN,
Gen'l Ag't & Att'y-in-fact. [L. S.]

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

32 And on the 25th day of June, 1898, came parties by counsel and filed agreement herein.

Agreement above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF KENTUCKY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6556. Agreement.

It is agreed between the complainant and defendant that in copying the record for the Supreme Court of the United States the clerk need not copy the special statutes relating to the commissioners of the sinking fund of the city of Louisville nor the ordinances recited and referred to in the stipulation filed herein and read in evidence by the defendant on the final hearing of this cause, but that counsel for the appellant, City of Louisville, may print such parts of said acts and ordinances as may seem to him relevant in an appendix to his brief, to have the same effect as if copied into the record of the appeal.

HUMPHREY & DAVIE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

33 DISTRICT OF KENTUCKY, *ss:*

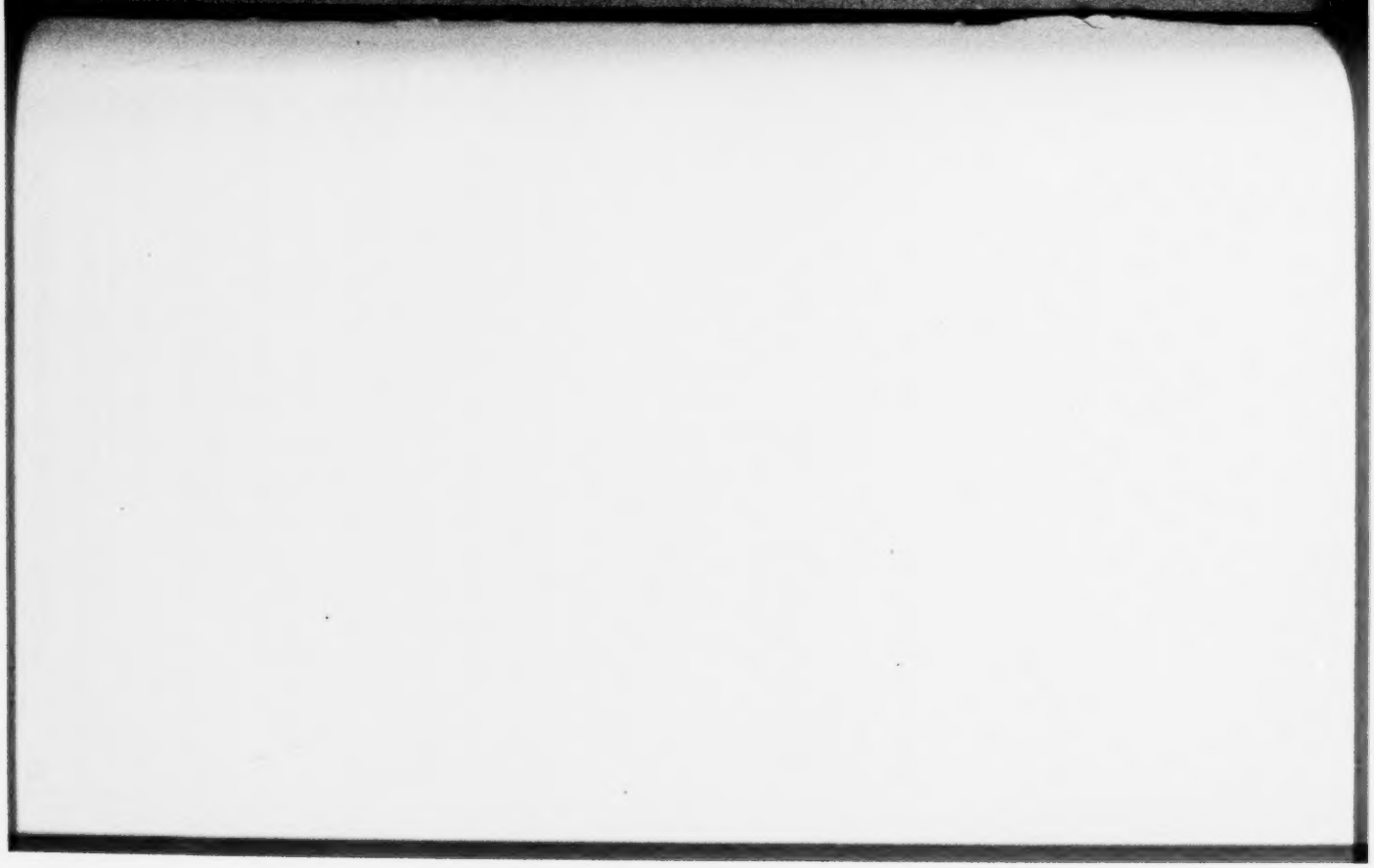
I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 32 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,942. Kentucky C. C. U. S. Term No., 357. City of Louisville, appellant, *vs.* The President, Directors, & Company of the Bank of Kentucky. Filed August 15th, 1898.



TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 356.

SAMUEL H. STONE, AUDITOR, CHARLES FINLEY, SECRETARY OF STATE, AND G. W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, AND THE CITY OF LOUISVILLE, APPELLANTS,

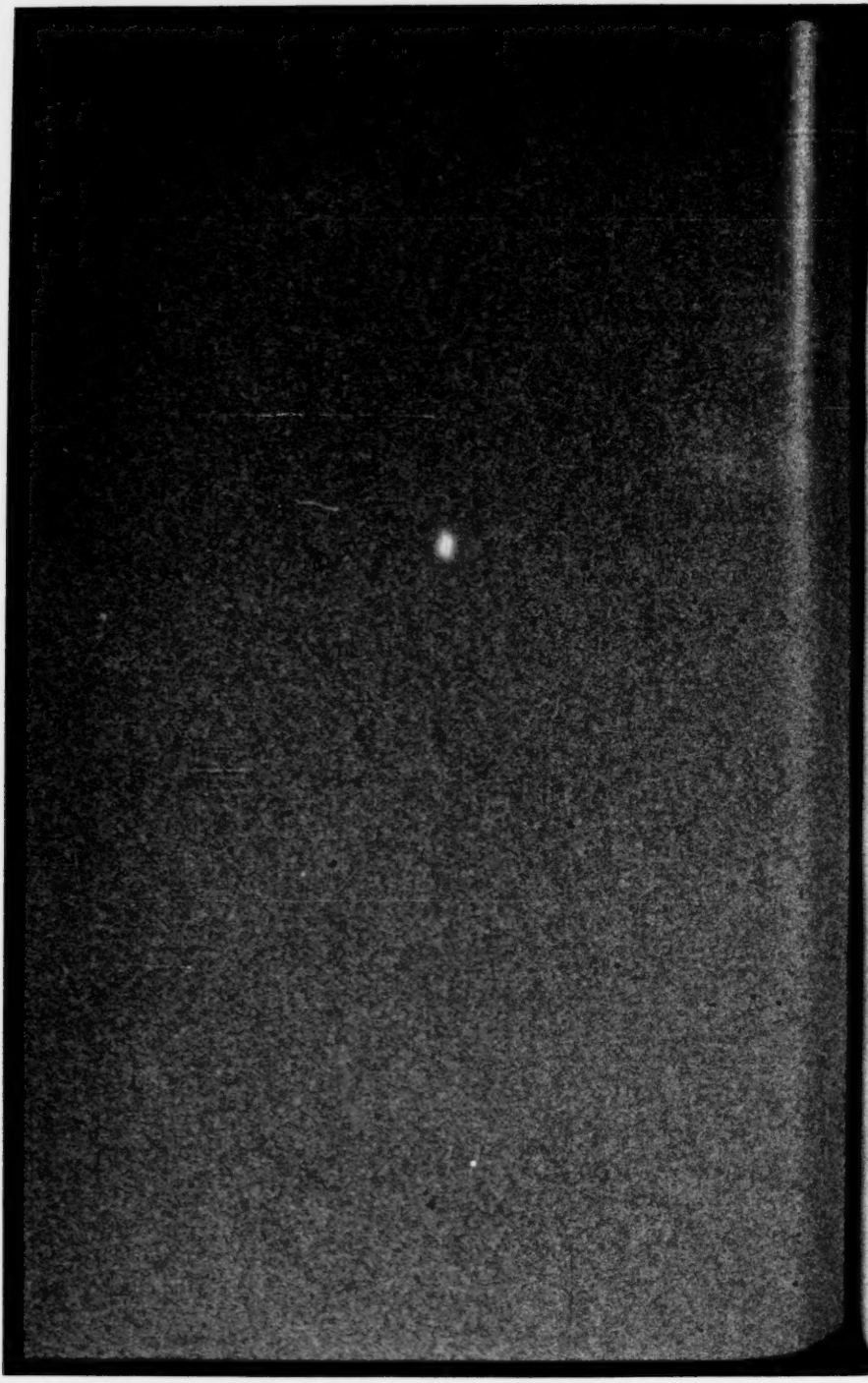
vs.

THE BANK OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1903.

(16,943.)



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SUPREME COURT OF THE UNITED STATES.

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1 *Transcript of Record.*

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on 21st day of February, 1898.

Present: Hon. John M. Harlan, circuit justice, and Hon. Wm. H. Taft and H. H. Lurton, circuit justices.

BANK OF LOUISVILLE
vs.
SAM'L H. STONE, &c.

Be it remembered that heretofore, to wit, on the 17th April, 1897, came the complainant, by Humphrey & Davie, its counsel, and filed in the clerk's office its bill of complaint in the above-named cause against the defendants herein, which bill is as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The president, directors and company of the Bank of Louisville bring this their bill of complaint against Samuel H. Stone, Charles Finley, G. W. Long and the city of Louisville. And thereupon, the complainant says:

I.

The complainant is a corporation duly created by and organized under the laws of the State of Kentucky, and a citizen of said State.

II.

2 The defendant, Samuel H. Stone, is the auditor of public accounts of the State of Kentucky; the defendant, Charles Finley, is the secretary of state of the State of Kentucky; the defendant, George W. Long, is the treasurer of the State of Kentucky; the defendant, The City of Louisville, is a municipal corporation duly created by and organized under the laws of the State of Kentucky.

III.

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky, approved February 2, 1833. By this act it was given full power and authority to acquire, hold, possess and enjoy all such real estate, goods, effects and chattels as should be convenient for the transaction of its business, and which might be conveyed to it as surety for any debt. It was directed that it should have and keep its principal office and place of discount in the city of Louisville and that it might establish branch offices of discount and deposit in other parts of the State. Its business was declared to be that of loaning money, discounting

promissory notes and bills of exchange, and it was given authority to issue bills or bank notes, payable to bearer, on demand, at any of its offices of discount and deposit, but not of less denomination than five dollars. It was given the general powers of a banking corporation.

IV.

By its original charter, which, as aforesaid, was approved February 2, 1833, it was provided that the complainant should continue a body politic and corporate until the first day of January, 1853. By an act approved February 16, 1838, it was provided that the complainant should have authority to establish and continue either one or two branches with a reasonable amount of capital, and if it should establish one branch within three years, its charter should be extended four years and on the establishment of the second branch the charter should be extended five additional years. The complainant established within the time and under the terms of said act, two branches, one at Paducah and one at Flemings-
3 burg, and, in this way, its charter life was extended nine years. By an act of the General Assembly of Kentucky, approved February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from the first day of January, 1863; but this extension was declared to be subject to certain restrictions, among others, that the bank should be subject to all the restrictions, limitations, penalties, conditions and duties imposed upon it by this act of incorporation and the acts amendatory thereto; that the stockholders should within one year from the 10th of May, 1858, by a vote of a majority given at a stated or called meeting, determine whether they would accept the proposed extension; and the said bank accepting the provision of the act, was required to notify the governor of the Commonwealth of the acceptance by the certificate of the president and directors of such bank, and when such notice was thus given, the act was to be considered in full force and effect.

There were other provisions in this act of extension not necessary to be here mentioned, but the complainant fully complied with all of them, and, among other things, complied with the requirements of the acceptance of the act by its stockholders, and of the certificate of the president and directors of such fact.

By an act of the General Assembly, approved May 1, 1880, and entitled "An act to extend and continue the charter of the Bank of Louisville," it was recited that "Whereas, it is represented to this General Assembly that the charter of the Bank of Louisville will expire and cease on the first day of January, 1883, and in order to renew and continue and extend the same" it was enacted that the charter rights and privileges of the complainant should continue and extend in full force and effect for twenty years from and after the said first day of January, 1883.

It is not necessary to set out in full the terms and conditions except to state that one of these was to the intent that before the act should go into effect it must be approved and accepted by a ma-

jority in interest of the stockholders of complainant, that
4 this was done and the notice of this action required by the
act was given; and, so it is, that its charter life will not expire until January, 1903.

V.

By the sixth section of the original act chartering the complainant it was provided among other things, that the cashier of the bank "shall on the first day of July, 1834, and on the same day annually thereafter pay unto the treasurer of the State twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank, provided that the legislature may increase or reduce the same; but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank."

By an act approved February 12, 1836, entitled "An act to increase the revenue," the legislature exercised the right reserved in the above section, and imposed a tax of fifty cents on each share of stock in the complainant, a taxation then largely in excess of the ordinary rate of taxation paid by other moneyed capital or property in the State of Kentucky.

The complainant paid, each year, the tax thus levied upon it, down to July 1, 1886, from which time it has paid a different amount, as will be hereinafter explained.

VI.

The complainant says that by the settled course of decision of the highest court of this State the meaning of these provisions in its charter has been fixed and determined; that on November 1, 1838, it was determined by the court of appeals of Kentucky (which is the highest court of said State) that this language prevented the Commonwealth from taxing the stockholders of the bank, and constituted a contract with the State, which was inviolable and a limitation on the legislative power to tax the stock of the bank or its property; that by a decision rendered by the said court of appeals on the 24th of November, 1869, it was determined that this lan-
guage meant to include taxation by any of the municipal
5 subdivisions of the State, and prevented such municipal subdivisions from taxing the real estate of the bank although situated within their boundaries.

By a decision rendered by the same court on June 5, 1888, it was determined (confirming the judgment of the Franklin circuit court) that the said 15th section as aforesaid, constituted a contract between the complainant and the State, by which the State would not tax the complainant at a greater rate than fifty cents on each one hundred dollars of stock; that this included all taxation of all kinds—State, county and municipal—and upon all kinds of property of the said bank, and that the said several acts extending its charter life were to be taken as not subject to repeal by the legislature.

VII.

By an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually, on the 1st day of July, of each year, make report of their condition to the auditor, and should pay into the State treasury seventy-five cents on each share of their capital stock, and should, in addition, pay into said treasury on their surplus, undivided profit and accumulation in excess of 10 per cent. of their capital stock, a tax at the same rate as the real property should be assessed; and it was distinctly provided by the act that the said taxation should be in full of all tax—State, county and municipal, except that the real estate and buildings owned and used by the banks in conducting their business should not be exempted from tax for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed. As a condition to its operation upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. Each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority
6 in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as hereinafter provided, and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation; which consent and agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth; and said agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said taxation shall be paid, during the corporate existence of the bank."

The consent provided for by this act, and the notice to the governor, were further required to be given before the next meeting of the General Assembly; provided, the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the complainant on May 2, 1887, a quorum of the stockholders and a majority thereof being present, such stockholders, and a majority in interest thereof, did give their consent to the levying of said tax, and to the waiver and release of all right under its charter to a different mode of and a lower rate of taxation; and said consent of the complainant to the waiver and release aforesaid, and the said agreement, was certified in writing, under the seal of the bank, by the proper corporate authority, to the governor of the Commonwealth, and delivered to him before the next meeting of the General Assembly after the passage of said act. The complainant files herewith as part hereof a duly certified copy of such resolution, consent and agreement marked Ex.

VIII.

The complainant, through its cashier, made its report and paid into the State treasury, on July 1, 1886, the full tax required by the act described in the foregoing paragraph, and which is commonly known as the "Hewitt act;" and, in conformity with said
7 Hewitt act, has made its report in proper form to the auditor of public accounts on the 1st day of July in each and every year up to this time; and, until the year 1893, paid into the State treasury, on or about the 1st day of July of every year from 1886 the full tax required by the said Hewitt act; being seventy-five cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State, upon its surplus undivided profits and accumulations in excess of 10 per cent. of its capital stock. These reports continued to be made by the complainant; but on July 1, 1893, the auditor refused to receive the tax under the Hewitt law, although the complainant tendered the same. He refused to receive it on the 1st of July, 1894, although the complainant again tendered the same. The complainant paid the same about the 1st of July, 1895, and on or about the 1st of July, 1896, and in the spring of 1896, at the request of the auditor, and after certain litigation hereinafter mentioned had been determined in its favor, paid to the auditor the difference between the amount paid by it on July 1, 1893, and July 1, 1894, and the amount which it tendered at these times and which was the amount due under the Hewitt law; so that it is now true that the complainant has every year, down to and including 1885, paid the full tax called for under its charter; and from 1886 to 1896, the full tax called for under the Hewitt law. It has, also during this period (1886 to 1896) paid in full to the municipalities where its banking-houses are situated, the full county and municipal tax thereon.

IX.

The legislature of Kentucky passed an act which went into force on November 11, 1892. The third article of said act dealt with the assessment of certain corporations, among others, banks. By this act it was provided in substance that every incorporated bank shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise
8 may be exercised. The auditor, treasurer and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is provided that in order to determine the value of the franchise the banks shall each file reports on or before the 1st day of March in each year, which reports shall be made up to include the 31st day of the preceding December. These reports are to be verified by the chief officer of the bank, and show the following facts: The name and principal place of business of the bank; the amount of capital stock; number of shares; amount of stock paid up; nominal and real value thereof; highest price at which such stock was sold at a

bona fide sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; amount of surplus funds and undivided profits, and the value of all other assets; total amount of indebtedness as principal; amount of gross or net earnings or income, including interest on investments, and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State; and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized and directed to fix the value of the capital stock of the bank, and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the State or in the counties where situated; and the remainder thus found is to be the value of the corporate franchise subject to taxation under the said act.

It is further provided that the said board shall apportion the value of such franchise among the several taxing jurisdictions entitled to a share of such tax.

It is further provided that the auditor of the State, at the expiration of thirty days after the final determination of such values, shall certify to the county clerk of the counties where any
9 portion of the corporate franchise of such banks shall be liable to local taxation, the amount thereof liable for county or State taxes; and such certificate is, by the county clerk, to be filed in his office, and by him certified to the collecting officer of the county and city for collection.

It is further provided that the taxes assessed by the State board of valuation and assessment shall be due and payable on July 1st succeeding such report.

It is further provided that in the event the banks fail to make such report and pay such tax, a penalty of 10 per cent. on the amount of the tax shall be attached, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum; and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, is to be deemed guilty of a misdemeanor and upon conviction is to be fined for each day it remains unpaid; to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction.

X.

Your complainant shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your complainant and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts,

and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies including your complainant. At that date the tax upon the gross receipts of the banks, if enforcible, was payable to the sinking fund of the city of Louisville, with a view of embarrassing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of Louisville,
10 including your complainant, upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

1. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the Hewitt bill. This sum it was provided should be an actual payment and not to be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

2. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

3. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

4. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabil-
11 ities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the

records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked —.

As further evidence of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your complainant, of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three clauses, it being understood that all who accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

12 On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your complainant) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks, if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof, marked —.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

XI.

Your complainant further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville pursuant to the contract aforesaid, three suits were brought, the Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which — represented itself and complainant. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856, but before the passage of the Hewitt bill, and brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by
13 the State since 1856; and the Third national bank also brought its suit in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the Hewitt bill, and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the Hewitt bill, and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the Hewitt bill, and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the Hewitt bill which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgments of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared

by its attorney general and by oral argument and printed
14 brief opposed the contention of the several banks. The city and the State through its respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68, of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies and the payment of taxes thereunder, constituted a contract between the State and the several banks, and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies first, that they did have a contract growing out of the acceptance of the Hewitt bill, and, second, that that contract was irrepealable by the State and lasted throughout the corporate existence of the several banks, and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the tran-
15 script of the records in the cases above named. Wherefore the complainant pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against the complainant for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

XII.

The complainant stated that the said board of valuation and assessment in July, 1893, valued its capital stock at $697,902.20 and in July, 1894, at $715,007.41; that the tax rate for the city of Louisville in 1893 was $2.17; in 1894 it was $1.88; in 1895, $1.88; in 1896, $1.85; and in 1897, $1.85; so that the complainant says that the amount of taxes which it would have to pay under the board of

valuation and assessment law, over and above what it would have to pay under the Hewitt law would be at least $10,000 per annum.

XIII.

Complainant says that this scheme of taxation violates the contract between it and the State in its charter and the amendments thereto, and violates the contract made between it and the State under the Hewitt law, and is very largely in excess of the taxation provided for by it- charter or by said Hewitt law; and the act of the legislature of Kentucky instituting such a method of taxation is violative of the Constitution of the United States, and particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract; and is void.

XIV.

The said method of taxation is also violative of the constitution of the State of Kentucky, in this, that by the said constitution of the State of Kentucky is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation but may, by gen-
16 eral laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes; in this, that the said law provided for an assessment of the capital stock of corporations, among others banks, by a State board of valuation and assessment, and provided for the certification of such values by the State board to counties and municipalities where any of such capital stock is situated or franchises employed; giving to said State board the right to apportion the same among the taxing districts, and providing that the corporation shall pay to such taxing districts local taxes thereon, whereas the said defendant, The City of Louisville, has no power to impose any taxes whatever on the franchise of the complainant and has never caused any valuation to be made of complainant's intangible property or of its franchises.

XV.

The premises considered, the complainant says that it has been fully and finally adjudicated in proceedings in which the complainant and the city of Louisville were both bound, that complainant's contract is valid and enforcible and that the complainant can be subjected to no greater rate of taxation than that agreed to by it under the Hewitt law, or if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for in the complainant's charter and amendments thereto.

XVI.

The complainant has always been ready to pay and has paid all the taxes due by it under the provisions of the Hewitt act, but if it should be determined that the State of Kentucky has the right to

retire from that contract, then the complainant submits that it is entitled to be restored to its former condition and it will then be ready and willing to pay all taxes that may be exacted from it according to the terms of its charter and amendments thereto.

17

XVII.

Complainant says that the defendant-, Samuel H. Stone, Charles Finley and George W. Long are threatening, and, unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896, and 1897, and certify such value to the clerk of the Jefferson county court to be by him certified to the collecting officer of the city of Louisville and that the city assessor of the city of Louisville will thereupon make out a bill for such taxes against the complainant and the city tax collector will attempt to collect the same; that such assessment and attempt to collect such taxes will be illegal and in violation of complainant's contract as has been heretofore adjudged as aforesaid, and will be unlawful and violative of complainant's said contract and will cast a cloud over complainant's franchise and damage it in a way that cannot be repaired or estimated at the common law, and its only remedy is by bill in equity and unless restrained by this honorable court, the said defendant, The City of Louisville, will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the harassment of many suits, and cast a cloud upon its franchise and property, and an effort will be made to enforce the penalties against this complainant as hereinbefore set out.

XVIII.

The premises considered, complainant prays that the said Samuel H. Stone, Charles Finley and George W. Long be perpetually enjoined and restrained from assessing the value of complainant's capital stock under the said act of November 11, 1892, for the years 1895, 1896 or 1897, or any other year, and that the said defendant Samuel H. Stone, be enjoined from certifying any such valuation to the city of Louisville, and that the said city of Louisville be

18 enjoined and restrained from endeavoring to collect any tax upon such valuation, that the complainant's contract be fully established, that it be declared that upon conforming to its said contract, as hereinbefore set up, by making the payment under the Hewitt law or under its charter, no other or further taxes shall be exacted from it in any form by any authority.

May it please your honors to grant unto your complainant a writ of subpœna, under proper authority, to be issued against the said Samuel H. Stone, Charles Finley, G. W. Long and the City of Louisville, commanding them and each of them under suitable penalty, to be therein fixed, and upon a day therein named, to appear and answer to this bill of complaint, but not under oath, answer under oath being waived; and to stand to and abide by all orders and

decrees that the court may enter in the premises; and your complainant will ever pray for this and all other appropriate relief.

HUMPHREY & DAVIE,
For Complainant.

STATE OF KENTUCKY, *County of Jefferson,* } *sct:*

M. Carey Peter states that he is vice-president of the complainant; that the facts stated herein, so far as they are stated from his personal knowledge are true, and, so far as stated upon information, are by him believed to be true.

M. CAREY PETER.

Subscribed and sworn to before *be* by M. Cary Peter this 17th day of April, 1897.

R. A. BATMAN,
N. P., J. Co., Ky.

My commission expires Jan'y 23, 1900.

EXHIBIT RESOLUTION.

Office of Bank of Louisville.

LOUISVILLE, KY., *July 1st*, 1887.

This is to certify that at a meeting of the board of directors of the Bank of Louisville, held at the office of said bank on the 5th
19 day of April, 1887, the following-named directors of said bank were present and voted, viz., Samuel Russell, J. B. Wilder, Charles Bremaker, J. E. Caldwell, H. G. Phillips and T. L. Jefferson. The following resolution was unanimously adopted, to wit:

Resolved, That a meeting of the stockholders of this bank be called for the 2nd day of May, 1887, to vote upon the question of acceptance or rejection of so much of the act of the legislature of the Commonwealth of Kentucky entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886, as applies to the taxation of banks. That in pursuance of said resolution the stockholders of said bank were notified by a printed circular (a copy of which is hereto attached) addressed and mailed to each of them, postage prepaid, more than ten days preceding said meeting and by an advertisement in two of the daily papers published in the city of Louisville.

That at the meeting of said stockholders which was duly and regularly held at the office of said bank in Louisville, Ky., on the 2nd day of May, 1887, in pursuance to the notice aforesaid the following resolution was unanimously adopted by the stockholders, to wit:

Resolved, That the stockholders of the Bank of Louisville hereby give their consent to the act of the legislature of the Commonwealth of Kentucky approved May 17th, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky" so far as the

same applies to banks and said Bank of Louisville, and said Bank of Louisville agrees to pay the tax as provided by said act and waives and releases all right under its charter to a different mode or smaller rate of taxation. And we hereby certify that there were 3,301 votes cast in favor of said resolution and no votes cast against it, which votes so cast represented 4,318 shares of stock of the Bank of Louisville out of a total number of shares of stock of said bank of 6,550 and the number of votes to which the stockholders were entitled was 5,342, the votes so cast in favor of said resolution represented a majority of the stock of said bank both in number and amount, and said resolution was adopted, the number of stockholders voting in person and by proxy was one hundred and thirty-one and the total number of stockholders of said bank was 241. Said bank, by its corporate authority, having accepted the provisions of said act now claims the benefit of same. All of which is certified to the governor of the Commonwealth of Kentucky.

Given under our hand and seal of the corporation this 1st day of July, 1887.

[SEAL.] BANK OF LOUISVILLE,
By SAMUEL RUSSELL, *President.*

E. A. HEWITT, *Cashier.*

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to Samuel H. Stone, auditor of public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by the president, directors and company of the Bank of Louisville, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:

[SEAL.] THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office, on or before the 7th day of June next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk.*

21 Upon which the marshal made the following return:

Executed April 24th, 1897, on the City of Louisville, by delivering a copy of within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Fees, $2.00.

Executed May 4th, 1897, on Chas. Finley, sec'y of state; May 14th, on Geo. W. Long, treasurer; May 15th, on Samuel H. Stone, auditor of public accounts, by delivering a copy of within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By P. D. TUCKER, *D. M.*

Fees, $6.00.

And on May 27, 1897, came the complainant by counsel, and filed a written stipulation herein:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6557. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill, and an answer at the same time, without waiving the demurrer.

HUMPHREY & DAVIE.
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

22 Came again the defendant, The City of Louisville, by its counsel and filed its demurrer to the bill of complaint:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } No. 6557. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Louisville, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer, states.

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

23 STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Came again the defendant, The City of Louisville, by its counsel and filed its answer herein:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6557. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of The Bank of Louisville, Complainant.

This defendant now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties and other

imperfections in the bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering states that the limit on the rate of taxation to be paid to the State, provided for in section fifteen (15) of complainant's original charter, approved February 2, 1833, and that the same should be in full of all tax and bonus, was an immunity from local taxation,
24 which expired with the complainant's original charter life, as extended by the legislature, on January 1, 1862, and the amendment to complainant's original charter, approved subsequent to February 14, 1856, whereby extensions of its charter life, and like immunity from local taxation, were granted unto the complainant for twenty and twenty-five years respectively, came within the purview of the act of the legislature of the State of Kentucky, approved February 14, 1856, and were by the provisions of the last-named act subject to amendment or repeal at the will of the legislature.

This defendant denies that the tax of fifty cents on each share of stock of the complainant was, when fixed by the act of February 12, 1836, referred to in complainant's bill, or at any time since, largely or at all in excess or as much as the ordinary rate of taxation, State and local, paid by other moneyed capital or property in the State of Kentucky.

This defendant denies that by the settled course of decision of the highest court of the State of Kentucky, the meaning of the provisions in complainant's charter, and the amendments thereto, has been fixed and determined, or that by reason thereof the complainant has an inviolable contract with said State, or that said provisions constitute a limitation on the legislative power of said State to provide for the taxation of plaintiff's property by the municipal subdivisions of said State, or that said provisions prevented such municipal subdivisions from taxing the real estate, or other property of the complainant.

This defendant denies that the complainant has since November 11, 1892, paid in full to this defendant the municipal tax on its real estate and other property.

This defendant states section six (6), of article two (2), of said act of May 17, 1886, referred to in complainant's bill, pertaining to the taxation of banks, expressly provided that said act (meaning article two (2) therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-e[illegible] (68),
of the General Statutes, which was as follows:

25 "All charters and grants of or to corporations, amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), of article two (2), of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its

power to amend or repeal, at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks from county and municipal taxation therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5), of article twelve (12), of said act of May 17, 1886, all other acts, general and special, and parts of acts, inconsistent therewith, or not in conformity therewith were repealed.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an ad valorem tax was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was claimed such authority existed under said act when said ordinance was adopted.

This ordinance was held to be in violation of the State constitution and void by the court of appeals of Kentucky, May 5, 1895, in the case of Levi, &c., *v.* City of Louisville, 97 Ky. Rep., 394.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans would be made to said commissioners of the sinking
26 fund, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should

thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which, is filed with complainant's bill marked "A," was signed by the attorney for the city of
27 Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy, marked "A," is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant, to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1891, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, and organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

This defendant denies that said alleged agreement or contract was duly executed, or on the faith or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and
28 conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the ques-

tion should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was and was intended to be, by said ordinance in lieu of the ad valorem tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, as required by law and in the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that, with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought
29 by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits were really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show

what questions were submitted to the circuit court and the court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted
30 September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had the irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for ad valorem taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for ad valorem taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville provided, or in the event the court of appeals of the State of Kentucky, at any time should overrule its said decision, rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and the trust companies in said State, have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the amount of taxes which it would have to pay under the board of valuation and assessment law over and above which it would have to pay under the Hewitt law would be as much as $10,000.

This defendant denies that the scheme of taxation provided for in the general revenue law of November 11, 1892, violates the alleged contract alleged to have been made between the complainant
31 and the State in its charter and the amendments thereto, or violates the alleged contract alleged to have been made between it and the State under the Hewitt bill; or that there was any irrepealable contract made between the complainant and the State in the com-

plainant's charter and the amendments thereto, or under the Hewitt bill, or that the act of the legislature of Kentucky, of November 11, 1892, instituting such method of taxation, is violative of the Constitution of the United States, or particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract, or that said act is void, or that it is violative of the constitution of the State of Kentucky in that, by the said constitution, it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof respectively the power to assess and collect such taxes, or, in that, the said law of November 11, 1892, provides for an assessment of the capital stock of corporations, among others, banks, by a State board of valuation and assessment, and provides for the certification of such value by the State board to the counties and municipalities where any such capital stock is situated or franchises employed giving said State board the right to apportion the same among the taxing districts and providing that the corporation shall pay to such taxing districts local taxes thereon; or that this defendant has no power to impose any taxes whatever upon the franchise or intangible property of the complainant.

This defendant states that the court of appeals of Kentucky has construed said provision of the constitution of said State, which is section one hundred and eighty-one (181) thereof, as meaning that the General Assembly shall not impose or fix the amount or rate of taxes for the purposes of any county, city, town, or other municipal corporation, and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property of corporations, companies, and
32 associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that by reason of the complainant's compliance with the provisions of the said Hewitt bill, under an alleged adjudication of the court of appeals for both of the years, or any year mentioned in complainant's bill, it is now inequitable to allow this defendant to collect any taxes from it, even though there may be, subsequent to the date of complainant's alleged payments as aforesaid, a change in the ruling in regard to the law of Kentucky on these subjects.

This defendant denies it has power under the law to harass or vex the complainant in order to coerce any alleged unjust demand or demands, or to throw into confusion complainant's transactions, or to cast a cloud upon its title to its personal property, or to create great or any disturbance or confusion in regard to the indebtedness to it of the various persons, or any person, with whom it has had dealings, or to whom it has loaned money.

This defendant denies that it was at the institution of this action,

or is now, threatening to collect the said taxes for the years 1893 and 1894, under the valuations of the complainant's capital stock, or intangible property, made by the State board of valuation and assessment, or will put into operation against the complainant the provisions of the law authorizing it to make collections, or that it will collect, or attempt to collect, from the complainant the taxes aforesaid, or any taxes held to be unlawful by said decision of the court of appeals of June 1, 1895, affirming the judgment of the Jefferson circuit court in said case of The Bank of Kentucky against R. H. Thompson, judge of the police court of the city of Louisville, or under the revenue law of November 11, 1892, so long as said decision shall be not overruled and remain in full force and effect, or that it has threatened or is threatening to do any illegal act, or act in violation of complainant's alleged contract, or to the great or any detriment of the complainant in its property or fran-
33 chises, or that complainant has such alleged contract with the State of Kentucky, or that from these alleged threatened wrongs, or any threatened wrong, the complainant has no remedy at the common law, or that its only remedy is by a bill in equity.

This defendant denies it has threatened, or is threatening, the complainant with any wrong or wrongs.

This defendant for further answer and defense to complainant's bill states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank-tax cases, wherein the same legal questions were involved and issues were made, as in the case referred to in the complainant's bill of complaint against R. H. Thompson, judge, &c., rendered a decision in which the former decisions of said court in said case delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank-tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution, in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of or compliance with those provisions, and that the same with respect to all said banks and similar institutions in the State were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and all banks were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill with respect to the method and rate of bank taxation by the State constitution
34 and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said re-

peal was only a legitimate exercise of the reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of the four old banks, originally chartered prior to the last-named date, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, hereinabove referred to as section eight (8), chapter sixty-eight (68), of the General Statutes of the State of Kentucky, and were all subject to amendment or repeal by and at the will of the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to bank taxation were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have already been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose on its part to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897, with the auditor or State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant denies that should it be determined that the State of Kentucky has the right to retire from said alleged contract with the complainant, the complainant is or would be entitled to be restored by this court, or any court, to its alleged former position.

This defendant denies that the defendants, Samuel H. Stone, Charles Finley and George W. Long, constituting said board are now or were at the institution of this action, threatening, or unless restrained by this honorable court, will proceed to value the franchise of the complainant in the manner set forth under the act of

Nov. 11, 1892, for the years 1895, 1896 and 1897, or either of them, or to certify such value to the county court clerk of Jefferson county to be by him certified to the collecting officer of the city of Louisville, or to certify such value to the county court clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort, and the collecting officer of the county of Franklin, or that such assessments, or either of them, will be illegal, or in violation of the complainant's alleged contract, or will cast a cloud over complainant's alleged franchise, or cause a multiplicity of suits, or any suit to be brought against the complainant, or damage it in a way that cannot be repaired or estimated at common law, or that from these alleged threatened wrongs the complainant has no remedy at the common law, or that its only remedy is by a bill in equity; or that unless restrained by this honorable court this defendant, or the defendants, The County of Franklin and The Board of Councilmen of the City of Frankfort, or
36 either of them, will attempt to levy or collect taxes based upon the apportionment found by said State board of valuation and assessment, or will subject complainant to the harassment of many suits, or any suit, or cast a cloud upon its franchises and property, or that an effort will be made to enforce penalties, or any penalty, against the complainant; and this defendant denies that this defendant, or either of its codefendants herein, will undertake to collect any taxes from the complainant held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled by said court and remains in full force and effect.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false or illegal claim or claims, nor to any suit or suits, nor will it suffer any irreparable injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Greene, a notary public in and for the county and State aforesaid, the affiant, George D.

Todd, who states he is the mayor and chief officer of the de-
37 fendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson Co., Kentucky.

And on May 28th, 1897, the following proceedings were had:

Circuit Court of the United States, District of Kentucky.

FRIDAY, *May* 28, 1897.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY
vs.
SAM'L H. STONE ET AL.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF LOUISVILLE
vs.
M'L H. STONE ET AL.

WESTERN BANK
vs.
SAM'L H. STONE ET AL.

LOUISVILLE BANKING COMPANY
vs.
SAM'L H. STONE ET AL.

UNION NATIONAL BANK
vs.
SAM'L H. STONE ET AL.

38 LOUISVILLE CITY NATIONAL BANK
vs.
SAM'L H. STONE ET AL.

BANK OF COMMERCE
vs.
SAM'L H. STONE ET AL.

AMERICAN NATIONAL BANK
vs.
SAM'L H. STONE ET AL.

FARMERS' & DROVERS' BANK
vs.
SAM'L H. STONE ET AL.

THIRD NATIONAL BANK
vs.
SAM'L H. STONE ET AL.

FIRST NATIONAL BANK
vs.
SAM'L H. STONE ET AT.

CITIZENS' NATIONAL BANK
vs.
SAM'L H. STONE ET AL.

GERMAN SECURITY BANK
vs.
SAM'L H. STONE ET AL.

39 FIDELITY TRUST & SAFETY VAULT CO.
vs.
SAM'L H. STONE ET AL.

LOUISVILLE TRUST COMPANY
vs.
SAM'L H. STONE ET AL.

This day came the complainants in each of the above-entitled causes and filed herein notice of motion to be entered herein this day.

And thereupon came the complainants The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all of the other causes by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants, Sam'l H. Stone, Geo. W. Long and Charles Finley, composing the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchises of the complainants under the act of November 11, 1892, until the further order of the court herein; and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time, the City of Louisville appearing herein by H. L. Stone, city attorney, and the County of Franklin appearing herein by Ira Julian, objected to the said motion, and the same was argued and submitted, and the court not being advised, takes time.

And at the same time came the Board of Councilmen of the City of Frankfort, and the County of Franklin, by the said Ira Julian and J. H. Polsgrove and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without
40 waiving the effect of the said demurrers filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long and Chas.

Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bills of complaint. And the said causes having been argued by counsel upon the said general and special demurrers as well as upon the demurrers of the City of Louisville, was submitted, and the court not being advised, takes time.

The demurrer of the defendants, Sam'l H. Stone and others above referred to, is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendant. } No. 6557.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the State of Kentucky, to the bill of complaint of Bank of Louisville, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained, to be true in such manner and form as the same *is* therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore and for divers other good reasons of demurrer appearing in the said bill these defendants do demur thereto and humbly demand the judgment of this court whether they shall be
41 compelled to make any further or other answer to the said bill and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify as counsel for the defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky in the foregoing demurrer, that, in my opinion the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on June 5th, 1897, came the complainant by counsel; came also The City of Louisville by its counsel. The parties by their counsel filed their stipulation herein:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF LOUISVILLE, Complainant, *vs.* S. H. STONE, &c., Defendant-. } 6557.

It is agreed that the record of the case of The Bank of Kentucky *vs.* R. H. Thompson, judge of the Louisville city court, filed in the cause of The President, Directors and Company of the Bank of Kentucky *vs.* Stone, &c., (No. 6555 in this court) may be read as if filed as an exhibit with complainant's bill in this cause, subject to all legal exceptions.

H. L. STONE, *City Att'y.*
HUMPHREY & DAVIE,
For Comp 't.

42 And on July 5th, 1897, came the complainant, by counsel, and filed its replication to the answer of the defendant The City of Louisville herein.

Which replication is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY, BANK OF LOUISVILLE, Complainant, *vs.* SAMUEL H. STONE, &c., Defendants.

Replication of the Complainant to Answer of The City of Louisville, Defendant.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HUMPHREY & DAVIE, *For Com.*

And on the 9th day of May, 1898, the following order was entered:

43 PRESIDENT, DIRECTORS, AND COMPANY, BANK OF LOUISville, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

Came this day the complainant in the above-styled case, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant also filed herein notice, duly served, of the motion to be made this day, and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motion, and also came the City of Louisville and objected to the filing of said supplemental bill of complaint and said motion, and filed herein affidavits to be read in this case, and also came the City of Frankfort and Franklin County and objected to the motion made in this case to which these defendants are parties, and the court being advised, it is now ordered, adjudged, and decreed that the said several defendants in the above-styled case are enjoined and restrained as follows: The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898, or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against the complainant on account of assessments heretofore made and certified for the years 1893 or 1894, or from attempting by distraining or otherwise from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

44 Amended and supplemental bill of complaint above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill of Complaint.

The comp[illegible]ant, by way of amended and supplemental bill of complaint, s[illegible]tes that the defendants Stone, Finley, and Long are threatening and, unless restrained by this court, will proceed to value the franchise of the complainant in the manner set forth in the original bill of complaint, under the act of November 11, 1892, for the year 1898 as well as for the several years mentioned in the 17th clause of the original bill of complaint, and are threatening to treat such assessment and valuation just as they are alleged to threaten to treat the assessment for the said years 1895, 1896, and 1897.

The complainant now desires to amend its bill of complaint by

inserting the words "and 1898" after the words "1897," in the 17th paragraph of its bill of complaint; and the complainant reiterates all that is said in its original bill of complaint applicable to the years 1895, 1896, and 1897 as equally applicable to the year 1898.

The premises considered, the complainant now prays as in its original bill of complaint, so, however, as to expressly include the year 1898 within the scope of the said prayer; and the complainant prays for all other, further, and proper relief.

HUMPHREY & DAVIE,
For Complainant.

45 STATE OF KENTUCKY, } ss:
County of Jefferson, }

M. C. Peter states that he is president of the complainant; that the facts stated herein, so far as stated from his personal knowledge, are true, and so far as stated from information he believes to be true.

M. C. PETER.

Subscribed and sworn to before me this May 6th, 1898.

HUSTON QUIN,
N. P., J. C., Ky.

Commission expires with next Kentucky legislature.

46 And on another day of our said court, to wit, June 4th, 1898—

It is ordered by the court that the preliminary injunction heretofore granted in the foregoing cause be, and the same is hereby, continued until 25th day of June, 1898.

And on another day of our said court, to wit, June 25th, 1898—

This cause coming on to be heard and having been argued, the court delivered an opinion herein, which is ordered to be filed, and it is now adjudged, ordered, and decreed as follows:

1. That the demurrer of the City of Louisville to the bill of complaint be, and it is hereby, overruled; to which the said City of Louisville excepts.

2. That until the further order of this court the defendants, Samuel H. Stone, Charles Finley, and Geo. W. Long, are enjoined and restrained from making or certifying any assessment of the rights, properties, or franchises of the complainant under the act of the legislature of Kentucky approved November 11, 1892, and from certifying any such valuation to the City of Louisville or to the county clerk of Jefferson county.

And then came the complainant and filed herein its general replication.

The replication above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY OF THE Bank of Louisville, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Replication to Answer of City of Louisville.

47 This repliant, saving and reserving to itself all ans all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the saie answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HUMPHREY & DAVIE, *For Com.*

And on July 14th, 1898, the following order was entered:

This day came the defendant and filed exceptions to the depositions of H. S. Barker and J. H. Leathers and the exhibits filed therewith and to the other documentary and record evidence offered and read by complainant on the final hearing of this cause; which exceptions were overruled by the court; to which ruling of the court defendant excepted.

This cause having come on to be heard and for final decree, the parties filed stipulations Nos. 1 & 2 & the complainant read, 1st, its bill of complaint; 2nd, the exhibits filed therewith containing resolution of the stockholders; 3rd, the record of the proceedings in the case of Bank of Kentucky *vs.* R. H. Thompson, judge, &c., lately pending in the Jefferson court of common pleas and in the
48 court of appeals of Kentucky, being an exhibit to the bill of complaint in the case of The President, Directors, & Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c., pending in this court; 4th, stipulation No. 1 between the complainant and the defendants; 5th, deposition of Henry S. Barker, taken in the case of The Bank of Commerce *vs.* Samuel H. Stone, &c., pending in this court, with the exhibits thereto attached; 6th, deposition of John H. Leathers, taken in the same case, with the exhibits thereto attached.

The defendant The City of Louisville read on hearing, 1st, its answer; 2nd, stipulation No. 2 between the complainant and the defendants, with documents therein referred to; 3rd, deposition of J. Moss Terry, taken in the case of Bank of Commerce *vs.* Samuel H. Stone, &c., pending in this court, with exhibits thereto attached.

And the court being advised, it is adjudged, ordered, and decreed as follows:

I. That the complainant is entitled to the benefit of the proceedings taken in the case of President, Directors, & Company of the Bank of Kentucky *vs.* R. H. Thompson, in the Jefferson court of common pleas, and proceedings taken in the said cause on appeal to the court of appeals of Kentucky, wherein R. H. Thompson and The City of Louisville were appellants and the said President, Directors, & Company of the Bank of Kentucky was appellee, to the same extent as if the complainant had been a party to the said proceedings.

II. That it is *res adjudicata* between the complainant and the
49 city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and Geo. W. Long, are perpetually enjoined and restrained from making any assessments under the act of November 11, 1892, and certifying the same to the city of Louisville upon any rights, properties, or franchises or shares of stock of the complainant, and that any provisions of the constitution of the State of Kentucky and any provision in the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant.

III. That the complainant do recover of the defendants its costs herein expended.

The defendants now in open court pray an appeal from this decree to the Supreme Court of the United States, which is allowed. The complainant waives citation upon said appeal in open court. The defendants filed herein their assignment of errors, and it is ordered that said appeal may be perfected by the execution of a bond by the defendants, with surety, to be approved by the clerk, in the penalty of one thousand dollars.

Stipulations Nos. 1, 2, & 3 above referred to are as follows:

50 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY OF THE BANK OF LOUISVILLE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

Stipulation No. 1.

It is agreed between the complainant and the defendants herein as follows:

1. That the complainant complied with the Hewitt law by

making and delivering the agreement and consent therein provided for.

2. That the complainant may read on the hearing the record of the proceedings in the case of The Bank of Kentucky *vs.* R. H. Thompson, in the Jefferson court of common pleas, and the same case on appeal in the court of appeals of Kentucky, City of Louisville and R. H. Thompson, appellants, *vs.* Bank of Kentucky, appellee, the same being filed in a case pending in this court styled President, Directors, & Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c.

HUMPHREY & DAVIE,
Solicitors for Complainant.
H. L. STONE, *City Att'y.*

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
versis
SAMUEL H. STONE, &c., Defendants. } # 6557. Stipulation No. 2.

51 I. It is stipulated and agreed between the complainant and the defendant City of Louisville that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1893," approved December 17, 1892 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 248–250).

2. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (*ib.*, pp. 219–222).

3. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

4. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance, referred to in complainant's bill, requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

5. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1895," approved December 22, 1894 (*ib.*, pp. 256, '7).

6. An ordinance entitled "An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

7. An ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to
52 the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

8. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

9. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

II. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated and organized and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

III. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act, on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

IV. That the complainant's franchise was prior to the institution of this action assessed by the State board of valuation and assessment under the act of November 11, 1892, for the year 1893 at $697,902, and for the year 1894 at $715,007; that these
53 assessments were duly certified by the State auditor to the clerk of the Jefferson county court and by the latter to the collecting officer of the defendant City of Louisville for collection, and that the assessor, under the ad valorem tax levy ordinances of the defendant city, has since April 12, 1897, made out on said respective assessments and listed with the tax receiver for collection against the complainant a tax bill for the year 1893, at the rate of 74½ cents on each $100, for $5,199.37, and a tax bill for the year 1894, at the rate of $1.88 on each $100, for $13,442.13, both of which tax bills remain unpaid.

V. It is agreed by counsel for complainant and defendant herein that the corporate existence which complainant had when it accepted the provisions of the Hewitt act expires, by then existing statute, on the 1st day of January, 1903.

VI. It is agreed that all depositions and evidence taken by complainant and defendants in case No. 6567 of Bank of Commerce, complainant, against S. H. Stone, &c., defendants, in this court shall be read and have the same effect (subject to all legal exceptions by either party for competency or irrelevancy) as though the same were taken by the parties respectively in this action.

HUMPHREY & DAVIE,
Solicitors for Complainant.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

Stipulation No. 3 is as follows:

54 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY OF THE Bank of Louisville, Complainant, *vs.* SAMUEL H. STONE, &c., Defendants.	Stipulation No. 3.

It is agreed between the parties complainant and defendant herein that in copying this record for the Supreme Court of the United States the clerk may omit all such parts of the record as are contained in the copy made for the Supreme Court of the record in the case of The Bank of Commerce *vs.* Samuel H. Stone, &c., and President, Directors, & Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c. Each party is to be at liberty to refer to those records for these depositions and documents in exactly the same way as if they were contained in this record.

HUMPHREY & DAVIE,
For Complainant.
H. L. STONE, *City Attorney.*

55 Said exceptions above referred to are as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant, *versus* SAMUEL H. STONE, &c., Defendants.	#6557. Exceptions to Complainant's Depositions, Exhibits, Documentary and Record Evidence.

The defendant City of Louisville excepts to the depositions, exhibits, documentary and record evidence offered and read in evidence by complainant on the final hearing of this cause as follows:

1. Questions Nos. 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 24, and 25 of the main examination in the deposition of H. S. Barker call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

2. The two exhibits filed with said Barker's deposition, marked Exhibit "Copy" and Exhibit "A," are incompetent and irrelevant evidence against this defendant.

3. The answers to questions Nos. 75, 76, and 82 of the cross-examination in the deposition of said Barker are not responsive to the questions asked, and, so far as they detail or refer to conversations or matters not shown by the proceedings of the commissioners of the sinking fund or record on their journal or minute book, said answers are incompetent and irrelevant testimony against this defendant.

4. The third paragraph of the answer of the commissioners of the sinking fund in the suit of The German Security Bank against

said commissioners, copied into the deposition of said Barker
56 on his own motion, is incompetent and irrelevant testimony against this defendant.

5. Questions Nos. 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, and 26 of the main examination in the deposition of J. H. Leathers call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

6. Exhibits Nos. 1, 2, 3, 4, and 5, made part of said Leathers' deposition, are incompetent and irrelevant testimony against this defendant.

7. The record in the suit of The Bank of Kentucky against R. H. Thompson, judge of the police court of Louisville, is incompetent and irrelevant evidence against this defendant.

HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

57 Said petition and assignment of errors above referred to *is* as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant, *versus* SAMUEL H. STONE, &-, Defendants.	# 6557. Petition and Assignment of Errors of the City of Louisville and Board of Valuation and Assessment.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now come the petitioners and defendants, City of Louisville and Samuel H. Stone, auditor; George W. Long, treasurer, and Charles Finley, secretary of state, constituting the board of valuation and assessment, and state that the record, proceedings, and decree of the court rendered herein July 14, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of their respective demurrers to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against these defendants or either of them.

II.

The court erred in overruling the exceptions of the defendant City of Louisville to the depositions, exhibits, documents, and records offered and read in evidence by complainant on the final hearing of this cause.

58 III.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of The Bank of Kentucky against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, July 24, 1894, affirmed by the court of appeals of Kentucky June 1, 1895, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Bank of Kentucky in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, on account of the alleged agreement with ex-City Attorney Barker and the commissioners of the sinking fund of the city of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant members of said State board enjoining and restraining them from valuing and assessing the franchise or intangible property of com-
59 plainant, and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897, and 1898, and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act, the city charter, and the State constitution, or either of them, impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore these petitioners and defendants say the said decree of the court herein is erroneous, and pray this honorable court to grant them an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so they will ever pray.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.
W. S. TAYLOR,
Attorney General, Solicitor for Defendants Constituting the Board of Valuation and Assessment.

60 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

BANK OF LOUISVILLE
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, Samuel H. Stone, Charles Finley, G. W. Long, & The City of Louisville & The Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Bank of Louisville in the sum of one thousand dollars, to be paid to the said Bank of Louisville, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1898.

Whereas the above-named Samuel H. Stone, Charles Finley, G. W. Long, & The City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Samuel H. Stone, Charles Finley, G. W. Long, & The City of Louisville shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO.
OF MARYLAND,
[SEAL.] By WILLIS S. MULLEN,
Gen'l Ag't & Att'y-in-fact. [L. S.]

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

61 Said agreement for record on appeal is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
S. H. STONE, &c., Defendants.
6557. Agreement for Record on Appeal.

In order to prevent unnecessary expense and making the record larger than is useful, the complainant and defendants have agreed as follows:

In copying the record in this case on appeal to the Supreme Court

of the United States, the clerk may omit (1) the opinion and dissenting opinion in the bank-tax cases, decided June 1, 1895 (see said opinion, 97 Ky., 590); (2) the clerk need not copy the special statutes relating to the commissioners of the sinking fund of the city of Louisville nor the ordinances recited in stipulation No. 2, filed herein, but counsel may print such parts thereof as seem to him relevant in an appendix to his brief.

HUMPHREY & DAVIE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

62 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 61 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,943. Kentucky C. C. U. S. Term No., 358. Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky, and The City of Louisville, appellants, *vs.* The Bank of Louisville. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 350.

CITY OF LOUISVILLE, APPELLANT,

vs.

BANK OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1898.

(16,944.)

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(16,944.)

SUPREME COURT OF THE UNITED STATES.

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1898.

1 *Transcript of Record.*

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on 21st day of February, 1898.

Present: Hon. John M. Harlan, circuit justice, and Hon. Wm. H. Taft and H. H. Lurton, circuit justices.

BANK OF LOUISVILLE
vs.
THE CITY OF LOUISVILLE.

Be it remembered that heretofore, to wit, on the 17th April, 1897, came the complainant, by Humphrey & Davie, its counsel, and filed in the clerk's office its bill of complaint in the above-named cause against the defendants herein, which bill is as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The president, directors and company of the Bank of Louisville bring this their bill of complaint against the city of Louisville. And thereupon, the complainant says:

I.

The complainant is a corporation duly created by and organized under the laws of the State of Kentucky, and a citizen of said State.

2 II.

The defendant, The City of Louisville, is a municipal corporation duly created by and organized under the laws of the State of Kentucky.

III.

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky, approved February 2, 1833. By this act it was given full power and authority to acquire, hold, possess and enjoy all such real estate, goods, effects and chattels as should be convenient for the transaction of its business, and which might be conveyed to it as surety for any debt. It was directed that it should have and keep its principal office and place of discount in the city of Louisville and that it might establish branch offices of discount and deposit in other parts of the State. Its business was declared to be that of loaning money, discounting promissory notes and bills of exchange, and it was given authority to issue bills or bank notes, payable to bearer, on demand, at any of its offices of discount and deposit, but not of less denomination than five dollars. It was given the general powers of a banking corporation.

IV.

By its original charter, which, as aforesaid, was approved February 2, 1833, it was provided that the complainant should continue a body politic and corporate until the first day of January, 1853. By an act approved February 16, 1838, it was provided that the complainant should have authority to establish and continue either one or two branches with a reasonable amount of capital, and if it should establish the branch within three years, its charter should be extended four years and on the establishment of one second branch the charter should be extended five additional years. The complainant established within the time and under the terms of said act, two branches, one at Paducah and one at Flemings-
3 burg, and in this way, its charter life was extended nine years. By an act of the General Assembly of Kentucky, approved February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from the first day of January, 1863, but this extension was declared to be subject to certain restrictions, among others, that the bank should be subject to all the restrictions, limitations, penalties, conditions, and duties imposed upon it by this act of incorporation and the acts amendatory thereto; that the stockholders should within one year from the 10th of May, 1858, by a vote of a majority given at a stated or called meeting, determine whether they would accept the proposed extension; and the said bank accepting the provisions of the act, was required to notify the governor of the Commonwealth of the acceptance by the certificate of the president and directors of such bank, and when such notice was thus given, the act was to be considered in full force and effect.

There were other provisions in this act of extension not necessary to be here mentioned, but the complainant fully complied with all of them, and, among other things, complied with the requirements of the acceptance of the act by its stockholders, and of the certificate of the president and directors of such fact.

By an act of the General Assembly of Ky, approved May 1, 1880, and entitled "An act to extend and continue the charter of the Bank of Louisville," it was recited that "Whereas, it is represented to this General Assembly that the charter of the Bank of Louisville will expire and cease on the first day of January, 1883, and in order to renew and continue and extend the same" it was enacted that the charter rights and privileges of the complainant should continue and extend in full force and effect for twenty years from and after the said first day of January, 1883.

It is not necessary to set out in full the terms and conditions except to state that one of these was to the intent that before the act should go into effect it must be approved and accepted by a majority in interest of the stockholders of complainant, that
4 this was done and the notice of this action required by the act was given; and, so it is, that its charter life will not expire until January, 1903.

V.

By the sixth section of the original act chartering the complainant it was provided among other things, that the cashier of the bank "shall on the first day of July, 1834, and on the same day annually thereafter pay unto the treasurer of the State twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank, provided that the legislature may increase or reduce the same; but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank."

By an act approved February 12, 1836, entitled "An act to increase the revenue," the legislature exercised the rights reserved in the above section, and imposed a tax of fifty cents on each share of stock in the complainant, a taxation then largely in excess of the ordinary rate of taxation paid by other moneyed capital or property in the State of Kentucky.

The complainant paid, each year, the tax thus levied upon it, down to July 1, 1886, from which time it has paid a different amount, as will hereinafter be explained.

VI.

The complainant says that by the settled course of decision of the highest court of this State the meaning of these provisions in its charter has been fixed and determined; that on November 1, 1838, it was determined by the court of appeals of Kentucky (which is the highest court of said State) that this language prevented the Commonwealth from taxing the stockholders of the bank, and constituted a contract with the State, which was inviolable and a limitation on the legislative power to tax the stock of the bank or its property; that by a decision rendered by the said court of appeals on the 24th of November, 1869, it was determined that this language meant to include taxation by any of the municipal subdivisions of the State, and prevented such municipal subdivisions from taxing the real estate of the bank although situated within their boundaries.

By a decision rendered by the same court on June 5, 1888, it was determined (confirming the judgment of the Franklin circuit court) that the said 15th section as aforesaid, constituted a contract between the complainant and the State, by which the State would not tax the complainant a greater rate than fifty cents on each one hundred dollars of stock; that this included all taxation of all kinds—State, county and municipal—and upon all kinds of property of the said bank, and that the said several acts extending its charter life were to be taken as not subject to repeal by the legislature.

VII.

By an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually, on the 1st day of July, of each year, make report of their

condition to the auditor, and should pay into the State treasury seventy-five cents on each share of their capital stock, and should, in addition, pay into said treasury on their surplus, undivided profit and accumulation in excess of 10 per cent. of their capital stock, a tax at the same rate as the real property should be assessed; and it was distinctly provided by the act that the said taxation should be in full of all tax—State, county and municipal, except that the real estate and buildings owned and used by the banks in conducting their business should not be exempted from tax for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed. As a condition to its operating upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. Each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as hereinafter provided, and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or a smaller rate of taxation; which consent and agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth; and said agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said taxation shall be paid, during the corporate existence of the bank."

The consent provided for by this act, and the notice to the governor, were further required to be given before the next meeting of the General Assembly; provided, the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the complainant on May 2, 1887, a quorum of the stockholders and a majority thereof being present, such stockholders, and a majority in interest thereof, did give their consent to the levying of said tax, and to the waiver and release of all right under its charter to a different mode of and a lower rate of taxation; and said consent of the complainant to the waiver and release aforesaid, and the said agreement, was certified in writing, under the seal of the bank, by the proper corporate authority, to the governor of the Commonwealth, and delivered to him before the next meeting of the General Assembly after the passage of said act. The complainant files herewith as part hereof a duly certified copy of such resolution, consent and agreement marked Ex.

VIII.

The complainant, through its cashier, made its report and paid into the State treasury, on July 1, 1886, the full tax required by the act described in the foregoing paragraph, and which is commonly

known as the "Hewitt act"; and, in conformity with said
7 Hewitt act, has made its report in proper form to the auditor of public accounts on the 1st day of July in each and every year up to this time; and, until the year 1893, paid into the State treasury, on or about the 1st day of July of every year from 1886 the full tax required by the said Hewitt act; being seventy-five cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State, upon its surplus undivided profits and accumulations in excess of 10 per cent. of its capital stock. These reports continued to be made by the complainant; but on July 1, 1893, the auditor refused to receive the tax under the Hewitt law, although the complainant tendered the same. He refused to receive it on the 1st day of July, 1894, although the complainant again tendered the same. The complainant paid the same about the 1st of July, 1895, and on or about the 1st of July, 1896, and in the spring of 1896, at the request of the auditor, and after certain litigation hereinafter mentioned had been determined in its favor, paid to the auditor the difference between the amount paid by it on July 1, 1893, and July 1, 1894, and the amount which it tendered at these times and which was the amount due under the Hewitt law; so that it is now true that the complainant has every year, down to and including 1895, paid the full tax called for under its charter; and from 1886 to 1896, the full tax called for under the Hewitt law. It has, also during this period (1886 to 1896) paid in full to the municipalities where its banking-houses are situated, the full county and municipal tax thereon.

IX.

The legislature of Kentucky passed an act which went into force on November 11, 1892. The third article of said act dealt with the assessment of certain corporations, among others, banks. By this act it was provided in substance that every incorporated bank shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county,
incorporated city, town or taxing district where its franchise
8 may be exercised. The auditor, treasurer and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is provided that in order to determine the value of the franchise the banks shall each file reports on or before the 1st day of March in each year, which reports shall be made up to include the 31st day of the preceding December. These reports are to be verified by the chief officer of the bank, and show the following facts: The name and principal place of business of the bank; the amount of capital stock; number of shares; amount of stock paid up; nominal and real value thereof; highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; amount of surplus funds and undivided profits, and the value of all other assets; total amount of indebtedness as principal;

amount of gross or net earnings or income, including interest on investments, and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State; and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized and directed to fix the value of the capital stock of the bank, and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the State or in the counties where situated; and the remainder thus found is to be the value of the corporate franchise subject to taxation under the said act.

It is further provided that the said board shall apportion the value of such franchise among the several taxing jurisdictions entitled to a share of such tax.

It is further provided that the auditor of the State, at the expiration of thirty days after the final determination of such values, shall certify to the county clerk of the counties where any
9 portion of the corporate franchise of such banks shall be liable to local taxation, the amount thereof liable for county or State taxes; and such certificate is, by the county clerk, to be filed in his office, and by him certified to the collecting officer of the county and city for collection.

It is further provided that the said taxes assessed by the State board of valuation and assessment shall be due and payable on July 1st succeeding such report.

It is further provided that in the event the bank fail to make such report and pay such tax, a penalty of 10 per cent. on the amount of the tax shall be attached, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum; and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, is to be deemed guilty of a misdemeanor and upon conviction is to be find for each day it remains unpaid; to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction.

X.

Your complainant says that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demand- of the complainant and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies including your complainant At that date the tax upon the gross receipts of the banks, if enforceable, was pay-

able to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city of Louisville as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of
10 Louisville, including your complainant, upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

1. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the Hewitt bill. This sum it was provided should be an actual payment and not to be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

2. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

3. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

4. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabil-
11 ities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked —.

As further evidence of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your complainant of the city, it was agreed

in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three clauses, it being understood that all who accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

This agreement is signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

12 On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including the complainant) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commission heretofore referred to. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks, if such decision should be rendered.

A copy of the contract aforesaid with the minutes aforesaid is filed herewith as part hereof, marked —.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

XI.

The complainant further states that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville pursuant to the contract aforesaid, three suits

were brought. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which — represented itself and complainant. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856, but before the passage of the Hewitt bill, and brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by
13 the State since 1856; and the Third national bank also brought its suit in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the Hewitt bill, and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the Hewitt bill, and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the Hewitt bill, and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the Hewitt bill which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgments of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits, though really against the city of Louisville, were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed
14 brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall

be subject to the provisions of section 8, chapter 68, of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the Hewitt bill, coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the Hewitt bill, and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the tran-
15 script of the records in the cases above named. Wherefore the complainant pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against the complainant for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

XII.

The complainant stated that the said board of valuation and assessment in July, 1893, valued its capital stock at $697,902.20 and in July, 1894, at $715,007.41; and that the tax rate for the city of Louisville in 1893 was $2.17; in 1894 it was $1.88; in 1895, $1.88; in 1896, $1.85; and in 1897, $1.85; so that the complainant says that the amount of taxes which it would have to pay under the board of valuation and assessment law, over and above what it would have to pay under the Hewitt law would be at least $10,000 per annum.

XIII.

Complainant says that this scheme of taxation violates the contract between it and the State in its charter and the amendments thereto and violates the contract made between it and the State

under the Hewitt law, and is very largely in excess of the taxation provided for by it- charter or by said Hewitt law; and the act of the legislature of Kentucky instituting such a method of taxation is violative of the Constitution of the United States, and particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract; and is void.

XIV.

The said method of taxation is also violative of the constitution of the State of Kentucky, in this, that by the said constitution of the State of Kentucky it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation but may, by gen-
16 eral laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes; in this, that the said law provided for an assessment of the capital stock of corporations, among others banks, by a State board of valuation and assessment, and provided for the certification of such values by the State board to counties and municipalities where any of such capital stock is situated or franchises employed; giving to said State board the right to apportion the same among the taxing districts, and providing that the corporation shall pay to such taxing district local taxes thereon, whereas the said defendant, The City of Louisville, has no power to impose any taxes whatever on the franchise of the complainant and has never caused any valuation to be made of complainant's intangible property or of its franchises.

XV.

The plaintiff further states that it having complied with the provisions of said Hewitt law and the adjudication of the court of appeals for both the years 1893 and 1894, hereinbefore mentioned, it is inequitable now to allow the defendant to collect any taxes from it even though there may be subsequent to the day of complainant's payment aforesaid a change in the ruling in regard to the law of Kentucky on these subjects.

XVI.

The complainant further states that the said defendant has power under its charter where taxes are due to it to cause a warrant to issue and distraint to be made by one of its officers and under such distraint, the personal property of the tax-payer to be taken and sold under processes of garnishment served upon all persons, debtors and such tax-payers; and in this way the complainant says that the defendant has power under the law to harass and vex the complainant in order to coerce this unjust demand of defendant and to throw into confusion its transactions and to cast a cloud upon its
17 title to its personal property and create great disturbance and confusion in regard to indebtedness to it of the various persons with whom it had dealings and to whom it has loaned money.

XVII.

The complainant has always been ready to and has always paid all the taxes due by it under the provisions of the Hewitt act, among other things, has paid to the defendant, The City of Louisville, taxes upon the real estate used for its banking purposes, and it will be ready, whenever any further taxes become due, to pay the same in accordance with the law.

XVIII.

The premises considered, the complainant says that the defendant, The City of Louisville, is threatening to and unless restrained by this honorable court will proceed to endeavor to collect the said taxes for the years 1893 and 1894, under the valuation of the complainant's capital stock made by the State board of valuation and assessment as aforesaid, and will put into operation against the complainant the provisions of law authorizing it to make collections, all of which will be illegal, in violation of complainant's contract and to the great detriment of the complainant in its property and franchises; and from these threatened wrongs the complainant has no remedy at the common law and its only remedy is by a bill in equity.

XIX.

The premises considered, complainants pray that the said City of Louisville be perpetually enjoined and restrained from endeavoring to collect any taxes upon the said returns of the board of valuation and assessment as hereinbefore set out, and from taking any proceedings to that end, by way of distraint or bringing suit or otherwise, and that the said complainant be declared as not indebted to the said defendant on account of such taxes; and the com-
18 plainant prays that its contract may be fully established, and that it be declared that having conformed to its said contract as hereinbefore set out, by making the payments under the Hewitt law, no other or further taxes can be exacted from it under any form or by any authority.

May it please your honors to grant unto your complainant a writ of subpœna, under proper authority, to be issued against the said City of Louisville, commanding it, under suitable penalty, to be therein fixed, and upon a day therein named to appear and answer to this bill of complaint, but not under oath, answer under oath being waived; and to stand to and abide by all orders and decrees that the court may enter in the premises; and the complainant will ever pray for this and all other appropriate relief.

HUMPHREY & DAVIE,
For Complainant.

STATE OF KENTUCKY, }
County of Jefferson, } *sct:*

M. Carey Peter states that he is the president of the complainant; that the facts stated herein, so far as they are stated from his per-

sonal knowledge, are true; and, so far as stated upon information, are by him believed to be true.

M. CAREY PETER.

Subscribed and sworn to before me by M. Carey Peter this 17th day of April, 1897.

R. A. BATMAN,
N. P., J. Co., Ky.

My commission expires Jan'y 23, 1900.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to the City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, 19 at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by the president, directors and company of the Bank of Louisville, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:

[SEAL.]

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office, on or before the 7th day of June next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

Upon which the marshal made the following return:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Fees, $2.00.

20 And on May 27th, 1897, came the complainant by its counsel; came also the defendant by its counsel. The parties by their counsel filed a stipulation herein:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6558. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill, and an answer at the same time, without waiving the demurrer.

HUMPHREY & DAVIE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

Came again the defendant by its counsel and filed its demurrer to the bill of complaint herein:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6558. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Louisville, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer, states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

21 2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville,

in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

22 Came again the defendant, by its counsel, and filed its answer herein:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6558. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of The Bank of Louisville, Complainant.

This defendant now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties and other imperfections in the bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering states that the limit on the rate of taxation to be paid to the State, provided for in section fifteen (15) of complainant's original charter, approved February 2, 1833, and that the same should be in full of all tax and bonus, was an immunity from local taxation, which expired with the complainant's original charter life, as extended by the legislature, on January 1, 1862, and the amendments to complainant's original charter, approved subsequent to February 14, 1856, whereby extensions of its charter life, and like immunity from local taxation, were granted unto the complainant for twenty and twenty-five years respectively, came within the purview of the act of the legislature of the State of Kentucky, approved February 14, 1856, and were by the provisions of the last-named act subject to amendment or repeal at the will of the legislature.

This defendant denies that the tax of fifty cents on each share of stock of the complainant was, when fixed by the act of February 12, 1836, referred to in complainant's bill, or at any time since, largely or at all in excess or as much as the ordinary rate of taxa-
23 tion, State and local, paid by other moneyed capital or property in the State of Kentucky.

This defendant denies that by the settled course of decision of the highest court of the State of Kentucky, the meaning of the provisions in complainant's charter, and the amendments thereto, has been fixed and determined, or that by reason thereof the complainant has an inviolable contract with said State, or that said provisions constitute a limitation on the legislative power of said State to provide for the taxation of plaintiff's property by the municipal subdivisions of said State, or that said provisions prevented such municipal subdivisions from taxing the real estate, or other property of the complainant.

This defendant denies that the complainant has since November 11, 1892, paid in full to this defendant the municipal tax on its real estate and other property.

This defendant states section six (6), article two (2), of said act of May 17, 1886, referred to in complainant's bill, pertaining to the taxation of banks, expressly provided that said act (meaning article two (2) therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2), of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal, at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks from county and municipal taxation therein provided for, and a contrary intent was not therein plainly expressed.

24 This defendant further states that by section five (5) of article twelve (12), of said act of May 17, 1886, all other acts, general and special, and parts of acts, inconsistent therewith, or not in conformity therewith were repealed.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an ad valorem tax was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was

claimed such authority existed under said act when said ordinance was adopted.

This ordinance was held to be in violation of the State constitution and void by the court of appeals of Kentucky, May 5, 1895, in the case of Levi, &c., *v.* City of Louisville, 97 Ky. Rep., 394.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans would be made to said commissioners of the sinking fund, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy, marked "A," is

not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant, to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the
26 government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

This defendant denies that said alleged agreement or contract was duly executed, or on the faith or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was and was intended to be, by said
27 ordinance in lieu of the ad valorem tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, as required by law and in the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer

than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that, with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits were really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of
28 Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and the court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay

their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for ad valorem taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar
29 to any claim for ad valorem taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville provided, or in the event the court of appeals of the State of Kentucky, at any time should overrule its said decision, rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and the trust companies in said State, have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the amount of taxes which it would have to pay under the board of valuation and assessment law over and above which it would have to pay under the Hewitt law would be as much as $10,000.

This defendant denies that the scheme of taxation provided for in the general revenue law of November 11, 1892, violates the alleged contract alleged to have been made between the complainant and the State in its charter and the amendments thereto, or violates the alleged contract alleged to have been made between it and the State under the Hewitt bill; or that there was any irrepealable contract made between the complainant and the State in the complainant's charter and the amendments thereto, or under the Hewitt bill, or that the act of the legislature of Kentucky, of November 11, 1892, instituting such method of taxation, is violative of the Constitution of the United States, or particularly of the clause thereof prohibiting any State from passing a law which shall impair the obligation of a contract, or that said act is void, or that it is violative of the constitution of the State of Kentucky in that, by the said constitution, it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof, respectively the power to assess and col-
30 lect such taxes, or, in that, the said law of November 11, 1892, provides for an assessment of the capital stock of corporations, among others, banks, by a State board of valuation and assessment, and provides for the certification of such value by the State board to the counties and municipalities where any such capital

stock is situated or franchises employed giving said State board the right to apportion the same among the taxing districts and providing that the corporation shall pay to such taxing districts local taxes thereon; or that this defendant has no power to impose any taxes whatever upon the franchise or intangible property of the complainant.

This defendant states that the court of appeals of Kentucky has construed said provision of the constitution of said State, which is section one hundred and eighty-one (181) thereof, as meaning that the General Assembly shall not impose or fix the amount or rate of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that by reason of the complainant's compliance with the provisions of the said Hewitt bill, under an alleged adjudication of the court of appeals for both of the years, or any year mentioned in complainant's bill, it is now inequitable to allow this defendant to collect any taxes from it, even though there may be, subsequent to the date of complainant's alleged payments as aforesaid, a change in the ruling in regard to the law of Kentucky on these subjects.

This defendant denies it has power under the law to harass or vex the complainant in order to coerce any alleged unjust demand or demands, or to throw into confusion complainant's transactions, or to cast a cloud upon its title to its personal property, or to
31 create great or any disturbance or confusion in regard to the indebtedness to it of the various persons, or any person, with whom it has had dealings, or to whom it has loaned money.

This defendant denies that it was at the institution of this action, or is now, threatening to collect the said taxes for the years 1893 and 1894, under the valuations of the complainant's capital stock, or intangible property, made by the State board of valuation and assessment, or will put into operation against the complainant the provisions of the law authorizing it to make collections, or that it will collect, or attempt to collect, from the complainant the taxes aforesaid, or any taxes held to be unlawful by said decision of the court of appeals of June 1, 1895, affirming the judgment of the Jefferson circuit court in said case of the Bank of Kentucky against R. H. Thompson, judge of the police court of the city of Louisville, or under the revenue law of November 11, 1892, so long as said decision shall be not overruled and remain in full force and effect, or that it has threatened or is threatening to do any illegal act, or act in violation of complainant's alleged contract, or to the great or any detriment of the complainant in its property or franchises, or that complainant has such alleged contract with the State of Kentucky, or that from these alleged threatened wrongs, or any threat

ened wrong, the complainant has no remedy at the common law, or that its only remedy is by a bill in equity.

This defendant denies it has threatened, or is threatening, the complainant with any wrong or wrongs.

This defendant for further answer and defense to complainant's bill states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank-tax cases, wherein the same legal questions were involved and issues were made, as in the case referred to in the complainant's bill of complaint against R. H. Thompson, judge, &c., rendered a decision in which the former decisions of said court in said case delivered June 1, 1895; and in the cases of Franklin County Court *v.*

Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and
32 other bank-tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution, in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of or compliance with those provisions, and that the same with respect to all said banks and similar institutions in the State were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and all banks were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of the four old banks, originally chartered prior to the last-named date, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, hereinabove referred to as section eight (8), chapter sixty-eight (68), of the General Statutes of the State of Kentucky, and were all subject to amendment or repeal by and at the will of the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to bank taxation, were repealed.

33 This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until

the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have already been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896 and 1897 with the auditor or State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false or illegal claim or claims, nor to any suit or suits, nor will it suffer any irreparable injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and
34 agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Greene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so

far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEORGE D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson Co., Kentucky.

35 And on another day of said court, to wit, on May 28th, 1897.

Circuit Court of the United States, District of Kentucky.

FRIDAY, *May* 28, 1897.

BANK OF KENTUCKY
vs.
CITY OF LOUISVILLE.

LOUISVILLE TRUST COMPANY
vs.
CITY OF LOUISVILLE.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
CITY OF LOUISVILLE.

GERMAN SECURITY BANK
vs.
CITY OF LOUISVILLE.

CITIZENS' NATIONAL BANK
vs.
CITY OF LOUISVILLE.

FIRST NATIONAL BANK
vs.
CITY OF LOUISVILLE.

THIRD NATIONAL BANK
vs.
CITY OF LOUISVILLE.

36 FARMERS' & DROVERS' BANK
vs.
CITY OF LOUISVILLE.

BANK OF COMMERCE
vs.
CITY OF LOUISVILLE.

LOUISVILLE CITY NATIONAL BANK
vs.
CITY OF LOUISVILLE.

UNION NATIONAL BANK
vs.
CITY OF LOUISVILLE.

LOUISVILLE BANKING COMPANY
vs.
CITY OF LOUISVILLE.

WESTERN BANK
vs.
CITY OF LOUISVILLE.

BANK OF LOUISVILLE
vs.
CITY OF LOUISVILLE.

This day came the complainants in each of the above-entitled causes and filed herein notices duly served on the defendant, and moved the court to grant them severally an injunction, until the further order of the court, enjoining and restraining the de-
37 fendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in the said bill of complaint.

And came the said City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same coming on to be heard, was submitted, and the court not being advised, takes time.

And at the same time, this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the said City of Louisville, and the same were argued by counsel, and submitted to the court, and the court not being advised takes time.

And on June 5, 1897, came again the parties, by their counsel, and filed their stipulation herein:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY, BANK OF LOUISVILLE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

It is agreed that the resolutions of the stockholders of the Bank of Louisville accepting the provisions of the Hewitt law, filed in the cause of The President, Directors and Company of the Bank of Louisville *vs.* Stone, &c., No. 6557, and the record in the case of Bank of Kentucky *vs.* R. H. Thompson, judge of the Louisville city court, filed in the case of President, Directors and Company of the Bank of Kentucky *vs.* Stone, No. 6555, in this court, shall be read as if filed herein, as an exhibit with complainant's bill, subject to all legal exceptions.

H. L. STONE, *City Att'y.*
HUMPHREY & DAVIE,
For Compl't.

38 And on the 4th day of June, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This cause coming on to be heard, *and* the court, being advised, delivered its opinion herein, which is ordered to be filed. It is now adjudged, ordered, and decreed by the court that the demurrer of the defendant, The City of Louisville, to the bill of complaint be, and it is hereby, overruled; to which the said City of Louisville excepts.

2. Until the further order of the court the said defendant, The City of Louisville, is enjoined and restrained from attempting in any manner to enforce against the complainant the taxes mentioned in the bill of complaint herein for the years 1893 and 1894.

And then came the complainant and filed herein its general replication.

Replication above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY OF THE Bank of Louisville, Complainant, *vs.* CITY OF LOUISVILLE, Defendant. } Replication to Answer of City of Louisville.

39 This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HUMPHREY & DAVIE, *For Com.*

And on the 14th day of July, 1898, the following order was entered:

This day came the defendant and filed exceptions to the depositions of H. S. Barker and J. H. Leathers and the exhibits filed therewith and to the other documentary and record evidence offered and read by complainant on the final hearing of this cause; which exceptions were overruled by the court; to which ruling of the court defendant excepted.

Exceptions above referred to are as follows:

40 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant, *versus* CITY OF LOUISVILLE, Defendant.	#6558. Exceptions to Complainant's Depositions, Exhibits, Documentary and Record Evidence.

The defendant, City of Louisville, excepts to the depositions, exhibits, documentary and record evidence offered and read in evidence by complainant on the final hearing of this cause as follows:

1. Questions Nos. 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 24, and 25 of the main examination in the deposition of H. S. Barker call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

2. The two exhibits filed with said Barker's deposition, marked Exhibit "Copy" and Exhibit "A," are incompetent and irrelevant evidence against this defendant.

3. The answers to questions Nos. 75, 76, and 82 of the cross-examination in the deposition of said Barker are not responsive to the questions asked, and, so far as they detail or refer to conversations or matters not shown by the proceedings of the commissioners of the sinking fund of record on their journal or minute book, said answers are incompetent and irrelevant testimony against this defendant.

4. The third paragraph of the answer of the commissioners of the sinking fund in the suit of The German Security Bank
41 against said commissioners, copied into the deposition of said Barker on his own motion, is incompetent and irrelevant testimony against this defendant.

5. Questions Nos. 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, and 26 of the main examination in the deposition of J. H. Leathers call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

6. Exhibits Nos. 1, 2, 3, 4, and 5, made part of said Leathers' deposition, are incompetent and irrelevant testimony against this defendant.

7. The record in the suit of The Bank of Kentucky against R. H. Thompson, judge of the police court of Louisville, is incompetent and irrelevant evidence against this defendant.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

And on the 14th day of July, 1898, the following decree was entered:

This cause having come on to be heard and for final decree, the parties filed stipulations Nos. *L* & 2 & complainant read, 1st, its bill of complaint; 2nd, the exhibits filed therewith containing resolutions of the stockholders; 3rd, the record of the proceedings in the

case of Bank of Kentucky *vs.* R. H. Thompson, judge, &c., lately pending in the Jefferson court of common pleas and in the court of appeals of Kentucky, being an exhibit to the bill of complaint in the case of The President, Directors, & Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c., pending in this court;
42 4th, stipulation No. 1 between the complainant and the defendant; 5th, deposition of Henry S. Barker, taken in the case of The Bank of Commerce *vs.* Samuel H. Stone, &c., pending in this court, with the exhibits thereto attached; 6th, deposition of John H. Leathers, taken in the same case, with the exhibits thereto attached.

The defendant, The City of Louisville, read on the hearing, 1st, its answer; 2nd, stipulation No. 2 between the complainant and the defendants, with documents therein referred to; 3rd, deposition of J. Moss Terry, taken in the case of Bank of Commerce *vs.* Samuel H. Stone, &c., pending in this court, with exhibits thereto attached.

And the court being now advised, it is adjudged, ordered, and decreed as follows:

I. That the complainant is entitled to the benefit of the proceedings taken in the case of President, Directors, & Company of the Bank of Kentucky *vs.* R. H. Thompson, in the Jefferson court of common pleas, and proceedings taken in the said cause on appeal to the court of appeals of Kentucky, wherein R. H. Thompson and The City of Louisville were appellants and the said President, Directors, & Company of the Bank of Kentucky was appellee, to the same extent as if the complainant had been a party to the said proceedings.

II. That it is *res adjuducata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendant,
The City of Louisville, is perpetually enjoined and re-
43 strained from collecting any tax against the complainant under the assessments for the years 1893 and 1894, as set out in the complainant's bill, and that any provision of the constitution of the State of Kentucky and any provision in the act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, or shares of capital stock other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed by the said Hewitt law, so long as said tax shall be paid during the corporate existence of the complainant.

III. That the complainant do recover of the defendant its costs herein expended.

The defendant now in open court prays an appeal from this decree to the Supreme Court of the United States, which is allowed. The complainant waives citation upon said appeal in open court. The defendant filed herein its assignment of errors, and it is ordered that said appeal may be perfected by the execution of a bond

by the defendant, with surety, to be approved by the clerk, in the penalty of $1,000,

Stipulations above referred to are as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY OF THE BANK OF LOUISVILLE, Complainant, *vs.* CITY OF LOUISVILLE, Defendant. } Stipulation No. 1.

44 It is agreed between the complainant and the defendant herein as follows:

1. That the complainant complied with the Hewitt law by making and delivering the agreement and consent therein provided for.

2. That the complainant may read on the hearing the record of the proceedings in the case of The Bank of Kentucky *vs.* R. H. Thompson, in the Jefferson court of common pleas, and the same case on appeal in the court of appeals of Kentucky, City of Louisville and R. H. Thompson, appellants, *vs.* Bank of Kentucky, appellee, the same being filed in a case pending in this court styled President, Directors, & Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c.

HUMPHREY & DAVIE,
Solicitors for Complainant.
H. L. STONE, *City Att'y.*

Stipulation No. 2 is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } #6558. Stipulation No. 2.

I. It is stipulated and agreed between the complainant and the defendant, City of Louisville, that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1893," approved Decem-
45 ber 17, 1892 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 248–250).

2. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (*ib.*, pp. 219–222).

3. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

4. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance, referred to in complainant's bill, requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

5. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1895," approved December 22, 1894 (*ib.*, pp. 256–'7).

6. An ordinance entitled "An ordinance providing for the reprospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

7. An ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

8. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from the ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

46 9. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

II. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated and organized and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 *to* 3024, Kentucky Statutes, edition of 1894.

III. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act, on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

IV. That the complainant's franchise was prior to the institution of this action assessed by the State board of valuation and assessment under the act of November 11, 1892, for the year 1893 at $697,902, and for the year 1894 at $715,007; that these assessments were duly certified by the State auditor to the clerk of the Jefferson county court and by the latter to the collecting officer of the defendant, City of Louisville, for collection, and that the assessor, under the ad valorem tax levy ordinances of the defendant city, has since April 12, 1897, made out on said respective assessments and

47 listed with the tax receiver for collection against the complainant a tax bill for the year 1893, at the rate of 74½ cents on each $100, for $5,199.37, and a tax bill for the year 1894,

at the rate of $1.88 on each $100, for $13,442.13, both of which tax bills remain unpaid.

V. It is agreed by counsel for complainant and defendant herein that the corporate existence which complainant had when it accepted the provisions of the Hewitt act expires, by then existing statute, on the 1st day of January, 1903.

VI. It is agreed that all depositions and evidence taken by complainant and defendants in case No. 6567 of Bank of Commerce, complainant, against S. H. Stone, &c., defendants, in this court shall be read and have the same effect (subject to all legal exceptions by either party for competency or irrelevancy) as though the same were taken by the parties respectively in this action.

HUMPHREY & DAVIE,
Solicitors for Complainant.
H. L. STONE,
City Attorney, Solicitor for Defendant,
City of Louisville.

Stipulation No. 3 is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PRESIDENT, DIRECTORS, & COMPANY OF THE Bank of Louisville, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
} Stipulation # 3.

It is agreed between the parties complainant and defendant herein that in copying this record for the Supreme Court of the United States the clerk may omit all such parts of the record
48 as are contained in the copy made for the Supreme Court of the record in the case of The Bank of Commerce *vs.* Samuel H. Stone, &c., and President, Directors, & Company of the Bank of Kentucky *vs.* Samuel H. Stone, &c. Each party is to be at liberty to refer to these records for these depositions and documents in exactly the same way as if they were contained in this record.

HUMPHREY & DAVIE,
For Complainant.
H. L. STONE, *City Attorney.*

Petition and assignment of errors of the City of Louisville is as follows:

49 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6558. Petition and Assignment of Errors of the City of Louisville.

To the honorable the judge of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant, City of Louisville, and states that the record, proceedings, and decree of the court ren-

dered herein July 14, 1898, contain manifest errors to its prejudice committed, as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in overruling the exceptions of the defendant, City of Louisville, to the depositions, exhibits, documents, and records offered and read in evidence by complainant on the final hearing of this cause.

III.

The court erred in decreeing that complainant has an
50 irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of the Bank of Kentucky against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, July 24, 1894, affirmed by the court of appeals of Kentucky June 1, 1895, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Bank of Kentucky in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant, City of Louisville, to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, for the years 1893 and 1894, on account of the alleged agreement with ex-City Attorney Barker and the commissioners of the sinking fund of the city of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against this defendant enjoining and restraining it from collecting or taking any steps to collect its taxes for said years from complainant, and during the corporate existence of the complainant, under said act of November 11, 1892, and in decreeing that the latter act, the city charter, and the State constitution, or either of them, impaired the obligation of said
51 alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petition- and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant

it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

52 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

BANK OF LOUISVILLE
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, The City of Louisville & The Fidelity & Deposit Company of Maryland, are held and firmly bound unto Bank of Louisville in the sum of one thousand dollars, to be paid to the said Bank of Louisville, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1898.

Whereas the above-named City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named City of Louisville shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO.
OF MARYLAND,
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

53 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF LOUISVILLE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
6558. Agreement for Record on Appeal.

The defendant having taken an appeal in this case to the Supreme Court of the United States, this agreement is now made to avoid

cost of copying and printing unnecessary parts of the record. It is therefore agreed as follows:

1. The clerk in making up the record need not copy any paper in this record which he has already copied in the record of the case of the same complainant *vs.* Samuel H. Stone, &c.

2. The two cases presenting questions so similar, it is agreed that either party may refer in this case to the record in the other case to the same effect as if such record was a part of this case.

3. The clerk need not copy the special acts relating to the commissioners of the sinking fund of the city of Louisville, nor the ordinances recited in stipulation No. 2, filed herein, but appellant's counsel may print such parts thereof as seem to him relevant in an appendix to his brief.

HUMPHREY & DAVIE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant.

54 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 53 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,944. Kentucky C. C. U. S. Term No., 359. City of Louisville, appellant, *vs.* Bank of Louisville. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 360.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, AND CITY OF LOUISVILLE, APPELLANTS,

vs.

THE LOUISVILLE BANKING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1895.

(16,945.)

(16,945.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 360.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, AND CITY OF LOUISVILLE, APPELLANTS,

vs.

THE LOUISVILLE BANKING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on February 21, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

LOUISVILLE BANKING COMPANY, Complainant,
versus
S. H. STONE, ETC., Defendants. } 6583.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, Louisville Trust Company, by its counsel, Helm & Bruce, and filed in the clerk's office of our said court *their* bill of complaint and exhibits against the above-named defendants, S. H. Stone, etc., which bill of complaint is in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Louisville Banking Company, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and the City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled "An act to incorporate the Louisville Insurance and Banking Company," approved on the 24th day — January, 1867; and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract, and to sue and be sued. Said amendments
2 were adopted, March 11, 1867, March 21, 1870, and March 20, 1872. By this last amendment the corporate name was changed from Louisville Insurance and Banking Company to "Louisville Banking Company." Other amendments were adopted March 1, 1876, February 4, 1880, April 22, 1884, and April 21, 1882.

Your orator says it is and has been since its organization engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said

Commonwealth governing the taxation of banks was very unsatisfactory in this: to wit, that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respect-
3 ive charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred

dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations are invested, and pay into the treasury the amount of tax due.

4 It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real

estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth, and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate, upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in

accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time, reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described. Your orator shows that it does not and never did own the building in which it does or ever did business.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May. 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

6 Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it wasagreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $10,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one

part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

7 Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.
B. Banks whose charters had been granted subsequent to 1856.
C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the
8 validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof, marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserv-

ing the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself and the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856, but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

9 In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank, and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits, though really against the city of Louisville, were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68, of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

10 2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of the Louisville Banking Company vs. R. H. Thompson, Judge of the Police Court of the City of Louisville, is filed herewith and made a part hereof.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes, imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state is by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe

showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the
11 number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at the price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or
12 other municipal corporation, but may, by general laws, confer

on the proper authorities thereof, respectively, the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the City of Louisville claims the right to collect, and is threatening to collect from your orator has not been assessed by the said City of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities, respectively, as auditor, secretary and treasurer of the State.

Your orator says that this board thus constituted, will, unless, restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt by distraint and otherwise to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said legal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent., and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed by distraint upon its personal property and harassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and cost, and the taxes claimed by the City of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and cost.

Your orator respectfully shows that the City of Louisville is insisting that the auditor of the State, the defendant Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that
13 the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessment, and will unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the

county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H. Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants, including The City of Louisville, and each of them, be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the City of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or claimed penalties in behalf of either the city or State; and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

Theodore Harris says he is the president of complainant, and that the statements contained in the foregoing bill are true.

THEODORE HARRIS.

Subscribed and sworn to before me by Theodore Harris this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

14 Here follows "Exhibit A," referred to in foregoing bill:

SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist

the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it, or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making above payments the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

15 Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part—

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company representing class B, and the Third national bank representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

16 It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Louisville.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the first day of June, A. D. 1896.

Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin, sitting.

LOUISVILLE BANKING COMPANY, Appellant,
versus
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.

Be it remembered that heretofore, to wit, on the 24th day of August, 1894, the appellants by their counsel filed in the
17 office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

STATE OF KENTUCKY,
Jefferson County.

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law and equity division, and Honorable Emmet Field, judge of the Jefferson circuit court, common pleas division, at the court-house, in Louisville, Ky., on dates hereinafter mentioned.

Be it known that heretofore, to wit, on the 4th day of May, 1894,

came plaintiffs, by Helm & Bruce, &c., attorneys, and filed its petition in the office of the clerk of the aforesaid court.

Said petition is as follows, to wit:

Jefferson Circuit Court, Law and Equity Division.

LOUISVILLE BANKING COMPANY, Plaintiff,
versus
R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Defendant. } No. 4340. Petition.

The plaintiff, The Louisville Banking Company, states that it is a corporation duly created by and existing under the laws of the State of Kentucky. It was originally incorporated by an act approved March 11, 1867, under the name of the Louisville Insurance and Banking Company, such act being entitled "An act to incorporate the Louisville Insurance and Banking Company." Its said charter has been amended from time to time by acts approved, respectively, March 21, 1870; March 20, 1872; March 1, 1876; February 4, 1880; April 22, 1884; April 21, 1892.

Under and by virtue of the said amendments its name has been changed to the Louisville Banking Company. By the terms of said act and amendments it was created a banking corporation, and there was conferred upon it the powers usual to such corporations, and it was to continue a body politic and corporate until January 1, 1899.

By the 15th section of said act, approved March 11, 1867, it was provided as follows:

"It shall be the duty of the president, on the 1st day of January of each year, to pay into the treasury fifty cents on each one hundred dollars of stock held and paid for in such institution; which shall be in full of all tax or bonus, and be a part of the sinking fund of this Commonwealth."

Plaintiff states that as aforesaid, this bank was promptly organized under and in accordance with its charter, and has ever since continued in existence until this time under said charter and the aforesaid amendments, exercising the powers, franchises and privileges therein conferred, and performing all the obligations therein imposed.

18 It has, on the 1st day of July, in every year from its incorporation, paid into the State treasury the tax of fifty cents on each share of its stock, as required by the charter, up to the year 1886. The plaintiff states that during most if not the whole of said time the said rate of taxation was very much higher upon the said bank than was imposed by the State upon other persons or corporations.

By an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually, on the 1st day of July of each year, make report of their condition to the auditor, and should pay into the State treasury seventy-five

cents on each share of its capital stock, and should in addition pay into the said treasury, on its surplus, undivided profits and accumulations in excess of ten per centum of its capital stock, a tax at the same rate as the real property should be assessed; and it was distinctly provided by said act that the said taxation should be in full of all tax, State, county and municipal, except that the real estate or building owned and used by the banks in conducting their business should not be exempted from taxation for county or municipal purposes, but that such real estate alone might be taxed for county or municipal purposes, as other real estate is taxed. As a condition to its operation upon any of the banks referred to therein, said act, in the fourth section thereof, provided as follows:

"SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided; and to waive and release all right under the act of Congress or under the charters of the State banks to a different mode or a smaller rate of taxation; which consent and agreement to and with the State of Kentucky, shall be evidenced by writing under the seal of said bank, and delivered to the governor of the Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax should be paid during the corporate existence of the bank."

The consent provided for by this act, and the notice to the governor, were further required to be given before the meeting of the next General Assembly, provided the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the plaintiff bank held on the — day of ——, a quorum of the stockholders and a majority thereof being present, such stockholders, and a majority in interest thereof, did give their consent to the levying of said tax and to the waiver and release of all right under its charter, to a different mode and a smaller rate of taxation; and said consent of the bank to the waiver and release aforesaid, and the said agreement, were certified in writing under the seal of the bank by the proper corporate authority, to the governor of the Commonwealth and delivered to him before the next meeting of the General Assembly after the passage of said act.

19

The plaintiff, also, through its cashier, made its report and paid into the State treasury on the 1st day of July, 1886, the full tax required by said act; and in conformity with said act has made its reports in proper form to the auditor of public accounts, on the 1st day of July, in each and every year up to this time, and has until the year 1893 paid to the State treasury, on each 1st day of July in every year from 1886, the full tax required by said act, being seventy-five cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State, upon its surplus, undivided profits and accumulations in excess of

ten per centum of its capital stock. It was only prevented from paying the whole of said tax on the 1st day of July, 1893, by the refusal of the auditor, the fiscal agent of the State, to receive the same.

The plaintiff has not, at any time, owned any real estate or buildings in which it conducted its business.

On the 1st day of July, 1893, the plaintiff's cashier did, as he had regularly done for years before, make a written report to the auditor of public accounts, verified by his oath required by law, of the true amount of the capital of the bank and of its surplus, undivided profits and accumulations, and did then and there tender and offer to pay into the treasury of the State the sum of $6,744.74, the full amount of the tax required and due under the aforesaid act to amend the revenue laws, approved May 17, 1886. Said tender was refused and rejected by the said auditor of public accounts, under the claim made by him that the tax provisions of the plaintiff's charter and the said act to amend the revenue laws, approved May 17, 1886, had been superseded and repealed by the new constitution of the State of Kentucky, which went into operation on the 28th day of September, 1891, and by the act of the legislature entitled "An act relating to revenue and taxation," which went into effect on November 11, 1892.

The said auditor, as the agent of the State, refused and declined to accept any other sum than the sum of $5,382.46, the amount claimed by him to be due to the State on the franchise of said bank, under the provisions of said act of November 11, 1892. The plaintiff, protesting against said act as illegal in its application to the plaintiff, acceeded to said auditor's demand, and under protest as aforesaid, paid into the State treasury the last-named sum.

The plaintiff further states that by an act entitled, "An act for the government of cities of the first class," approved July 1, 1893, and which is applicable to the city of Louisville, it is provided, among other things, that the general council may, by ordi-
20 nance, provide for the following licenses to be paid into the sinking fund, with adequate penalties for doing business, or following a calling, occupation, profession, or using, or holding, or exhibiting the articles therein named, without the required license, viz: for each bank, trust and title company, the license tax shall not be less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city.

In pursuance of the said charter as aforesaid, the general council of the city of Louisville did pass an ordinance which was approved January 29, 1894, by which it was provided, among other things, that hereafter the following licenses should be paid into the sinking fund of the city of Louisville, viz: each bank and trust company shall pay an annual license tax of four per cent. of the gross earnings, exclusive of rent from real estate paying taxes in the city of Louisville.

Plaintiff states that the said act granting a charter to cities of the first class, and the said ordinance passed in pursuance thereof, are both unconstitutional and void in that they impair the obligation

of the contract between the plaintiff and the Commonwealth of Kentucky as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the said revenue law of May 17, 1886; and are a violation of the Constitution of the United States, and especially the section thereof providing that no State can pass any law impairing the obligation of a contract.

The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance as aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter and the several acts amending the same which were accepted and acted upon by the said bank, constituted a contract between the State on the one part and the bank and its stockholders on the other part, continuing during the legal existence of the corporation; and the State never had and has not now the right to repeal or annul said agreement, or the rights conferred by said charter limiting the right of the State to impose a tax on said bank without the consent of said bank.

Plaintiff further states that it did give its consent to the act of May 17, 1886, and did, under the considerations therein recited, waive and release its rights under its charter to a different mode or a smaller rate of taxation than is therein provided. Such consent and waiver were made on the belief that the said act was intended to put in operation a permanent legislative policy governing the taxation of all banks then existing which would accept its provisions, to endure at least during the corporate existence of all said existing banks. Plaintiff submits that such is the true construction of said act, and that the said act and its acceptance constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments.

21 Plaintiff states that it was provided in said ordinance that all licenses should be paid in advance, and in every case where it is based upon a per centum of the earnings or income of the corporation, the computation shall be made upon the earnings or income of such corporation for the year immediately preceding the time the license is to be dated or is payable; and the corporation to whom the license shall be granted shall at the end of the year pay the amount due for the excess over the estimates made at the time of issuing the license, under the same penalty as if it had failed or refused to procure a license.

And it is further provided that any corporation violating any of the provisions of said ordinance shall be fined not less than five dollars nor more than one hundred dollars for each offense; each day that the violation is continued to constitute a separate offense.

The plaintiff states that notwithstanding the premises as aforesaid, the commissioners of the sinking fund of the city of Louisville have demanded of this plaintiff that it shall pay to them the sum of $5,938.78 and upon its failure so to pay have caused a warrant to be issued out of the police court of the city of Louisville, wherein this plaintiff is charged with the offense of conducting a bank without a license, and unless prohibited by this honorable court, the defendant, R. H. Thompson, who is judge of the police

court of the city of Louisville, will cause this plaintiff to be tried under the said warrant, and will cause this plaintiff to be fined for failing to comply with said ordinance and not producing a license to do business in accordance therewith. Plaintiff further states that as aforesaid the said ordinance is null and void and of no effect; and the said R. H. Thompson, judge of the police court of the city of Louisville, has no rightful power or authority to enforce the same or cause this plaintiff to be tried upon the said warrant.

Wherefore the plaintiff prays that this court by a writ of prohibition or order addressed to the police court of the city of Louisville prohibit it from proceeding in the matter of the warrant sued out in said court against plaintiff for failing to pay said license fee, and that on final hearing it be adjudged that said license ordinance and said act for the government of cities of the first class in so far as they authorize a tax in any form to be levied against and collected from the plaintiff be declared unconstitutional and void, and for all general and proper relief.

HUMPHREY & DAVIE,
HELM & BRUCE,
For Plaintiff.

Theo. Harris says he is the president of the Louisville Banking Company and he believes the statements contained in the foregoing petition are true.

THEODORE HARRIS.

22 Subscribed and sworn to before me by Theodore Harris this 4th day of May, 1894. My commission expires January 15, 1898.

ARTHUR PETER,
Notary Public, Jefferson County, Ky.

And thereupon the clerk issued summons and copy which is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

We command you to summon R. H. Thompson, judge of the police court of the city of Louisville, to answer a petition filed against him in our Jefferson circuit court, by Louisville Banking Company and warn him that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option, and make due return hereof within sixty days from date hereof.

Witness John S. Cain, clerk of said court, this 4th day of May, 1894.

JOHN S. CAIN, *Clerk*,
By E. WHITEHEAD, *D. C.*

The sheriff returned said summons with the following endorsement thereon:

Came to hand May 5, 1894, at 11 a. m.

Executed May 8, 1894, on R. H. Thompson, judge police court, by delivering to him a copy of the within summons.

H. A. BELL, *S. J. C.*,
By F. P. CARROLL, *D. S.*

At a court held for the court aforesaid on the 11th day of June, 1894.

This day came the parties and by consent it is ordered that this cause be and is transferred to the common pleas division to be heard with the case of Bank of Kentucky *vs.* City of Louisville.

At a court held for the Jefferson circuit court, common pleas division on the 19th day of June, 1894.

Came parties by counsel and said case being heard was submitted and the court not being advised takes time.

At a court held for the court aforesaid on the 24th day of July, 1894.

The court being sufficiently advised filed an opinion herein:

Jefferson Circuit Court, Common Pleas Division.

BANK OF KENTUCKY, &c., *vs.* R. H. THOMPSON, Judge, &c. } Opinion.

These cases involved the liability of the several plaintiffs to municipal taxation. The Bank of Kentucky represents the
23 class of banks chartered before 1856; the Louisville Banking Company represents the banks chartered since that date, and the Third national the interests of the national banks of the city.

A bank chartered before 1856 and one whose charter is subsequent to that date were made plaintiffs, because in that year the following general statute became a law:

"All charters and grants of or to corporations, or of amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Gen. Stats., chap. 63, sec. 8, p. 861.)

Before that act was passed there was no general law giving the legislature control over charters; if the right to amend or repeal was not reserved in the charter it did not exist. But as to charters granted since that date the act quoted becomes a part as fully as if it was incorporated therein, unless a plain intent to exclude it is shown.

The charter of the Bank of Kentucky was approved February 22, 1834, that of the Louisville Banking Company, January, 1867. In the charters of all the banks interested in this litigation, it is pro-

vided in substance that at no time shall the tax exceed fifty cents on each $100 of stock therein.

In 1886, an act generally known as the "Hewitt bill," was passed to amend the revenue laws, by which it is provided that all banks in the State shall pay a tax of seventy-five cents upon the $100 of their stock, and certain other taxes for which they were not theretofore liable, but knowing that the rate of taxation could not be increased beyond the limit fixed in their charters, so far as banks created before February, 1856, were concerned, without their consent, the law required of all the banks as follows:

"That each of said banks, institutions and corporations, by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of said bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

"SEC. 5. The said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the
24 next General Assembly: *Provided*, they pay the tax provided for in section 1 from the passage of this act.

"SEC. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes."

All of the banks concerned, filed their written consent in due time to pay the tax thus provided for.

The present constitution seeks to have all property taxed in proportion to its value.

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises." Sec. 176.

The General Assembly in the charter for cities of the first class now propose to adopt a license tax for banks and certain other moneyed corporations, whereby each of them is required to pay not less than four, nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city. The city council passed an ordinance conforming to the charter requiring each bank to pay an annual license tax of four per cent.

The banks ask in this action for a writ of prohibition against the city, to prevent it from enforcing the tax levied by the ordinance, for the reason, mainly, that the "Hewitt bill" constitutes a contract which the State has no right to violate, either by constitutional provisions or legislative enactment.

As the law touching all the questions raised by the demurrer of the city has recently undergone a thorough investigation by two distinguished circuit judges, who delivered carefully prepared and able opinions, I shall merely state the conclusions to which an attentive consideration of the authorities submitted by counsel has led.

As to the Bank of Kentucky and the banks represented by it, there is little room for argument in this court, because in the recent case of The Franklin County Court *vs.* Deposit Bank, &c., 87 Ky., 387, the court of appeals decided the identical questions now presented. The city of Frankfort assessed the corporate property of the Bank of Kentucky for municipal taxation. The bank relied upon its charter to defeat the tax.

The court held that the agreement in its charter that it should pay to the State a tax of fifty cents on each of its shares of stock and that this should be in full of all other tax constituted a contract which cannot be violated or changed without the consent of the bank.

Referring to the Dartmouth College case, where the principle first obtained prominence, the opinion says:

"This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recognized by the courts of last resort of all the States, that a decision by us holding the contrary would be regarded as eminently sporadic."

The Dartmouth College case was decided in 1819, and has been steadily adhered to ever since. The doctrine established by it has sometimes been questioned but never overthrown.

It would be idle now to theorize whether or not in view of the mighty changes that have occurred in our social polity during the three quarters of a century which have elapsed, one legislature should be permitted to make a contract curtailing the sovereign power of taxation by which all succeeding legislatures and law-making bodies are to be bound through all the coming years. The Dartmouth College case is a fact in our jurisprudence, and Mr. Justice Miller realized it when he said in the opinion in the case of New Jersey *vs.* Yard, 95 U. S., 354.

"The writer of this opinion has always believed and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But, so long as a majority of this court adhere to the contrary doctrine, he will when the question arises, join with the other judges in considering whether such a contract has been made."

It is true that in this State such power has been taken from the legislature by constitutional provision, but contracts of that character heretofore made and not affected by the statute of 1856 are as binding and inviolable as they ever were.

The demurrer to the petition of the Bank of Kentucky will have to be overruled.

Concerning the Louisville Banking Company and the banks it represents it is sufficient to say that, notwithstanding the definite

and formal terms of the contract entered into between them and the State by means of the "Hewitt bill," the legislature which passed that law gave them notice that the right was reserved to any succeeding legislature to amend or repeal it. "This act shall be subject to the provisions of section eight (8), of chapter sixty-eight (68), of the General Statutes."

The fact that the right was reserved by the State to repeal or modify the Hewitt bill and abrogate the contract with the banks under it, presents no valid objection in their behalf.

As long as the law stood unrepealed they were entitled to enjoy all the benefits of their contract, and they were not and could not be taxed except in the manner and to the extent indicated by their written consent; the obligation rested equally upon both parties as long as it lasted.

Section 8, of chapter 68, was as much a part of the contract as if it had been embodied in the writing. This question was fully considered in Griffin *vs.* Kentucky Ins. Co., 3d Bush, 592, and Clark *vs.* Louisville Water Co., 143 U. S., page 1. The demurrer to the petition of the banking company will have to be sustained.

The national banks derive all their powers from Congress
26 and their corporate rights cannot be abridged nor in any manner interferred with by a State legislature, but with reference to taxation they occupy the same position that State banks of issue hold. The only limitation placed by Congress upon the power of the State to tax them being that they shall not be discriminated against in this particular. City National Bank of Paducah *vs.* City of Paducah, 10 Ky. Law Rep., 506.

The fact that — are banks in the State which by contracts in their charters made before national banks came into existence, pay a smaller tax than is assessed against national banks and other similar institutions organized since the national banking act became a law can make no difference. All that is required is that as far as the State has the power to control the matter national banks shall not be taxed at a higher rate than it taxes the State banks. In the case of Lionberger *vs.* Rowe, 9 Wallace, 468, it is said:

"Congress meant no more by the second limitation in the proviso to the 41st section of the national banking act than to require of each State as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.—Syllabus."

"The measure had reference to prospective legislation by the States, and its object was accomplished when the States conformed as far as practicable, their revenue systems to it. Exact conformity was required if obtainable, but the law-making power did not intend such an absurd thing as that the power of the State to tax should depend on its doing an act which it obliged itself not to do."

As the national banks will be taxed in the same manner and only to the same extent that the State banks organized since February, 1856, will be taxed, it follows that there is no discrimination against

them: therefore, the demurrer to the petition of the Third national will have to be sustained.

It would be more satisfactory to hold that all the plaintiffs are equally liable, or that none of them is subject to municipal taxation, but the law must be given as it is.

EMMET FIELD, *Judge.*

At a court held for the court aforesaid on the 24th day of July, 1894.

This cause having been heard and submitted, and the court being advised, it is considered by the court that the petition herein does not set forth a cause of action, and the demurrer to the said petition is sustained; and the plaintiff declining to plead further it is adjudged that the petition of the plaintiff be and the same is hereby dismissed; and it is adjudged that the defendants recover of the plaintiff their costs herein expended; for which they may
27 have execution; to all of which the plaintiff excepts and prays an appeal to the court of appeals of Kentucky, which is granted.

STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing 18 pages, this included, contain a full, true and complete transcript of the record and proceedings had in the case wherein Louisville Banking Company is plaintiff, and R. H. Thompson, judge of the police court of the city of Louisville, is defendant, No. 4340, as the same appears of record and on file in my said office.

Witness my hand this 17th day of August, 1894.

JOHN S. CAIN,
Clerk of Jefferson Circuit Court.

Upon which transcript was endorsed the following statement:

LOUISVILLE BANKING COMPANY, Appellant, *vs.* THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.	Appeal from the Jefferson Circuit Court, Common Pleas Division.

The judgment appealed from was rendered July 24, 1894, and is on page 18 of the Record. Appeal granted below. Helm & Bruce, Humphrey & Davie, for appellant. Henry S. Barker for appellees.

At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 9th day of October, A. D. 1894, the following order was made:

LOUISVILLE BANKING COMPANY, Appellant,
vs.
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees. } Jefferson.

Ordered that this case be continued for oral argument.

Afterwards at a court of appeals held as aforesaid, on March 5, A. D. 1895, the following order was entered:

LOUISVILLE BANKING COMPANY, Appellant,
vs.
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees. } Jefferson.

By agreement of all the parties and on their motion, it is ordered that these seventeen cases be heard together, and said causes coming on to be heard were argued by A. P. Humphrey for the
28 banks and Ira Julian for the Commonwealth, counties and cities and laid over until toworrow for further hearing.

Afterwards, on the 6th day of March, A. D. 1895, the following order was entered herein:

These causes coming on to be heard were argued by D. W. Lindsay for the banks, W. McD. Shaw and Hugh Rodman for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, on March 7, 1895:

These causes again coming on to be heard were argued by Wm. Goebel for the banks and H. C. Barker for the cities and counties and laid over for further hearing on tomorrow:

Afterwards, on March 8, 1895:

These causes again coming on to be heard were argued by John W. Rodman and T. L. Edelen for the banks and laid over for further hearing on tomorrow.

Afterwards, March 9, 1895:

These causes again coming on to be heard were argued by James P. Helm for the banks and laid over for further hearing on next Tuesday.

Afterwards, on March 12, 1895, the following order was entered herein:

These causes again coming on to be heard were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards at a court of appeals held as aforesaid on the 1st day of June, A. D. 1895, the following judgment was entered:

LOUISVILLE BANKING COMPANY, Appellant, *vs.* THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.	Appeal from the Jefferson Circuit Court, Common Pleas Division.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appellants recover of the appellees their costs herein expended.

Judges Lewis, Paynter and Guffy dissenting.

At the same time, to wit, on June 1, 1895, the court, through Chief Justice Pryor, delivered the following opinion:

COMMONWEALTH, for Use, &c., *vs.* FARMERS' BANK OF KENTUCKY.	Franklin.
FARMERS' BANK OF KY. *vs.* BOARD OF COUNCILMEN OF CITY OF FRANKFORT.	Franklin.
FARMERS' BANK OF KY. *vs.* COUNTY OF FRANKLIN, &c.	Franklin.
BANK OF KY. *vs.* ARMSTRONG, Sheriff, &c.	Franklin.
29 PRESIDENT, DIRECTORS, AND COMPANY OF THE Bank of Ky. *vs.* BOARD OF COUNCILMEN OF CITY OF FRANKFORT, &c.	Franklin.
COMMONWEALTH, for Use, &c., *vs.* BANK OF KY.	Franklin.
SAME *vs.* DEPOSIT BANK OF FRANKFORT.	Franklin.
DEPOSIT BANK OF FRANKFORT *vs.* FRANKLIN COUNTY, &c.	Franklin.
COMMONWEALTH, for Use, &c., *vs.* FRANKFORT NATIONAL BANK.	Franklin.

SAME *vs.* STATE NATIONAL BANK.	Franklin.
THIRD NATIONAL BANK *vs.* CITY OF LOUISVILLE, &C.	Jefferson C. P. Div.
LOUISVILLE BANKING CO. *vs.* SAME.	Jefferson C. P. Division.
CITY OF LOUISVILLE, &C., *vs.* PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK of Ky.	Jefferson C. P. Div.
PRESIDENT, DIRECTORS, AND COMPANY OF THE NORTHern Bank of Ky. *vs.* BOURBON COUNTY.	Bourbon.
CITY OF COVINGTON *vs.* FIRST NATIONAL BANK OF COVINGTON.	Campbell.
SAME *vs.* GERMAN NATIONAL BANK OF COVINGTON.	Campbell.
FARMERS' BANK OF KY. *vs.* HENDERSON.	Henderson

(Filed June 1, 1895.)

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the following 58 pages (being numbered 1 to 57 inclusive, with an interpolated number, viz: "page 1 continued") contain a true, full, and complete transcript of the record and proceedings had in said court in the case of Louisville Banking Company, appellant, against The City of Louisville, R. H. Thompson, judge of the police court of the city of Louisville, appellees, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 10th day of April, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

[SEAL.]

My fee for this transcript, $24.25.

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STATE OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court, Common Pleas Division.

LOUISVILLE BANKING COMPANY, Plaintiff, }
versus }
R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Defendant. } No. 4340. Order.

At a court held on the 13th day of April, 1897:

This day came the plaintiff, The Louisville Banking Company, and filed the opinion and mandate of the court of appeals herein, the mandatory part of which is as follows: "It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion." And thereupon, in pursuance of said opinion and mandate, the judgment heretofore entered herein is set aside and held for naught.

It is now adjudged by the court that the plaintiff's petition sets forth a good cause of action and the defendant's demurrer to the said petition is overruled, and the defendant declined to plead further herein, and thereupon the plaintiff moved for judgment; and it is considered that the prayer of the plaintiff's petition be
31 granted, and that the defendant, R. H. Thompson, judge of the police court of the city of Louisville, be, and he is hereby

prohibited from proceeding further with the warrant against the plaintiff, Louisville Banking Company, mentioned in the petition, in the police court in the city of Louisville, or making any further order therein; and it is further considered and adjudged that the plaintiff recover of the defendant its costs herein expended, and may have execution therefor, and the parties are hence dismissed.

STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing is a full, true and complete copy of the order entered April 13, 1897, in the case wherein Louisville Banking Company is plaintiff and R. H. Thompson, judge of the police court of the city of Louisville is defendant, No. 4340, as the same appears of record and on file in my said office.

Witness my hand and seal as clerk of said court, this 16th day of April, 1897.

JOHN S. CAIN,
[SEAL.] *Clerk Jefferson Circuit Court.*

The President of the United States of America to Samuel H. Stone, auditor public accounts Commonwealth of Kentucky; Charles Finley, secretary of state Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by Louisville Banking Company, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:

[SEAL.] THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office, on or before the 7th day of June next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk.*

Endorsed on the back of said subpœna is the following return:

Executed April 24th, 1897, on the City of Louisville by deliver-

ing a copy of within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Fees $2.00.

32 Executed May 4th, 1897, on Chas. Finley, secretary of state; May 14th on Geo. W. Long, treasurer; May 15th on Samuel H. Stone, auditor of public accounts, by delivering a copy of within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By P. D. TUCKER, *D. M.*

Fees $6.00.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
No. 6561. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Banking Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer, states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, } sct:
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

33 Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant, } No. 6561. Stipulation.
versus
SAMUEL H. STONE, &c., Defendants. }

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time, without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant, } No. 6561.
versus
SAMUEL H. STONE, &c., Defendants. } In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Banking Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering—

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not ex-

pired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of
34 its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted

may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2), of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its
35 power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12), of said act of May 17, 1886.

This defendant denies that said act of May 17, 1887, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom, or amend or repeal the same, as provided for in section six (6), article two (2), of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $10,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class,"

approved July 1, 1893, or in pursuance thereof, although it was claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license
36 tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville, and said alleged

agreement or contract set forth in said copy marked "A," is
37 not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be ' emed a waiver by them of any of their claimed rights, or that same was done to prevent confusion from coming into the n nagement of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

38 This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last

longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied
39 with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay

their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purpose of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States,
40 that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court

of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court, proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt respectively to enforce, as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been, or to be illegally, made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes; and this defendant denies that the said auditor has threatened to
41 so certify said assessment, or will, unless restrained, certify said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened, or will be made, or that any such certification thereof has been, or is, threatened, or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897,

in the case of The Deposit Bank of Owensboro *vs.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *vs.* Deposit Bank of Frankfort, Same *vs.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institutions in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

42 This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit, sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a

rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896 and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

43 STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

Circuit Court of the United States for the Sixth Circuit, District of Kentucky, Louisville, Ky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF LOUISVILLE, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

WESTERN BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
SAM'L H. STONE, Defendant.

UNION NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, Defendant.

LOUISVILLE CITY NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

BANK OF COMMERCE, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

AMERICAN NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

44 FARMERS' AND DROVERS' BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

THIRD NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

FIRST NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

CITIZENS' NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

GERMAN SECURITY BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

FIDELITY TRUST AND SAFETY COMPANY, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant.

This day came the complainants in each of the above-entitled causes and filed herein notice of motion to be entered herein this day. And thereupon came the complainants, The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all of the other causes, by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants Samuel H. Stone, Geo. W. Long and Chas. Finley, composing the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchises of the complainants under the act of November 11, 1892, until the further order of the court herein; and enjoining and restraining the other defendants herein, to wit: The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time, the City of Louisville appearing herein by H. L. Stone, city attorney, and the County of Franklin appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort appearing herein by Ira Julian, objected to the said motion, and the same was argued and submitted, and the court not being advised takes time.

45 And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without waiving the effect of the said demurrers, filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bills of complaint. And the said cause having been argued by counsel upon the said general and special demurrers as well as upon the demurrers of the City of Louisville, was submitted, and the court not being advised takes time.

WM. H. TAFT,
Circuit Judge.

May 28, 1897.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING CO., Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6561.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Louisville Banking Co., complainant:

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained, to be true in such manner and form as the same *is* therein set forth and alleged, demur to said bill and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore and for divers other good causes of demurrer appearing in the said bill these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

46 I hereby certify as counsel for the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that, in my opinion, the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

47 And at another term of our said court held for its February term, 1898, continued and held, to wit, on May 9th, 1898—

LOUISVILLE BANKING COMPANY
vs.
SAMUEL H. STONE.

Came this day the complainant in the above-styled case, wherein Samuel H. Stone is defendant, and filed herein an amended and supplemental bill of complaint, and complainant also filed herein notice duly served of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motion, and also came the City of Louisville and objected to the filing of said supplemental bill of complaint and said motion and filed herein

affidavits to be read in this case, and also came the City of Frankfort and Franklin County and objected to the motion made in this case, to which these defendants are parties, and, the court being advised, it is now ordered, adjudged, and decreed that the said several defendants in the above-styled case are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898 or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against the complainant on account of the assessments heretofore made and certified for the years 1893 and 1894, or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years. This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions.

To all of which defendants excepted.

48 The amended bill above referred to is as follows:

United States Circuit Court, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill.

The Louisville Banking Company, complainant herein, by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this court of the motion for an injunction the defendants Samuel H. Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now threatening to assess and will as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify and assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city
49 of Louisville, and said city will attempt, by distraint and otherwise, to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator or attempting to collect any tax from your orator for the year 1898

or any other year until the final order and determination of this court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

Theodore Harris says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

THEODORE HARRIS.

Subscribed and sworn to before me by Theodore Harris this May 6th, 1898—

HUSTON QUIN,
N. P. J. C., Ky.

Commission expires with the next Kentucky legislature.

50 And on another day of our said court, to wit, June 4th, 1898—

It is ordered by the court that the preliminary injunction heretofore granted in the foregoing cause be, and the same is hereby, continued until 25th day of June, 1898.

51 And on another day of our said court, to wit, Saturday, June 25th, 1898—

The court, being advised, filed its opinion herein.

It is therefore adjudged, ordered, and decreed as follows:

First. The demurrer of the defendant City of Louisville to the bill of complaint is hereby overruled; to which said City of Louisville excepts.

Second. The demurrer of the defendant Samuel H. Stone, George W. Long, and Charles Finley to the bill of complaint is overruled; to which the defendants severally except.

Third. And thereupon the complainant, by Helm & Bruce, counsel, filed herein its replication to the answer of the city of Louisville.

And by consent this cause came on to be heard for final decree. The complainant read upon the hearing its bill of complaint and the exhibits filed therewith, viz:

1. The exhibit, being the record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville.

2. The exhibit, being the order entered upon the mandate from the court of appeals in said case of Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville.

3. Exhibit, being the certificate of John H. Leathers, cashier and secretary of the board of directors and stockholders of said complainant, in accepting the provisions of the revenue act of May 17, 1886, commonly known as the Hewitt bill.

The defendant City of Louisville read on the hearing its
52 answer and the stipulation between the complainant and said defendant filed herein June 25, 1898, together with the ordinances and special statutes therein mentioned and referred to.

It is now adjudged, ordered, and decreed that the defendants Samuel H. Stone, George W. Long, and Charles Finley be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, and 1898, with which latter year the corporate existence of the complainant terminates, and are enjoined and restrained from certifying such value to the county clerk of Jefferson county or to any officer of the city of Louisville; and the defendant City of Louisville is enjoined and restrained from endeavoring to collect any tax upon any such valuation, sand the complainant, by making payments in accordance with said act of the 17th of May, 1886, known as the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

It is further adjudged, ordered, and decreed, by reason of the plea of *res judicata* relied on by complainant in its bill and as shown by the exhibits therewith, — has an established contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be
53 assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article II of the said act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendants its costs in this action expended.

And now came defendants and prayed an appeal in open court and tendered their assignment of errors, whereupon the court allows the appeal and orders the assignment of errors to be filed and fixes the appeal bond herein at $1,000.

The replication above referred to is as follows:

54 Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
S. H. STONE, &c., Defendants. } Replication.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

54½ The opinion above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING CO.
vs.
SAMUEL H. STONE, ETC. } No. 6561.

LOUISVILLE BANKING CO.
vs.
CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases present substantially the same questions as those already passed upon in the case of the Bank of Kentucky against the same defendants. The complainant company was a corporation organized after the act of 1856, but before the Hewitt act. It duly accepted the provisions of the Hewitt act. After the passage of the revenue act of November, 1892, and the adoption of the ordinance by the city of Louisville imposing a license upon the gross receipts of banks doing business within its limits, a warrant was sued out by the city of Louisville in its police court against the Louisville Banking Company for a failure to pay the license. This bank filed a petition for a writ of prohibition in the circuit court of Jefferson county against R. H. Thompson, the police judge, averring that the ordinance of the city of Louisville was void as impairing an obli-

gation of the complainant's contract with the State under the Hewitt act, and that any authority given to the city of Louisville to pass such ordinance by the revenue act of November, 1892, was likewise void as impairing the obligation of the contract. The petition prayed that the police judge might be prohibited from taking jurisdiction of the proceeding against complainant for a violation of the ordinance. Issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville.

The City of Louisville, though not a party in name,
54½ was, in reality, the party defendant, and appeared by counsel. Indeed, the proceedings were taken for the purpose of testing the validity of the license ordinance by agreement between the city attorney and the complainant bank. The Jefferson circuit court found the issues in favor of the defendant and entered a decree dismissing the petition. Thereupon the complainant banking company caused an appeal to be taken in its name from the judgment of the Jefferson circuit court to the court of appeals, and to that appeal it made the City of Louisville and R. H. Thompson, the police judge, parties. In the court of appeals the cause was argued by the counsel for the city of Louisville. The court of appeals reversed the judgment of the Jefferson county circuit court, and in its opinion held that the ordinance of the city of Louisville was void, for the reason that the Louisville Banking Company had an irrevocable contract with the Commonwealth upon its due acceptance of the terms of the Hewitt act, limiting the amount of taxes to which it was subject to those imposed by that act during its corporate existence.

For the reasons already stated in the case of the Bank of Kentucky against the same defendants, we think it conclusively established, as between the parties by a former adjudication, that the complainant had an irrevocable contract under the Hewitt act with the Commonwealth of Kentucky, by which no greater taxes than therein provided could be imposed upon it by the Commonwealth or under its authority.

For the reasons stated in the same opinion, we think the complainant entitled to equitable relief to prevent a violation of that contract by the taxes assessed under the revenue act of 1892. An order for a preliminary injunction, therefore, must issue in these cases, and the demurrers to the bills must be overruled.

55 And on 25th day of June, 1898, came parties by counsel and filed the following agreement herein:

In the United States Circuit Court for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
S. H. STONE, &c., Defendants. } # 6561. Stipulation.

It is stipulated and agreed between the complainant and the defendant City of Louisville that the following ordinances of the

said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 219–222).

2. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

3. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance referred to in complainant's bill requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

4. An ordinance entitled "An ordinance providing for the retrospective assessments of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

5. An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

56 6. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

7. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

II. It is further stipulated and agreed between the complainant and the defendant City of Louisville that the complainant, Louisville Banking Company, did not pay any sum for license for the year 1894 under the said license ordi-ance approved January 29, 1894, but loaned to the commissioners of the sinking fund of the city of Louisville $5,938.78, for which said commissioners executed their note to complainant February 26, 1894, bearing interest at the rate of four per cent. (4 %) per annum, which note said commissioners paid in full to complainant February 21, 1896, with $475.12, accrued interest thereon, and said complainant paid to said commissioners of the sinking fund for license for 1895 under said ordinance the sum of $4,223.62, February 8, 1895.

III. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated and organized and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinances and special statutes are

57 made part of the record, as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

IV. It is further stipulated and agreed that during the time the complainant's action against R. H. Thompson, judge, mentioned in complainant's bill, was pending in the Jefferson circuit court and in the court of appeals of Kentucky on appeal, Hon. Henry S. Barker, who appeared as counsel for the defendant in said action, was the employed attorney of the commissioners of the sinking fund of the city of Louisville on an annual salary, as well as the city attorney of said city.

V. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

HELM & BRUCE,
Solicitors for Complainant, Louisville Banking Company.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

58 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
versus
S. H. STONE, &c., Defendants. } # 6561.

Petition and Assignment of Errors of the Board of Valuation and Assessment.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now come the petitioners and defendants, Samuel H. Stone, auditor, George W. Long, treasurer, and Charles Finley, secretary of state, composing the board of valuation and assessment, and state that the record, proceedings, and decree of the court rendered herein June 25, 1898, contain manifest errors to their prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of their demurrer to complainant's bill and in entertaining jurisdiction of this action and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against these defendants.

II.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Louisville Banking Company, against R. H. Thompson, judge of

the police court of Louisville, in the Jefferson circuit court,
59 common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by these defendants, constituting the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against these defendants, as members of said State board, enjoining and restraining them from valuing and assessing the franchise or intangible property of complainant and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897, and 1898 and during the corporate existence of the complainant, as required of these defendants, composing said State board, by said act of November 11, 1892, and in decreeing that the latter act and the State constitution or either of them impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore these petitioners and defendants say the said decree of the court herein is erroneous, and pray this honorable court to grant them an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so they will ever pray.

W. S. TAYLOR,
Attorney General, Solicitor for Defendants Stone, Long, and Finley, Composing the Board of Valuation and Assessment.

60 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
versus
S. H. STONE, &c., Defendants.

6561. Petition and Assignment of Errors of the City of Louisville.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant City of Louisville and states that the record, proceedings, and decree of the court rendered herein June 25, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I. The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action and in not decreeing a dismissal of complainant's bill because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II. The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Louisville Banking Company, against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited
61 in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first *calss*, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by its codefendants, constituting the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant members of said State board, enjoining and restraining them from valuing and assessing the franchise or intangible property of complainant and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897, and 1898 and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act or the State constitution or either of them impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may
61½ be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

62 Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING COMPANY
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, Samuel H. Stone, Charles Finley, G. W. Long, & City of Louisville & Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Louisville Banking Company in the sum of one thousand dollars, to be paid to the said Louisville Banking Company, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1898.

Whereas the above-named Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville shall prosecute their appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND, [L. S.]
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

63 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
versus
S. H. STONE, &c., Defendants. } # 6561.

Agreement for Record on Appeal to Supreme Court.

In order to prevent unnecessary expense and the making of the record larger than is useful, the complainant and defendants have agreed as follows:

In copying the record in this case on appeal to the Supreme Court of the United States, the clerk may omit (1) the opinion and dissenting opinion in the bank tax cases, decided June 1, 1895,

beginning with the words "Opinion of the court by Chief Justice Pryor," page 31, and ending with the words "In this view I cannot concur," page 59, of printed record in this court (see said Opinions, 97 Ky., 590); (2) the clerk need not copy the special acts relating to the sinking fund commissioners of the city of Louisville nor the ordinances recited in the stipulation filed herein, but counsel may print such parts of said acts and ordinances as seem to them relevant in an appendix to their brief, and (3) the issue and service of citation on the appeal is hereby waived.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

64 DISTRICT OF KENTUCKY, *ss:*

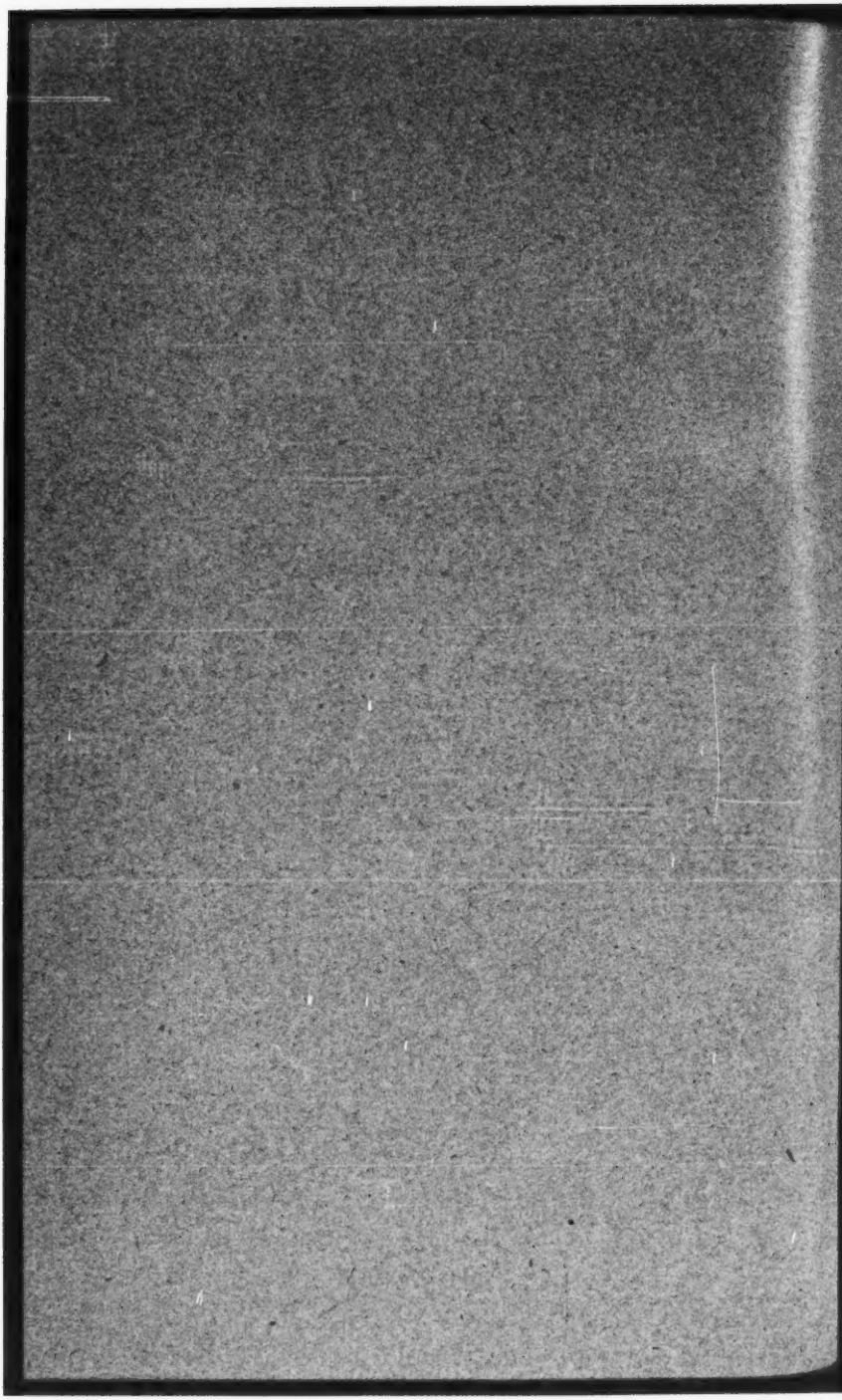
I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 63 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,945. Kentucky C. C. U. S. Term No., 360. Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the Commonwealth of Kentucky, and City of Louisville, appellants, *vs.* The Louisville Banking Company. Filed August 15th, 1898.



(16,946.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 361.

CITY OF LOUISVILLE, APPELLANT,

vs.

THE LOUISVILLE BANKING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on February 21, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

LOUISVILLE BANKING COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } # 6562.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, Louisville Banking Company, by its counsel, Helm & Bruce, and filed in the clerk's office of our said court *their* bill of complaint and exhibits against the above-named defendant, which bill of complaint is in words and figures as follows, to wit:

2 To the judges of the c rcuit court of the United States for the sixth circuit and district of Kentucky:

Louisville Banking Company a citizen and resident of the State of Kentucky brings this bill against the city of Louisville, a municipal corporation of the State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled, "An act to incorporate the Louisville Insurance & Banking Company," approved on the 24 day of January, 1867; and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract and to be contracted with, to sue and be sued, and generally to do such banking business as is usually granted to such corporations. The amendments to the charter of your orator were adopted March 11, 1867; March 21, 1870, & March 20, 1872. By this last amendment the corporate name was changed from "Louisville Insurance & Banking Company" to "Louisville Banking Company." Other amendments were adopted Mar. 1, 1876; Feb'y 4, 1880; April 22, 1884, and April 21, 1882.

Your orator says it is, and has been since its organization, engaged in the banking business in the city of Louisville, Ky.

Your orator respectfully shows that one, Samuel H. Stone, is now the auditor of public accounts for the Commonwealth of Kentucky, having been duly elected and qualified according to law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the

secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents
3 on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General As-

sembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate autl ority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its

shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

4 Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that it does not and never did own the building in which it does or ever did business.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11,

1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $10,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the

city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the

records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

6 This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was *was* plainly expressed, brought suit in which it represented itself as the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the

State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

7 2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies,

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville, is filed in this court with the bill of said bank against Sam'l H. Stone & others, & is now referred to and made a part of this bill.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of No-

vember, 1892, it is provided in substance that every incorporated bank and trust company shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state was by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, pen-
8 alties and interest after becoming delinquent, shall be deemed

guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect and is threatening to collect from your orator has not been assessed by the city of Louisville, but the assessment has been made by the auditor, secretary of state and treasurer of the State under the pretended authority of the act of November 11, 1872, heretofore referred to.

Your orator respectfully shows to the court that the taxes which the defendant, The City of Louisville, is threatening to collect is upon the assessments for the years 1893 and 1894. The amount of the pretended assessment made by the said State board of valuation and assessment against your orator upon its franchise for the year 1893 is $1,266,463.01, and for the year 1894 is $884,480.11. Your orator further shows that for the year 1893 the tax rate of the city of Louisville was $2.17, and for the year 1894 it was $1.88, so that the total amount involved in this controversy is $44,110, which exceeds the amount of taxes which your orator would have to pay under the "Hewitt bill" in the sum of $35,000.

Your orator further shows that the auditor of the State acting under the authority of said void law certified the assessment against your orator's franchise for the years aforesaid to the clerk of the county court of Jefferson county; and the said clerk has certified said assessment to the tax collector of the city of Louisville, and your orator further respectfully shows that the said city of Louisville will by its officers, unless restrained by this honorable court, proceed by distraint and otherwise to collect said illegal tax upon said illegal assessment when it has no lawful right to do so, and the claim of the defendant, The City of Louisville, that it has the right to collect said taxes against your orator, casts a cloud upon your orator's right to pay taxes under and in accordance with its contract and your orator will furthermore be subjected to much harassment and litigation, and unnecessary costs; and your orator and its stockholders will be greatly and irreparably injured by the false claims of the defendant, The City of Louisville, and its attempts by distraint and by a suit to collect said taxes.

To the end therefore that your orator may not be subjected to

the false claims and suits which will be instituted by the City of Louisville, and that it may be spared the irreparable injury which it will suffer by attempts to collect said taxes by distraint and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendant, The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said City of Louisville, its officers and agents to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to it as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

9 Theodore Harris says he is president of complainant, and that the statements contained in the foregoing bill are true.

THEODORE HARRIS.

Subscribed and sworn to before me by Theodore Harris this 17 day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

A copy;
Attest: THOS. SPEED, *Clerk.*

10 Exhibit "A" referred to is as follows:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions,

were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not
11 to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will
12 not prosecute them or any of them for doing business without license.

A true copy.

Attest: J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the bank-, trust, and title companies of the city of Louisville.

It is agrees between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S.

Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being un-
13 derstood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as pro-
vided in the Hewitt bill.

14 Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named in the minutes of the sinking fund commission-

ers of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to The City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by Louisville Banking Company, which
15 you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:
[SEAL.]

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

And the marshal made the following return thereon:
Executed April 24th, 1897, on the City of Louisville by deliver-

ing a copy of the within spa. in chancery to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

And on May 27th, 1897, came the parties, by counsel, and filed stipulation herein.

Said stipulation is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING CO., Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6562. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

16 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} In Equity. No. 6562.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Banking Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, *and* in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.
My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

And on May 27th, 1897, came the defendant and filed its answer herein, which is as follows:

17 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } In Equity. No. 6562.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Banking Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks,

or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

18 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for

taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12) of said act of May 17, 1886.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $10,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
19 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of

Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void and of no binding

force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

20 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that, the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract,

or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

21 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so, or that the alleged claim of this defendant, that it has the right to collect said taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making, any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or
22 national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted

subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the com-

plainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant, City of Louisville.

23 STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

24 And on May 28th, 1897, came the complainant in the above-entitled cause and filed herein notice, duly served on the defendant, and moved the court to grant it an injunction until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in the said bill of complaint.

And came the City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same coming on to be heard, was submitted, and the court, not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the City of Louisville, and the same were argued by counsel and submitted to the court, and the court, not being advised, takes time.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until the 25th day of June, 1898.

And on June 25th, 1898, came *came* the complainant, by Helm and Bruce, its counsel; came also the defendant, The City of Louisville, by Henry L. Stone, its counsel. The said parties, by their said counsel, filed a stipulation herein. The court, being advised, filed its opinion herein. It is therefore adjudged, ordered, and decreed as follows:

25 First. The demurrer of the defendant, City of Louisville, to the bill of complaint is hereby overruled; to which the City of Louisville excepts.

Second. And thereupon came the complainant, by Helm & Bruce, counsel, and filed herein its replication to the answer of the

City of Louisville, and, by consent, this cause came on to be heard for final decree. The complainant read upon the hearing its bill of complaint and the following exhibits, which are on file in the case pending in this court styled Louisville Banking Company *vs.* Samuel H. Stone and others, viz:

1. The exhibit, being the record of the proceedings in the case of Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville.

2. The order of the Jefferson circuit court, common pleas division, upon the mandate of the court of appeals.

3. The certificate of John H. Leathers, cashier and secretary of the board of directors of the complainant, of the proceedings taken by the board of directors and the stockholders of the complainant in accepting the provisions of the act of May 17, 1886, known as the Hewitt bill.

The defendant, City of Louisville, read its answer and the stipulation between complainant and defendant filed herein June 25, 1898, together with the ordinances and special statutes therein mentioned and referred to, and it is now adjudged, ordered, and decreed that the said defendant, City of Louisville, is perpetually enjoined and restrained from proceeding to collect from the complainant the taxes mentioned in the bill of complaint for the years 1893 and 1894.

26 It is further adjudged, ordered, and decreed by reason of the plea of *res judicata* relied on by complainant in its bill, and as shown by the exhibits therewith, — has an established contract with the Commonwealth of Kentucky under the provisions of article 2, of the act of the General Assembly of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article II of the said act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendants its costs in this action expended.

And now comes defendant and prayed an appeal in open court

and tendered its assignment of errors'; whereupon the court allows the appeal and orders the assignment of errors to be filed and fixes the appeal bond herein at $1,000.00.

26½ Opinion above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING COMPANY
vs.
CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

This case presents the same questions as are presented in the case of the *Louisville Banking Co. v. Samuel H. Stone, etc.*, already disposed of, but involves the taxes for 1893 and 1894. The taxes for 1895, 1896, 1897 and 1898 were involved in the prior case.

The order will be that the preliminary injunction prayed for shall issue, and that the demurrers to the bills be overruled.

27 Stipulation above referred to is as follows:

In the United States Circuit Court for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } # 6562. Stipulation.

It is stipulated and agreed between the complainant and the defendant, City of Louisville, that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893. (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 219–222.)

2. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

3. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance referred to in complainant's bill requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

4. An ordinance entitled "An ordinance providing for the retrospective assessments of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

28 5. An ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

6. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, pp. 252–256).

7. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib*, pp. 28, 29).

II. It is further stipulated and agreed between the complainant and the defendant, City of Louisville, that the complainant, Louisville Banking Company, did not pay any sum for license for the year 1894, under the said license ordinance, approved January 29, 1894, but loaned the commissioners of the sinking fund of the city of Louisville $5,938.78 for which said commissioners executed their note to complainant February 26, 1894, bearing interest at the rate of four per cent. (4 %) per annum, which note said commissioners paid in full to complainant February 21, 1896, with $475.12 accrued interest thereon, and said complainant paid to said commissioners of the sinking fund for license for 1895, under said ordinance, the sum of $4,223.62 February 8, 1895.

III. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated
29 and *r*organized, and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinances and special statutes are made part *-d* the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

IV. It is further stipulated and agreed that during the time the complainant's action against R. H. Thompson, judge, mentioned in complainant's bill, was pending in the Jefferson circuit court and in the court of appeals of Kentucky on appeal, Hon. Henry S. Barker, who appeared as counsel for the defendant in said action, was the employed attorney of the commissioners of the sinking fund of the city of Louisville on an annual salary, as well as the city attorney of said city.

V. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act on May 17, 1886, was required by statute at the latter date to be and was in fact on Friday, December 30, 1887.

HELM & BRUCE,
Solicitors for Complainant, Louisville Banking Company.
HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

The replication above referred to is as follows:

30 Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

Replication.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

31 And on the 25th day of June, 1898, came the parties and filed agreements herein.

Agreements above referred to *is* as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
No. 6562. Agreement.

It is agreed between the complainant and defendant that in copying the record for the Supreme Court of the United States the clerk need not copy the special statutes relating to the commissioners of the sinking fund of the city of Louisville nor the ordinances recited and referred to in the stipulation filed herein and read in evidence by the defendant on the final hearing of this cause, but that counsel for the appellant, City of Louisville, may print such parts of said acts and ordinances as may seem to him relevant in an appendix to his brief, to have the same effect as if copied into the record on the appeal.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

32 In the Circuit Court of the United States for the Sixth Circuit District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } #6562. Agreement.

The defendant, City of Louisville, having taken an appeal in this case to the Supreme Court of the United States, this agreement is now made to avoid cost of copying and printing unnecessary parts of the record. It is therefore agreed as follows:

1. The clerk, in making up the record, need not copy any paper in this record which he has already copied in the record of the case of the same complainant *vs.* Samuel H. Stone, &c.

2. The two cases presenting questions so similar, it is agreed that either party may refer in this case to the record in the other case to the same effect as if such record was a part of this case.

3. The issue and service of a citation in this case upon appeal is hereby waived.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant.

33 The petition for appeal and assignment of errors above referred to are as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE BANKING COMPANY, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } #6562.

Petition and Assignment of Errors of the City of Louisville.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant, City of Louisville, and states that the record, proceedings, and decree of the court rendered herein June 25, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Louisville Banking Company, against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court,
34 common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, — of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant, City of Louisville, to ad valorem taxes on the assessments of complainant's franchise or intangible property, made for the years 1893 and 1894 by the board of valuation and assessment of the State of Kentucky under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant, City of Louisville, enjoining and restraining it from collecting its taxes on assessments of the franchise or intangible property of complainant, and from taking any steps to collect its said taxes for said years and during the corporate existence of the complainant, as provided by said act of November 11, 1892, and in decreeing that the latter act impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

35 Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING COMPANY
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, the City of Louisville & Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Louisville Banking Company in the sum of one thousand dollars, to be paid to the said Louisville Banking Company, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally,

and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1898.

Whereas the above-named City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named City of Louisville shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND, [L. S.]
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

36 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 35 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appear from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,946. Kentucky C. C. U. S. Term No., 361. City of Louisville, appellant, *vs.* The Louisville Banking Company. Filed August 15th, 1898.

No. 510.

SAMUEL H. STONE, AUDITOR, CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, AND CITY OF LOUISVILLE, APPELLANTS,

vs.

THE BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 18, 1898.

(16,947.)

(16,947.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 362.

SAMUEL H. STONE, AUDITOR; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, AND CITY OF LOUISVILLE, APPELLANTS,

vs.

THE BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.

Be it remembered that heretofore, to wit, on the 17th day of April, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendants.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Bank of Commerce, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and the City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled "An act to incorporate the Western Financial Corporation," approved on the 10 day February, 1865; and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract, and to sue and be sued. Said amendments were adopted. March 2, 1865; Feb'y 15, 1869; Feb'y 27, 1882, and March 8, 1884. By this last act the name was changed from the Western Financial Corporation to the "Bank of Commerce."

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this: to wit, that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond

the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respect-
3 ive charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred

dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time al-

lowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth, and
4 from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate, upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time, reported to the auditor in the manner provided

by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described. Your orator shows that it did not until Feb'y, 1894, own the building in which it did business, and since that date it has regularly each year paid its taxes to the city of Louisville.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation

which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof, marked A.

6 The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself as the Bank of Louisville,

which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856, but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State *bank* from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits, though really against the city of Louisville, were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68, of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance

thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of the Louisville Banking Company *vs.* R. H. Thompson, Judge of — police court of the city of Louisville, is filed in this court with the bill of said bank against Sam'l H. Stone and others, and is now referred to and made a part of this bill.

7 Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes, imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state was by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of

business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the

proper authorities thereof, respectively, the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the City of Louisville claims the right to collect, and is threatening to collect from your orator has not been assessed by the said City of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities, respectively, as auditor, secretary and treasurer of the State.

Your orator says that this board thus constituted, will, unless, restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon
8 your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said legal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent., and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed and harassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost, and the taxes claimed by the City of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost.

Your orator respectively shows that the City of Louisville is insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessment, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H. Stone, auditor; Charles Finley, secretary; George W. Long, treasurer of the State of Kentucky, and The City of Louisville to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived) and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants including The City of Louisville and each of them be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the City of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

9 H. M. Burford says he is the president of complainant, and that the statements contained in the foregoing bill are true.

H. M. BURFORD.

Subscribed and sworn to before me by H. M. Burford this 17 day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

A copy.
Attest: THOS. SPEED, *Clerk.*

10 The exhibit above referred to is as follows:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing-house and stated that it was the purpose of said banks to resist

the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent *prejudice* the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four *per* centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893 and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest: J. M. TERRY,
Secretary & Treasurer.

12 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order *the* effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

13 A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies

falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions
14 named in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto atteched as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to Samuel H. Stone, auditor public accounts Commonwealth of Kentucky; Charles Finley, secretary of state Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you
15 in our said court, by Bank of Commerce, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17 day of April, A. D. 1897, and in the 121 year of our Independence.

Attest:
[SEAL.] THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendant- are to enter their appearance in the suit in the clerk's office, on or before the 7 day of June next, the

day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk*.

And the marshal returned the same with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Executed May 4th, 1897, on Chas. Finley, sec't'y of state; May 14th on Geo. W. Long, treasurer; May 15th on Samuel H. Stone, auditor of public accounts, by delivering a copy of the within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal.
R. D. TUCKER, *D. M.*

16 And on the 27th day of May, 1897, came the parties, by counsel, and filed stipulation herein.

Stipulation above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } # 6567. Stipulation.

It is stipulated and agreed that the defendant City of Louisville may file a demurrer to the complainant's bill and an answer at the same time, without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } # 6567. In Equity.

The Demurrer of The City of Louisville to the Bill of Complaint of Bank of Commerce, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained

to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer
17 states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore and for divers other good causes of demurrer appearing in the said bill this defendant does demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

18 Answer above referred — is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } No. 6567. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Commerce, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other

imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering—

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of sec-

tion eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2), of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12), of said act of May 17, 1886. This defendant denies that the complainant has regularly since February, 1894, paid its taxes to the city of Louisville.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, and no right to retire therefrom, or amend or repeal the same, provided for in section six (6), article two (2), of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to sub-

ject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling

within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes

against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending

August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States,

that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court, proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt respectively to enforce, as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been, or to be illegally, made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes; and this defendant denies that the said auditor has threatened to
23 so certify said assessment, or will, unless restrained, certify said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to

the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened or will be made, or that any such certification thereof has been, or is, threatened, or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the ex-

piration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896 and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

24 This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Greene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so

far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on the 28th day of May, 1897, the following order was entered:

This day came complainant in the above-entitled cause and filed herein notice of motion to be entered herein this day; and thereupon came the complainants, The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all the other causes, by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants, Samuel H. Stone, Geo. W. Long, and Chas. Finley, comprising the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchises of the complainants under the act of November 11th, 1892, until the further order of this court herein, and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time, the City of Louisville appearing herein by H. L. Stone, city attorney, and the County of Franklin appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort appearing herein by Ira Julian, objected to the said motion and the same was argued and submitted, and the court not being advised takes time.

And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without waiving the
26 effect of the said demurrer, filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bill of complaint; and the said cause having been *agreed* by counsel upon the said general and special demurrers as well as upon the demurrers of the City of Louisville, was submitted, and the court not being advised takes time.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } # 6567.

The demurrer of the defendants Samu*le* H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the State of Kentucky, to the bill of complaint of Bank of Commerce, complainant.

27 These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained, to be true in such manner and form as the same *is* therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore and for divers other good *cuases* of demurrer appearing in the said bill these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the bill, and pray to be hence dismissed with their costs and charges in their behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify as counsel for the defendants Samuel H. Stone' auditor; Charles Finley, secretary of state, and George W. Long' treasurer of the State of Kentucky, in the foregoing demurrer, that' in my opinion, the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on May 9th, 1898, the following order was entered:

28 Came this day the complainants in the above-styled cases, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant in the said case also filed herein notice duly served of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions, and also came the City of Louisville and objected to the filing of said supplemental bill of complaint and sa-d motions and filed herein affidavits to be read in each case, and also came the City of Frankfort and Franklin County and objected to the motions made in cases, to which these defendants are parties, and, the court being advised, it is now ordered, adjudged, and decreed that the said several defendants in

the above-styled cases are enjoined and restrained as follows: The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainants or any of them for the years 1895, 1896, 1897, and 1898 or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against any of the complainants on account of assessments heretofore made and certified for the years 1893 and 1894, or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions.

Said amended and supplemental bill above referred to is as follows:

29 United States Circuit Court, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill.

The Bank of Commerce, complainant herein, and by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this court of the motion for an injunction the defendants Samuel H. Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now threatening to assess and will as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt, by distraint and otherwise, to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

30 Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator or attempting to collect any tax from your orator for the year 1898 or any other year until the final order and determination of this

court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

H. M. Burford says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

H. M. BURFORD.

Subscribed and sworn to before me by H. M. Burford this May 6th, 1898.

HUSTON QUIN,
N. P. J. C., Ky.

Commission expires with next Kentucky legislature.

And on June 4th, 1898, the following order was entered:

31 It is ordered by the court that the preliminary injunction heretofore granted be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This cause coming on to be heard, the court delivered a written opinion herein, which is ordered to be filed, and it is now adjudged, ordered, and decreed as follows:

First. The demurrer of the City of Louisville to the bill of complaint be, and it is hereby, overruled; to which the City of Louisville excepts.

Second. That the demurrer of Samuel H. Stone, Charles Finley, and George W. Long to the bill of complaint be, and it is, overruled; to which the said Stone, Finley, and Long severally except.

Third. That until the further order of this court the defendants Samuel H. Stone, Charles Finley, and George W. Long are enjoined and restrained from making or certifying any assessment of the rights, properties, or franchises of the complainant under the act of the legislature of Kentucky approved November 11, 1892, and from certifying any such valuation to the city of Louisville or to the county clerk of Jefferson county.

And then came complainant and filed herein its general replication.

Said replication is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
S. H. STONE, &c., Defendants.

32 *Replication.*

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the mani-

fold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto, saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

Opinion above referred to is as follows:

33 Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6568.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE and Others and THE CITY OF LOUISville, Defendants. } No. 6567.

Before Harlan, circuit judge, and Taft and Lurton, circuit judges.

Heard on demurrer to the bill and motion for preliminary injunction.

The Bank of Commerce is a State bank of Kentucky, organized under a statute of that State, approved February 10, 1865. It is situated in Louisville, and when the Hewitt act was passed to amend the revenue laws of the Commonwealth of Kentucky, May 17, 1886, it duly accepted the terms of that act before the meeting of the next legislature of Kentucky. One of the grounds relied upon in the bill was that of *res judicata*. The averments of the bill upon this point were contained in paragraphs 4 and 5 of the bill, as follows:

"Paragraph 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator, and of every other bank and trust company in the city of Louisville, a tax equal to 4 per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville, in behalf of the city, against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and

with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon
34 the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which, by the agreement, was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

"First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the Hewitt bill. This sum, it was provided, should be an actual payment, and not be repaid under any circumstances, but its payment was not in any manner or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

"Second. In addition to making the above payments, the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum, which, added to said payment, would equal 4 per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations, agreeing to repay the same with interest at 4 per centum per annum; and, if it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

"Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to 4 per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

"Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such action as might be necessary to settle and adjudge the rights and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them, or any of them, for doing business without license.

"The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked 'A.'"

The Exhibit "A" referred to is as follows:

"SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement, whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with thedifferent banks, trust and title companies, who will be subject to the payment of the license fees, if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the Hewitt bill. This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This agreement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the

premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

36 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of said board and the mayor of the city of Louisville on one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphreys & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit: Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit: Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill, would fall in class B, named above.

Third. In pursuance of that agreement the sinking fund commissioners, caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectfully applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the exist-

ence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under
37 the Hewitt bill, that that should exempt all banks and companies falling with that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners, of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Louisville.

A true copy.
Attest:

HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN."

So much of the certified transcript of the judgment in the proceedings in prohibition as is of importance has been set forth in the report of the case of Louisville Banking Company against the same defendants.

TAFT, circuit judge, delivered the opinion of the court:

In the case of the *Bank of Kentucky v. Stone*, just decided, we have held that by the judgment of the court of appeals and of the Jefferson circuit court in the prohibition suits, the city of Louisville was estopped to deny as against the parties to that judgment, that they had an irrevocable contract of exemption from any greater burden of taxation than that imposed in the Hewitt act. The complainant in the case now before us was not a party to the record in either of the three prohibition suits, but it claims the benefit of the judgment therein as a privy to the parties. This privity is said to arise from an agreement between the city of Louisville on the one part and certain banks of Louisville, including the complainant, on the other by which it was stipulated that the controversies between

all the banks and the city should abide the event in test suits to be instituted by three banks selected to represent three classes.

Two questions are presented for our consideration:

First. Was the contract described in the bill and attached
38 to it as an exhibit, the contract of the city of Louisville?

Second. If so, did the contract bring the complainant into such relation to the prohibition judgment and the parties thereto that it may claim the benefit of the estoppel of that judgment?

First. The averment of the bill is that the contract set forth was signed by the president of the sinking fund and by the attorney for the city under the authority and direction of the mayor and board of sinking fund commissioners and by the counsel who represented the banks in said litigations. The bill further recites that the agreement was made between the city of Louisville and its sinking fund commissioners and the banks and trust companies including the complainant. Upon demurrer to the bill, these averments would doubtless be sufficient to show that the contract which was made was the contract of the city of Louisville. But the case is pending also upon the motion for a preliminary injunction; and upon that motion it is proper for us to consider the answer of the city of Louisville, which by stipulation, was permitted to be filed without the withdrawal of the demurrer. The answer contains this averment:

"This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked 'A,' was signed by the attorney for the city of Louisville, under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville and said alleged agreement or contract set forth in said copy marked 'A' is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled 'An act for the government of cities of the first class' approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute
39 the duties required and powers given by the act incorporating the same and the amendments thereto; but neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together had any

lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations or covenants or either of them, contained in said alleged agreement or contract at the time, in the manner or under the circumstances alleged in complainant's bill or otherwise."

Upon a motion for preliminary injunction, therefore, the issue is raised whether those who signed the contract on behalf of the city of Louisville were authorized to bind it thereto. We are of opinion that the city attorney was vested with ample authority to bind the city of Louisville to the contract mentioned in so far as it affected the complainant herein. By section 2909 of the Revised Statutes of Kentucky it is provided that "there shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

The foregoing section makes this officer the retained attorney of the city in every suit brought against it. The question at issue between the banks and the city of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the city attorney and the commissioners of the sinking fund whose duty it was to receive the money for the benefit of the city that they intended to resist the collection of the tax by litigation. It was the duty of the city attorney under the statute above set forth to take charge of the litigation thus about to be brought. It was his duty as the attorney of the city to save, so far as he could without prejudice to the city's interests, costs which might be accumulated should suits to the number of twenty be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of a stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation and was entirely under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the city attorney and the attorneys for the banks of this character would have been as clearly part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the city attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion

and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation and the authorities fully sustain this conclusion.

In *North Missouri R. R. Co. v. Stevens*, 36 Mo., 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that as the same facts arose in all the cases they would abide by the judgment that should be rendered in one of them and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement and that it was void. The court sustained the agreement as within the authority of the attorneys. It said:

"The arrangement in this case is not a compromise according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of the thing to be recovered; it comes nearer within the general management of the case."

In *Ohlquest v. Farwell & Co.*, 71 Iowa, 231, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client or waive any cause of action or de-
41 fense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial."

See also *Eidan v. Finnegan*, 48 Mo., 33; *Gilmore v. American Central Ins. Co.*, 67 Cal., 366.

In Thompson on Trials, 1st vol., section 195, the author says:

"Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys in virtue of their general retainers, to stipulate that only one shall be tried and that the others shall abide the result of that one."

We think therefore, that in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In *Patton v. Caldwell*, reported in 1st Dallas, 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties and therefore not admissible; upon which an agreement of all the underwriters to be bound by one verdict was proven.

McKean, chief justice, said:

"The defendant had no opportunity of cross-examining, upon the former trial; and the answer is, that he, with the rest of the
42 underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel.

Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement; yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire, that all such agreements may be entered on the records of the court."

The court then held that the verdict thus offered was not conclusive. As this latter proposition, however, is in conflict with the rule laid down by the Supreme Court of the United States in a recent case of *South Pacific R. R. Co. v. United States*, 168 U. S., 1, that part of the decision cannot be regarded as authority here.

In *Brown, Russell & Russell v. Sprague*, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

Mr. Freeman in his work on Judgments says, section 174:

"Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of per-

sons who being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. * * * The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action.
43 * * * Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party and for the protection of his own interests."

These principles are sustained by the cases cited by that learned author. See *Cole v. Favorite*, 69 Ills., 457; *Wood v. Ensel*, 63 Mo., 193; *Executors of Tate v. Hunter*, 3 Strobhart, 136–140; *Palmer v. Hayes*, 112 Ind., 289; *Gill v. United States*, 7 Court of Claims, 522, 526. See also Herman on Estoppel, section 139.

In Greenleaf on Evidence, vol. 1, section 523, the principle is stated as follows:

"But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim, under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with them in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him, shall produce a specified sum, he thereby connects himself in privity with the proceedings and the record of the judgment in that suit will be conclusive evidence against him."

In the case of *Rapelye & Purdy v. Prince & Prince*, 4 Hill, 119, Mr. Justice Bronson, speaking for the supreme court of New York, said:

"When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party."

In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits

which were conducted were openly conducted in the interest of all the parties to the agreement with the knowledge and by the consent of the city of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have
44 been so bound. Had the result gone the other way and a judgment been rendered in favor of the city of Louisville in the cases referred to, it cannot admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the sinking fund commissoners for the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city and a formal judgment was not taken. It is just that inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit. This conclusion necessarily leads to the result that the demurrer to the bill must be overruled and the motion for a preliminary injunction allowed.

And on the 14th day of July, 1898, the following order was entered:

This day came the defendant and filed exceptions to the depositions of H. S. Barker and John H. Leathers and the exhibits filed therewith and to the other documentary and record evidence offered; which exceptions were overruled by the court; to which ruling of the court defendant excepted.

The depositions of H. S. Barker and J. H. Leathers, above referred to, are as follows:

45 The deposition of H. S. Barker, taken by agreement on the 7th day of July, 1898, at the office of Messrs. Humphrey & Davie, situate in the Louisville Trust Co.'s building, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the complainant in an action between The Bank of Commerce, complainant, and S. H. Stone, &c., defendants, now pending in the circuit court of the United States for the district of Kentucky.

Appearances: For complainant, Messrs. Helm and Humphrey; for defendants, Col. H. L. Stone.

Said witness, having been first duly sworn, deposed as follows:

Direct examination by Mr. JAMES P. HELM:

1 question. State your name, age, residence, and occupation.

Answer. Henry S. Barker; Louisville, Kentucky; occupation, attorney-at-law.

2. Are you now engaged in the practice of law?

A. I am not actually engaged in the practice of law now, having been elected judge of the Jefferson circuit court, criminal division, in November, 1897, and qualified as judge the first Monday in January, 1898.

3. What was your occupation in 1893 and 1894?

A. I held the office of city attorney of Louisville, Kentucky, from December, 1887, to December, 1896, continuously, and during all of that time I was also attorney for the sinking fund of Louisville.

4. Were you counsel for the city of Louisville at the time
46 the controversy arose between the city of Louisville and the banks and trust companies of the city of Louisville?

A. Yes, sir.

5. Were you present at a conference which was held in the office of the sinking fund commissioners of the city of Louisville on February 13th, 1894, when there was a conference between Messrs. Barret, Leathers, and Swearingen, members of the clearing-house, and the mayor and certain officers of the sinking fund commissioners?

A. Yes, sir; and at all other conferences that were formal in regard to that matter. There may have been some informal talks concerning the matter in controversy, but in all formal matters where anything was to be done or to be finally agreed to I was a party to the conference.

6. I hand you now a certified copy of the minutes of that meeting, under date of February 13th, 1894, spread upon the records of the sinking fund commissioners, the copy being certified to by J. Moss Terry, secretary and treasurer of the sinking fund commissioners. Said paper is marked Exhibit "Copy." I notice from this copy of the minutes by Mr. Terry that he speaks of certain banks being selected to test the question between the city upon the one side and the banks and trust companies upon the other. Will you please, now, in your own way, just proceed to state how the parties

came to agree to select certain banks to test the question between the city and banks and trust companies?

A. The question that existed between the city of Louisville and the banks and trust companies of the city of Louisville at that time was an old one. Prior to the adoption of the present
47 constitution, under the law familiarly called the Hewitt bill, all of those financial corporations had a contract with the State of Kentucky by which they paid a larger sum into the State treasury than was exacted from other citizens upon similar property, and in consideration of that they were given immunity from all local taxation except upon the real estate in which they carried on their business. The present constitution of the State of Kentucky went into effect September 28th, 1891. By that instrument it was sought to place all property upon a level for the purpose of taxation, and it was claimed and believed by the authorities of the city of Louisville that the Hewitt bill, in so far as it affected the interests of the city of Louisville, had been repealed by the constitution; no legislation, however, was had in favor of the city of Louisville on that subject until the adoption of the present charter of the city of Louisville, which was approved July 1st, 1893, and the revenue bill which was adopted November 11, 1892. These two statutes, it was believed, consummated fully the repeal of the Hewitt bill so far as it exempted banks and other financial corporations from local taxation. Nothing, however, seems to have been done in regard to pushing the banks under the present charter until along in the late fall of 1893, and I presume that that occurred because of the fact that we were engaged in the mayoralty race, which took place in November, 1893. This is a mere opinion, as I have no positive recollection on the subject, but I do know that there were many conferences, formal and informal, mostly the latter, between myself and the counsel for the banks who had been retained, as I
48 well knew. I have said before this was an open question, about which there was no secret; the city authorities knew exactly what the banks claimed, and the banks and their attorneys knew exactly what the city authorities claimed. The matter in controversy between the banks and the city came to a head about November, 1893. About that time, in conference with the attorneys for the banks and trust companies, Messrs. Helm & Bruce and Humphrey & Davie, the litigation being in the immediate charge of Mr. Helm and Judge Humphrey, of these two firms. I knew, as I said before, that they were contending and had contended all the time that they had an inviolable contract under the Hewitt bill with the State of Kentucky exempting them from all local taxation. The city authorities having come to the conclusion that they had the right to tax the banks and other financial institutions of the city, chose to tax them by means of a license upon their gross receipts, and in January, 1894, the general council passed a license ordinance by which the banks and trust companies and title companies were required to pay a license tax upon their gross receipts. On the banks and trust companies the amount fixed was four per cent. of their gross earnings. As soon as this ordinance became a law,

under my direction the various license inspectors of the sinking fund notified each bank and trust company in his district that it would be required to pay the license at once or the ordinary proceedings would be taken against them to force them. This was what is called an ordinance warrant, by which the party is summoned before the police court of the city of Louisville, and if found delinquent on his license a fine is imposed, which is repeated as long as the delinquency continues.

49 This notice was the immediate cause of the conference between the attorney of the sinking fund and the commissioners of the sinking fund and the banks and their attorneys, which resulted in the agreement referred to in the resolution spread upon the minutes of the sinking fund, a certified copy of which has just been handed me by Mr. Helm. When this conference of February 13th, 1894, was held we were brought face to face with the fact that all the banks and trust companies claimed immunity; also that they were divisible into three classes. One class was those banks whose charters had been granted them prior to the act of 1856, with which the court is familiar; those State banks whose charters had been granted them subsequent to the act of 1856, and the national banks, and it was supposed by counsel that the trust companies went into the class of the State banks, whose charters had been granted subsequent to the act of 1856. The attorneys for the banks informed us that they proposed to resist the payment of any tax, license or ad valorem, and to stand upon and contend for their rights under the Hewitt bill; and, of course, unless some agreement was made for selecting and making the test cases, this would result in bringing a suit for each one of the corporations involved, there being from twenty-three to twenty-five, if I recollect correctly. It seemed to us that it would be useless to bring so many suits, entailing a very much larger cost upon the losing side and also entailing a good deal more labor upon the judges who had the matter to decide, and we therefore agreed to select one of each of the natural classes into which these financial institutions divided themselves in regard to their defenses and allow the final

50 judgment rendered in that case to go as to all of that class.

7. If this arrangement had not been made as indicated in the resolution, a copy of which you have referred to, were you given to understand that each one of these institutions would refuse to pay anything and bring its separate suit?

A. Undoubtedly, I was given so to understand, and that result would have been unavoidable, as I would have taken out an ordinance warrant against each one of them, which would have forced them into the police court, and they would have been bound to have defended as many suits as there were institutions delinquent. Now, to save all this, the agreement in regard to the classes was made.

8. Now, as a result of that agreement, will you please state what amount of money was paid into the sinking fund of the city of Louisville by the banks and trust companies?

A. In the year 1894 there was paid into the sinking fund of the

city of Louisville actually $69,191.17 under that agreement. In 1895 there was paid $71,604.11, not one dollar of which would the city ever have gotten but for this agreement.

9. Was the agreement made at the time the banks were selected to test the question between themselves and the city of Louisville ever reduced to writing? If so, will you please state whether the original paper, which I now hand you, is the paper which was executed between the parties?

A. The agreement was reduced to writing, and the paper handed to me by the counsel for the banks in this case is the original agreement as reduced to writing and signed by the parties. I
51 know all the signatures to this paper to be genuine. I file said paper herewith and make it part of my deposition, and mark it for identification Exhibit "A."

10. At the time you signed that paper as city attorney did you have any conference with the mayor? And, if so, you may state whether he concurred with you in the opinion that it was the proper thing to do.

Objected to as incompetent.

A. I had many conferences with the mayor and with the finance committee of the general council of the city of Louisville. This was a most important question to the city of Louisville, and it was the subject of many earnest conferences between the mayor of the city of Louisville and myself and various officers of the city of Louisville. We calculated roughly that these corporations would produce annually, in round numbers, one hundred thousand dollars, a sum which cut a very large figure in the financial calculation of the city and its officials, and it was of the utmost importance to have everything done that would expedite and simplify the contention between these corporations and the city of Louisville; and I want to say just here that, while it does not seem to have been put into any of these agreements, there was a very important understanding between the counsel for the banks and myself, and that was to expedite this litigation as far as it could possibly be done, and which was done and carried out, although it does not seem to have been reduced to writing.

11. You say you had this conference with the mayor and the finance committee of the general council. Did they concur with you in the propriety of entering into this agreement?

52 A. Most fully. I want to say here that this was a most important matter, both to the banks and to the city, and we approached the subject with the view of settling the contention in the most expeditious way possible, and at the same time in a manner that would injure the banks the least. The mayor of the city of Louisville and myself both recognized that litigation such as this was calculated to alarm the stockholders of the banks and might result in a very serious injury, and all of the parties to the litigation—the bankers, through their counsel; the counsel for the city, the mayor and the officers of the city—all approached this subject with a view of doing the greatest good and the least harm possible to the parties

concerned in it. In other words, we approached it, if I may use the term, in a statesmanlike manner, because it was a matter to be treated in that broad and liberal way.

12. Was there any discussion at that meeting of February 13th, 1894, on the part of the officers of the city of Louisville urging the banks and trust companies to pay the whole of the license tax?

A. Yes, and that answer naturally follows what I have stated. The bankers and their counsel were made aware of the fact that the city needed this revenue, and to a certain extent had made calculations based upon getting the revenue, and we urged them to pay at once and not wait until the end of the litigation. Now, the bankers felt as kindly towards the city as the city felt towards the bankers, and they desired to do everything in their power that was consistent with maintaining their claims under the Hewitt
53 bill to serve the interest of the city of Louisville, and the result of that was that they agreed, as is set forth in that resolution, to make a total payment of the money, a part of which was to be paid back if the litigation ended adversely to the city, and a large part of it was to be absolute without reference to how the suit came out after the litigation.

13. Mr. Barker, what was done under this resolution by the banks and trust companies?

A. The provision of the agreement, as shown by the resolution, was carried out to the letter.

14. Were the notes which were given by the sinking fund commissioners afterwards surrendered by the banks?

A. Yes; and all payments made absolute except those of the three banks which were selected to furnish the test cases. As to them, it was thought by counsel that if they surrendered their notes and made their payments absolute the result would be that the litigation would be merely a sham, that there would be nothing actually involved in it, and this would be disrespectful to the court, and therefore the arrangement was not made or carried out as to them.

15. The agreement which you have examined and which I now hand you again, signed by the parties, appears not to have been dated. Can you state about when that agreement was reduced to writing and signed?

A. I have no independent recollection of that matter, but an examination of the paper itself convinces me that it was December, 1894.

54 16. Before or after the second payment?

A. After the second payment—immediately after.

17. Now, state when the second payment by the banks and trust companies was made.

A. In December, 1894. I know that this original stipulation represents truthfully the facts in every particular, and the recitation of the surrender of the notes and the payments being made absolute in it convinces me that it was made after the second payments were made, and I know that it must have been done immediately after, and perhaps was drawn up and agreed to in every detail at the time the payments were made and delivered afterwards.

18. At the time this agreement was reduced to writing had there been any decision rendered either way by any court?

A. Yes; a decision by the lower court had been made and was, except in the cases of the Bank of Kentucky and the Bank of Louisville, adverse to the banks and the trust companies.

19. I notice that the second year the Bank of Kentucky and the Bank of Louisville made no payment to the city, but that all the other banks and trust companies did. Why was that?

A. The reason of that was that the Bank of Kentucky and the Bank of Louisville had charters which antedated the act of 1856, and the lower court in deciding the matter held that they had irrepealable contracts with the State and were exempt from local taxation, and therefore they did not pay the second year, as the decision was in their favor, that being the contract and the contract being carried out by all the parties as the litigation proceeded.

55 20. The other banks and trust companies continued under the agreement to pay until the final decision?

A. Yes, sir.

21. And they paid the second year?

A. They paid the second year.

22. The case having been decided in June of 1895?

A. Yes; that is true.

23. Mr. Barker, did you represent Judge Thompson in that litigation?

A. Yes, sir; I represented all that side.

24. How did you happen to represent Thompson?

A. Well, that was the way to represent the city, and I got Judge Thompson's permission to do so.

25. In order to protect the interests of the city?

A. In order to protect the interests of the city. The writ of prohibition against Judge Thompson was only taken out to test this case and carry out this agreement, and I made known the fact to Judge Thompson, and he, of course, turning the matter over to me, I had absolute charge of that whole side.

Cross-examination by Col. H. L. STONE, city attorney:

26. Your employment as attorney by the commissioners of the sinking fund was as any other attorney would be employed and was not dependent upon the fact that you were city attorney of the city of Louisville?

A. I was regularly employed by the commissioners of the sinking fund—elected as their attorney.

27. They employed an attorney each year, did they, and
56 you were selected each year on a salary?

A. No; I was elected only once and continued during the nine years I was city attorney; there was no change made in that time.

28. You were paid a salary in that capacity?

A. Yes, sir; paid a salary each year.

29. The license tax sought to be collected under the license ordi-

nance of January 29th, 1894, all went to the sinking fund, did it not?

A. Under the charter all license goes to the sinking fund, that being the revenue of the city set apart to pay the bonded indebtedness of the city.

30. Is it not a fact that the license tax fixed in the ordinance of January 29th, 1894, against banks and trust companies was in lieu of any ad valorem tax on the personalty of banks and trust companies for the year 1894?

A. Yes, as the levy ordinance for the year 1894 will show.

31. In the resolution of February 13th, 1894, of the commissioners of the sinking fund, a copy of which you have made a part of your deposition, I see it stated that the banks, with two or three exceptions, were allowed to enter into an arrangement. What two or three exceptions were those?

A. Well, I think I can recollect one, but I am not sure that I can recollect the others; one was the Fourth national bank, I am quite sure.

32. You don't remember what other institutions, whether a bank or trust company, compose the remainder of the exceptions?

57 A. Well, no trust company composed it; I feel quite sure that none of the trust companies were in the exceptions, and the Fourth national bank was the only one I can remember.

33. If that was the only one, why was the clause inserted, "two or three exceptions"?

A. Well, I cannot at this time remember.

34. Was there ever any resolution or proceedings on the part of the commissioners of the sinking fund with respect to this matter, or delegating any authority to you in the premises, except that of February 13th, 1894?

A. I suppose that that is the only formal resolution that was ever entered upon the minutes of the board in regard to the matter, but it was discussed between the commissioners of the sinking fund and myself many times.

35. That resolution is the only corporate action, then, that is on the journal of the board of sinking fund commissioners, that you know of?

A. Yes, sir.

36. Was there any corporate action of the city of Louisville, by resolution or otherwise, passed by the general council of the city of Louisville delegating to you authority to go into any agreement with the banks in respect to the rights of the city and the banks and trust companies?

A. No; there was no resolution or ordinance passed by the board of the general council authorizing me to do that; I did not think it was necessary that there should be; I thought then, as I know

58 now, I had full authority as attorney for the city to make the agreement, and acted upon that supposition, rightfully or wrongfully.

37. Henry S. Tyler, as mayor of the city, was also *ex officio* member of the sinking fund commissioners?

A. Yes, and also the president of the board of aldermen was a member of the board of sinking fund commissioners.

38. I notice in the resolution of February 13th, 1894, that nothing is said about ad valorem taxes; the agreement which you say you signed subsequently does speak of ad valorem taxes and purports to be an agreement that the results of those prohibition suits should determine the rights of the city with respect to the ad valorem tax also. In the absence of any other resolution or proceeding on the part of the sinking fund commissioners or general council of the city, how was it that the ad valorem taxes were to be determined by the license-tax suits?

A. Well, we looked at that as lawyers, I presume, and that was that there was a question between the city and the banks, and that the question was whether we could tax them at all or whether they has an inviolable contract, and if they had an inviolable contract *was* could not tax them at all, and if their contract was a repealable one we could tax them either or both ways, and that difference in the verbiage, as I regarded it, was entirely immaterial.

39. Do you know who prepared this written agreement which you signed without date?

A. No; I do not remember who reduced it to writing, but the matter was all fresh in our minds, and it had been carried out to the letter, as we all understood it, and there was no contro-
59 versy about the details of the agreement.

40. Do you know why it was left undated?

A. No; I do not. You can see that it was acted on before it was reduced to writing, and I can only say that that was the result of the absolute confidence that existed between the city attorney at that time and the counsel for the banks. Whatever they said to me I relied on implicitly, and I know whatever I said to them they relied on with equal certainty.

41. Who presented that agreement to you for your signature?

A. I do not remember now but one independent circumstance, Colonel, and that was that Mayor Tyler did not sign it. He, having to go somewhere, told me to sign it, but I presume that they were all present except the mayor.

42. That agreement purports to be entered into by the mayor of the city, as I understand it. Did Mayor Tyler or any one as mayor of the city ever sign that agreement?

A. No; as I told you, that was the only independent circumstance that I remember now. Mayor Tayler had to be absent, and I remember distinctly of his so saying that he could not be present and told me to sign it.

43. I have not asked what he said, but simply the facts.

A. I am giving you the reason the signature does not appear there.

44. How long was he absent from the city?

A. I don't know that he was absent from the city at all. He was to be absent at the time that paper was to be signed.

60 45. Was there any reason why he did not sign it subsequently when he had the opportunity?

A. None except the fact that the bankers and their attorneys knew that that paper was signed in absolute good faith and would be carried out in absolute good faith by Mayor Tyler and myself. As I said to you, these gentlemen had had many conferences, both with Mayor Tyler and myself, and they knew what he thought and knew how he regarded this matter, and all of that was *a*, *b*, *c* to us.

46. If this was to bind or be an obligation of the city of Louisville, then why was it not signed by the mayor, signing the city of Louisville, by him as mayor?

A. Well, as I said, that Mayor Tyler, had he been present, would have signed it, but I did not think that was necessary and do not think so yet.

47. Mayor Tyler died in January, 1896, did he not?

A. Yes.

48. If this original agreement was reduced to writing and signed as far as it is, as you now recollect, shortly after December, 1894, Mayor Tyler had about a year to sign it in before his death, did he not?

A. Yes; that is about the time between those dates.

49. Do you know who took charge of this original agreement and has had custody of it since you signed it?

A. I suppose the banks have had it. I am surprised that a copy of that was not left with the sinking fund, spread upon the minutes, and, as I say, if we had been dealing at arm's-length with each other it would more than likely have been done so, and the mayor's signature would have been there; but this having been drawn up in pursuance of an agreement made before and lived up to, and carried out in every detail up to the time that was written, and nobody seeking to draw away from it, and no expectation that they would draw away from it, that superinduced the laxity that seemed to have prevailed in regard to the agreement.

61

50. I will ask you to state, if you can state now positively, if this original agreement, which you did sign, was executed before the decision of the court of appeals by Judge Pryor June 1st, 1895.

A. Most assuredly it was, and before Mr. Tyler died.

51. What enables you to state that?

A. Every fact in it shows it.

52. What fact shows it?

A. The fact that the mayor agreed that he would sign it and I know it to be true, and I would have remembered it distinctly, and in the second place I know the banks would not have agreed to it afterwards and there would not have been any sense in executing it afterwards.

53. Point out anything in the body of that contract that indicates it was signed before June 1st, 1895.

A. I do not need to look at that. I know that it was signed before. I remember that it was signed before, in Mr. Tyler's lifetime. I remember, as I told you, that he could not be present and asked me to sign it.

54. Did he tell you to sign his name or the city of Louisville to it?

A. No; he told me to execute it, and I did execute it as an agreement theretofore made and theretofire in a large part carried out.

62 55. This closing paragraph of this original agreement first speaks of the terms and conditions named by the minutes of the sinking fund commissioners February 13th, 1894, and then says: "But at a later date, and in further reliance upon said agreement, all said banks and companies except those actually involved in the test cases paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of." Now, if this document had been prepared immediately after December, 1894, when you say the absolute payments were made, why was it that that time is referred to as a "later date" instead of giving the date which was immediately preceding the execution of this document?

A. Well, it was about a year. I don't consider that so immediately preceding it.

56. If it was in January, 1895, that this was executed, it would be only a month or two, wouldn't it?

A. I didn't say '95: I said December, '94.

57. The payment or agreement?

A. The payment and agreement.

58. Why was it referred to, if the payments were made contemporaneously, which were absolute, in this language, "at a later date"?

A. That refers to the first payment, in the spring in that year. It was in February, and February, 1894, is nearly a year from December, 1894. They were not all absolute in the first payment. At a later date those were made absolute as well as the others, and making all those payments absolute and the surrender of these notes was a

63 concession on the part of the banks and trust companies, making them absolute in December, 1894. The original agreement did not contemplate that state of facts at all. They had a right to make the second payment, if the agreement had been enforced on their part against the city, just as they made the first, but upon my representation of how the city's finances were becoming entangled they conceded that to the city of Louisville.

59. They made a donation, you mean, to the city.

A. You may call it whatever you please. I call it a concession. Yes, you could call it a donation.

60. Did the city enter into this original document in consideration of that?

A. What do you mean by the original document?

61. The one that is undated.

A. Well, I can't say that; undoubtedly that simply represents the original agreement. The original agreement, Colonel, was made in January or February of 1894. That did not contemplate that. That contemplated just what the resolution states. They should make part absolute and part should be determined by the end of the

litigation. Now, when we came to the latter part of the year, seeing that the city's fiscal affairs would be thrown into confusion, I said to the counsel who represented the banks that the city was becoming entangled, that I was not willing to go on at that rate, and I may explain that in this way: It was of the utmost importance that the city's bonded indebtedness should be cared for; that it should, with scrupulous fidelity, meet the yearly interest as it fell due and pay it; and perhaps it would not be out of place here to say that in all of its corporate existence the city of Louisville had never been behind in the payment of its interest an hour, and we passed through all
64 sorts of financial panics, and that inasmuch as the license was set apart to take care of the bonded indebtedness of the city of Louisville and its annual interest, it was of the utmost importance that the sinking fund commissioners should know exactly what it had each year. As this litigation commenced to grow out and we could not see exactly where we were going to land, I said to these attorneys, "I want these payments made absolute," and at the end of the litigation, of course, if they won they would have the exemption, but all payments before that they would lose, and they conceded it to the city.

62. What did the city give in return, in the way of consideration, for these absolute payments which were subsequently made? What concessions did the city make, if any, and the sinking fund commissioners? Was the original agreement or conditions or terms altered in any way?

A. No; only in that instance they agreed to pay absolute.

63. That was on the part of the banks. What concession did the city or sinking fund commissioners make?

A. There wasn't any.

64. Nothing on the part of the city or the sinking fund commissioners?

A. None in the world. The bankers were interested in upholding the credit of the city of Louisville. They were large holders of its bonds, and were interested in upholding its credit; very much more so than any other class of citizens we had. They saw exactly our position, and, as I stated before, they approached the subject in somewhat of a statesmanlike manner.

65. Can you give any good reason why this agreement was
65 not reduced to writing at the start instead of being put off and left in a verbal and indefinite condition for a year or more?

A. I can give you a reason. I don't know whether it would be a good one. I think I have already given it. The banks relied on me and I relied on their attorneys. There was no question but what it would be enforced to the letter as between the attorneys and myself, and if we had won I would have expected every one of those corporations to step up and pay.

66. They would have had to by law, wouldn't they, without any agreement about it?

A. Yes; but I mean I would have expected them to have done it without any litigation. I would have expected that to have settled

the questions between us. I would not have expected, in other words, any plea of the statute of limitations or anything of that sort to be injected in the case.

67. In this undated agreement the trust companies are classed with the State banks which were chartered after 1856; was it understood by you at that time, or was it your view, that they were properly classed on the same footing as banks chartered after 1856?

A. I don't know that it was absolutely my opinion; if they were entitled to fall in that class they would be in that class, but I don't think that I had in my mind any particular distriction between the trust companies and the banks, but that any weight was attached to that in my mind I cannot say now, because I do not remember.

68. You undertook, also, to put in the same class all banks chartered after 1856, whether they had been chartered or obtained
66 extensions of their corporate existence after the year 1887, or the period in which the Hewitt bill gave banks the right to accept its provisions?

A. Colonel, you have to take that agreement at just what it recites, as far as I am concerned, because I did not go into that at all.

69. I will ask you to state whether or not the terms of this agreement have been abided by or violated by any of the banks existing in the city of Louisville when it was entered into; if so, what banks and in what way.

Objected to.

A. Well, I don't know anything on that that the records will not show you fully. Some time after the first decision by the court of appeals four banks brought suit against the city of Louisville to recover the money they had paid under the agreement. I want to state that the counsel who represented the banks and who made the agreement with me were not the counsel who brought those suits, but, on the contrary, they refused to bring them, and all of them have assured me that they were ready to give any evidence they could that would enable *ne* to defeat those suits. The banks in question were the German bank, the Western bank, the German Security bank, and the Louisville City national bank. All of these suits are, of course, public records and will show for themselves what they claim and by whom they are brought.

Answer objected to.

70. There has been no final determination of those suits yet?

A. I don't know; there had not been at the time I *caesed* to be city attorney of the city of Louisville.

71. I notice that the Bank of Louisville paid its license in
67 1894. I will ask you to state if that was not done before there was any resolution of the sinking fund commissioners or before any arrangement was made with the banks at all, of the kind you mention.

A. I have no independent remembrance of the exact date upon which the Bank of Louisville paid its license in 1894, but I have before me a sheet drawn off from the books of the sinking fund of

Louisville, which I am sure is correct, which shows that the Bank of Louisville, on the 20th of February, 1894, paid the sum of $2,036.26, and I have no doubt that the date and amount are correct. The resolution is dated the 13th day of February, 1894, which is seven days before the payment.

72. Is it not a fact that subsequent to the payment of these amounts by the several banks and trust companies to the sinking fund commissioners as license tax that the city of Louisville adopted an ordinance giving credit by all amounts paid by parties as license upon their ad valorem tax bills upon the same personal property employed in their business for the fiscal years of 1894 and 1895?

A. The license ordinance which contained the provision authorizing the license tax, in lieu of the ad valorem tax, applied to many other kinds of business besides that of banking and the business of carrying on trust companies. Now, when the banks obtained the decision on the question of the Hewitt bill, the inviolability of the Hewitt bill, so far as they were concerned, they were struck out of consideration by the city authorities, but the court of appeals, in the
case of Levi, &c., against The City of Louisville, held that the
68 provision providing for a license system in lieu of the ad valorem system was void, and in that opinion it was stated that in levying ad valorem tax credit should be given by the amount of the license tax paid under the ordinance, and the ordinance which you have referred to was drawn by me and passed by the general council to carry out that statement or requirement in the opinion of the court of appeals in the case mentioned.

73. The ordinance allowing credit for license tax paid on ad valorem tax bills is without exception, isn't it, and embraces all parties? I refer to the ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6th, 1895.

A. That is the ordinance in question, and undoubtedly is general in its terms. Of course, it could only have reference to such license as was paid in the ordinary way, and, of course, could not have any reference to license paid to be absolute under agreement.

74. There is no exception, though, in the ordinance, which is prepared on that subject and which was adopted?

A. No. At the time that ordinance was passed, so far as I knew and believed, the questions between the city of Louisville and the banks were settled until the expiration of their various charters.

75. In this undated agreement which you signed I see that it refers, in the outset of it, as being executed under the authority of the board of sinking fund commissioners, given at a regular meeting of said board; had that reference to the meeting of February 13th, 1894?

A. I presume that that is true; that seems to be the sense
69 of it, and, although it is not on the minutes, this paper was signed by the president of the board of commissioners of the sinking fund with the full knowledge of the board.

Defendant excepts to the answer on the ground that the minutes of the board show the acts of the board.

76. I see in the resolution of February 13th, 1894, the president of the sinking fund commissioners was authorized to enter into "the following arrangement with the different banks, &c.," and then the arrangement seems to have been set forth in four paragraphs. I will ask you to state if you have any knowledge of any other arrangement or agreement the president was authorized to make or enter into with the banks, &c., than that set forth in the resolution of February 13th, 1894, or of any other authority on the minutes of said board.

A. I don't know what the minutes show, as I am not the custodian, but I believe the minutes only show the resolution you refer to, but there were many conferences and talks on this subject which perhaps were not reduced to writing and not put in a formal resolution. Now, this arrangement, this whole arrangement, in every detail was fully authorized by the board. They knew of it; every member of the board knew it, and it was so manifestly to their advantage that there cannot be the slightest question but what they authorized and agreed to every part of it. It was a one-sided agreement, so far as I considered it, in favor of the city authorities as against the institutions.

Defendant excepts to all of the answer that is not responsive to the question or relates to any conference or alleged authorities or agreements not shown by the journal of the board of sinking fund commissioners.

70

77. Why is it that instead of the president of the sinking fund commissioners execution the agreement contemplated by the resolution of February 13th, 1894, he simply approved the agreement entered into between you and the attorneys for the banks?

A. I presume that he considered that that was the same thing; that what he did was the execution of it.

78. I will ask you to state if that agreement, which bears no date, signed by you, was ever presented at a regular meeting of the board of sinking fund commissioners and approved or ratified by that board.

A. Yes; and it was signed at a regular meeting by me.

79. Does the journal of the board of sinking fund commissioners show any such state of fact as that?

A. I don't know, but it was lying on the table and signed by me right there in their presence.

80. Would not the secretary of the board of sinking fund commissioners know of that fact if it had been there?

A. I don't know that he would have remembered it.

81. Will you give the date of any such alleged board meeting when a majority of the commissioners were present and this was presented for ratification or approval?

A. No; I don't remember the date.

82. Will you name the commissioners that were present on that occasion?

A. No; I cannot. I can name Mr. Gibson, and I feel pretty sure that Colonel Ray was there. The others I cannot name. I want to

state to you that there were many regular meetings of the
71 sinking fund commissioners of which there are no minutes at which very important questions were discussed, and this was one of them. It is very easy to get a quorum of the sinking fund commissioners. Mr. Gibson, who was the president, was living within one hundred yards of the city hall; the mayor, a member of the board, was back there in the city hall, and nearly all the commissioners were men of prominence and doing business within a short distance of the city hall and could be gotten there with the telephone, as was frequently the case, within five minutes after it was desired they should have a meeting, and it was the constant habit to have just such meetings as that called over the telephone and arranged for in five minutes after it was desired to hold it.

Defendant excepts to the answer in so far as it refers to any meeting not shown by the journal of the board.

83. If there had been any regular meeting of the majority of the board of sinking fund commissioners to take into consideration this agreement which you signed in a matter of this importance would it not have been spread upon the journal of that board or some reference have been made to it in the minutes of that board?

A. I did not say a regular meeting; I said a meeting.

84. Well, a special meeting, then, where there was a majority of the commissioners to take this subject into consideration?

A. Not necessarily.

85. Was the secretary of the sinking fund commissioners furnished with even a copy of this undated agreement at any
72 time to take care of or preserve as part of the records of that board?

A. I don't know.

86. Did the general council of the city of Louisville, by resolution or otherwise, ever approve or ratify this agreement which you signed as city attorney?

A. No; it was not submitted to them as a body.

87. Was a duplicate or copy of it ever filed in either of the three cases that were brought by prohibition proceedings on the warrant under the license ordinance.

A. No; I reckon not. I don't suppose the gentlemen would have thought that necessary after we had told them it would not be.

88. Was there any statement giving the names of the several banks, State and national, and trust companies as being parties to or having any right or claim under this undated agreement furnished to the board of sinking fund commissioners of the city of Louisville or preserved by you in any way?

A. I can only state in answer to that what I have said before: This being a public question, we knew that these gentlemen represented all or nearly all of these corporations; that they had employment; the banks and trust companies had had many meetings about this matter; they had taken advice; they had employed their counsel, and I am somewhat surprised to know that there was any

of them excepted, because if you had asked me, without showing me this agreement where it recites that there were two or three that did not go into it, I would have said they were all in, because I supposed that Humphrey & Davie and Helm & Bruce represented them all, and the fact that these two or three are not in
73 it only goes to show that the counsel for the banks were scrupulously particular to state the exact facts as to their employment, because I supposed all the time that they represented every one of them.

89. You have already said you knew the Fourth national bank was not included?

A. Yes; with the exception of the Fourth national, you are correct, and I am glad you called my attention to it. I did know that was one. I remember distinctly to have made complaint to the counsel, at least one of the counsel for the banks, about the position of the Fourth national, and I remember they disapproved of the position the Fourth national took, and that incident is why I remember it as not having been included in the agreement, but I do not remember that any others were omitted.

90. It was left, however, to the recollection of yourself or counsel claiming to represent the banks and trust companies as to what banks or trust companies were entitled to claim under this agreement. In other words, there is no record preserved, either in the agreement itself or otherwise, as to what banks and trust companies could claim under it?

A. We had the best record in the world, Colonel; we had their money; every one of them paid while the agreement was in our mind, and the record shows exactly who was in it; it shows who paid and who did not and when they paid, and it shows the amounts they paid.

91. Do the minutes or records of the board of sinking fund commissioners show that those who paid their license, the amount,
74 into the treasury of that board were entitled to claim under this agreement, or does it make any reference to this agreement?

A. Perhaps not in so many words, but the agreement we made with the counsel was to be executed, and was executed, at once or within a very short time. Of course, there was some little straggling about the payments; some of the banks did not pay as early as others, but they paid right along, as you can see by an examination of the books of the sinking fund.

92. If I understand you, the Fourth national bank paid nothing to the sinking fund commissioners of the city of Louisville under the license ordinance of January 29th, 1894?

A. No, sir; and did not go into the agreement.

93. If I understand you, by the terms of this agreement, as you understood it, as finally agreed on at a later date than in February, 1894, whatever that date may have been, all these banks that were entitled to claim under this agreement were to pay or were bound to pay the full amount of the four per cent. on their gross earnings absolutely for the years '94 and '95 to the sinking fund commis-

sioners in order to be entitled to the provisions of the agreement, except the three banks that brought suit?

A. Yes; undoubtedly.

Redirect examination:

94. You have spoken of the first payment under that resolution of February 13th, 1894, being for the taxes of 1894. Will you state whether that is for the taxes of the year '93–'4, being the first year's taxes under the new organization?

A. It was for the first fiscal year's taxes; our fiscal year
75 commences on the first day of September and the fiscal year would be from the first of September of each year until the 31st day of August of the next year.

95. And the first fiscal year would be from the 1st of September, 1893, to the 31st of August, 1894?

A. Yes, sir.

96. You have been asked about what banks and trust companies entered into and became bound by that agreement. I will ask you whether the records which you have taken from the office of the sinking fund commissioners show which of these institutions paid on the strength of that agreement, and will ask you to call off the names.

A. I have a sheet drawn, at my request, from the books of the sinking fund of Louisville, which shows each and every financial corporation that went into this agreement and paid under it and was entitled to the benefits of its provisions, and I will read them as follows:

The Bank of Louisville, the Kentucky Title Company, the German Security bank, Bank of Commerce, the Kentucky national bank, Second national bank, the Louisville City national bank, the German bank, the Farmers' & Drovers' bank, the Western bank, German Insurance bank, the Fidelity Trust and Safety Vault Company, the Louisville Trust Company, the Third national bank, the Kentucky Trust Company, the Columbia Trust Company, the Union national bank, the Germania Safety Vault and Trust Company, the German national bank, the Citizens' national bank, the Merchants' national bank, the Dime savings bank, First national bank, the Bank of Kentucky, the Louisville Banking Company, and the Third national bank.

76 97. You have stated that they were all entitled to the benefit of that agreement. Do you mean by that that such of them as would be able to show that they accepted in due time the provisions of the Hewitt bill were entitled to it?

Objected to.

A. That is shown in the agreement; the agreement shows the exact facts.

98. Does the paper taken from the books of the sinking fund commissioners, to which you have referred once or twice, indicate that the commissioners of the sinking fund had executed the notes to the several banks, as provided for in the agreement, except in the

few cases where the absolute payment was in excess of the four per cent. of the gross receipts?

A. Yes, sir.

99. You have also stated that four of the banks had, after the decision of June, 1895, brought suit to recover from the city the amount which they had paid in under that agreement. Were you then the counsel for the city?

A. Yes, sir.

100. Did you defend those suits?

A. I did.

101. What was your defense?

A. I set up this agreement, as the records will show. I don't know whether those suits were brought against the city at all or not; they may have been, and probably were, against the sinking fund, but, as attorney for the sinking fund, I set up as a defense this agreement. I pleaded the agreement in defense of the suit.

77 102. Have any of the banks ever pressed those suits since that time?

A. I filed the answer of The Sinking Fund or of The City of Louisville, whichever was the defendant, or the answer of both, if both were made defendants, as is sometimes the case, and pleaded the agreement of which I have been talking in this deposition in bar to the right of recovery. A demurrer was entered to the answer making this plea and the demurrer overruled in each case. That, I think, is as far as the litigation ever progressed, but, of course, the records themselves will show.

Recross-examination:

103. Don't you recollect that the answers in those cases were either denied by formal replies or controverted of record after the demurrer was overruled and the issues were thus made up?

A. I believe that the counsel is right and that my recollection was in error and that there were depositions.

104. Now, what bank took depositions and whose depositions were taken, as far as you recollect?

A. I cannot say. This is a matter that has sprung up during the taking of the deposition, about which I have not thought at all, and perhaps I ought not to have made any statement with reference to it at all, as the records will show absolutely the correct facts.

105. Don't you remember, however, independently of the records, that one or more of the banks took depositions and whose depositions were taken?

A. I remember one deposition was taken. That was Mr. James S. Barret's, the president of the German Security bank. It was

78 taken at the office of his counsel, Messrs. Barnett, Miller & Barnett, and I believe that they did deny in each case the agreement, but as to that the records will show.

106. You don't now remember the name of any other witness whose deposition was taken in either of the cases?

A. No; I do not, or whether there were any others.

107. Do you know whether the deposition of Mr. Barret, in the case of the German Security bank, has ever been filed?

A. I do not.

108. Do you know what examiner or notary took it?

A. I feel quite sure that the stenographer in Barnett, Miller & Barnett's office took it.

The witness, H. S. Barker, upon his own motion, makes the following additions and corrections to his deposition after it was written out and he had read it over:

After having read my original deposition in this case, I desire to make the following additions and corrections thereto, having first seen the counsel on both sides and explained to them wherein I desired to amend my deposition and they all agreeing to it:

First. I was in error in saying that a demurrer had been filed by the plaintiffs in the four suits brought by the banks after the first decision of the bank-tax question in the court of appeals to the third paragraph of the answer. On the contrary, there was no demurrer filed, but by agreement of counsel all affirmative allegations were controverted of record, as may be done under our code practice.

Second. In answer to Colonel Stone's question as to what stenographer took the deposition of James S. Barret in the case
79 of *of* The German Security Bank against The Sinking Fund of Louisville, I stated that I thought the stenographer in the office of Barnett, Miller and Barnett took said deposition. In this I was mistaken. The deposition was taken by Charles A. Graham, official stenographer of the common pleas division of the Jefferson circuit court.

Third. While my answer to cross-question sixty-four is true so far as it goes, I feel that it does not fully state the reasons for the concession made by the banks in favor of the sinking fund of the city of Louisville to the extent of making all payments of license under the agreement absolute, and as a part of my answer to said cross-question sixty-four I desire to incorporate the third paragraph of the answer of the sinking fund of Louisville to the petition in the case of The German Security Bank *vs.* The Sinking Fund of Louisville. This third paragraph was drawn by me two years ago, when the whole matter was very much fresher in my mind than now, and I believe that it fairly sets forth all of the facts and circumstances connected with the modifications of the city of Louisville and the *city of Louisville and the* sinking fund of the city of Louisville, and I refer to said third paragraph and make it a part of my answer to question sixty-four and request the stenographer to copy it in full. The same paragraph occurs in the answer to each of the four suits and are identical in substance, except that the amounts sued for and necessarily referred to in the third paragraph are different in each case, but the body of the paragraph and the history of the transaction is the same in each.

80 Said paragraph referred to by the witness is in words and figures as follows, to wit:

"For further answer herein to both paragraphs of the petition, the defendants say that after the passage of the ordinance set out in the petition assessing the banks the plaintiff and all the banks and trust companies of the city of Louisville entered into a combination and jointly employed counsel to test their rights under the contract with the State of Kentucky as contained in the act known as the Hewitt bill; that by agreement with and at the instance of counsel for plaintiff and the other banks and trust companies in the city of Louisville these defendants, in order to make test cases wherein might be decided the respective rights of the city of Louisville to tax the banks and the rights of the banks under the contract set forth in the 'Hewitt bill,' sued out three warrants in the city court of Louisville, one against the Bank of Kentucky, another against the Louisville Banking Company, and another against the Third National Bank of the City of Louisville, whereupon the said three banks last named, by their said counsel, instituted three separate actions in the Jefferson circuit court against R. H. Thompson, judge of the city court of Louisville, and the city of Louisville, wherein it was claimed that the ordinance in question was void, and praying that the said city of Louisville and the said R. H. Thompson, judge of the city court of Louisville, be prohibited from prosecuting said actions against said banks. It was then and there agreed that the judgment of the court in these three actions should be the judgment as to the rights of all the banks and trust companies in the city of Louisville. In order to
81 effect this agreement with the city of Louisville and the sinking fund commissioners of the city of Louisville, and as a consideration for the same it was then and there agreed between the city of Louisville and the board of sinking fund commissioners of the city of Louisville and the plaintiff and all of the other banks and trust companies of the city of Louisville that they would pay into the sinking fund of the city of Louisville the amount which would be due from them if the ordinance in question was held valid. Of the amount thus paid the difference between the amount of taxes due from the banks and trust companies of the city of Louisville to the State of Kentucky under the general rate of taxation for the year 1894 and the amount which would have been due the State of Kentucky from the said banks and trust companies under the 'Hewitt bill' was to be paid by said banks and trust companies into the sinking fund of the city of Louisville absolutely; the balance of the amount paid into the sinking fund under the ordinance was to be treated and considered as a loan from the banks and trust companies to the sinking fund, and as evidence of which the board of sinking fund commissioners executed and delivered to each of said banks and trust companies their respective promissory notes for the respective sums so loaned by the banks and trust companies to the sinking fund; that in pursuance of said arrangement, on the 7th day of March, 1894, the plaintiff, The German Security Bank, paid into the sinking fund the sum set up in the first paragraph of the petition herein, to wit, the sum of $1,821.62; of this amount the sum of $581.75, under the agreement hereinbefore set

forth, was to be paid absolutely, and for the balance, to wit, the sum of $1,239.87, the board of sinking fund commissioners executed and delivered to the plaintiff its promissory note. The defendants state that afterwards there was instituted and was pending in the
82 Jefferson circuit court, common pleas division, several actions by tax-payers, styled 'George W. Levi against The City of Louisville' and 'J. Duff Reed against City of Louisville,' wherein it was claimed that under and by virtue of the present constitution of the State of Kentucky there was bound to be a uniform rate of ad valorem taxation upon all property, whether real or personal, for city, county, and State purposes; that said last-named actions came on for trial before the judge of the common pleas division of the circuit court, who rendered an opinion and judgment therein, wherein it was adjudged that all property in the city of Louisville under the constitution must be taxed at a uniform ad valorem rate of taxation, and that any attempt on the part of the city of Louisville to substitute a license system of taxation in lieu of the ad valorem system was void. After this judgment was rendered, during the fiscal year of 1895, which said fiscal year began on the first day of September, 1894, the subject of what the city should do in regard to taxing the banks and trust companies of the city of Louisville again came up between the board of sinking fund commissioners and the counsel for the plaintiff and the other banks and trust companies. The counsel for said banks and trust companies were extremely anxious that the city of Louisville and the sinking fund commissioners should still continue the license system of taxation, and, above all things, feared and dreaded the ad valorem system of taxation as applied to the banks and trust companies, and the plaintiff and the other banks and trust companies of the city of Louisville entered into a new agreement and contract with the city of Louisville, by which it was then and there agreed that if the city of Louisville
83 should continue the license system as to the banks and trust companies of the city of Louisville in lieu of the ad valorem system of taxation until the Levi and Reed cases against the city and the cases of The Bank of Kentucky, The Louisville Banking Company, and The Third National Bank against R. H. Thompson, judge, and The City of Louisville should be all finally determined and ended in the court of appeals, where they were all then pending, that the plaintiff and the other banks and trust companies, except the three litigating banks, would all surrender the notes that they had received for the loan made under the first agreement heretofore set out, and would, pending the termination of said actions in the court of appeals, pay year by year the license required by the ordinance in question absolutely and without recourse; that in pursuance of said agreement and contract the plaintiff, The German Security Bank, voluntarily surrendered to these defendants the said note executed and delivered as aforesaid, and then and there agreed that the payment of $1,821 62 paid as aforesaid should be absolute and without recourse, and afterwards, to wit, February 11th, 1895, the said plaintiff paid into the sinking fund of the city of Louisville

voluntarily and under said contract the further sum of $1,466.64. Defendants state that at the various times of said agreement and contract and payments neither the plaintiff nor these defendants nor the city of Louisville knew certainly what the rights of the banks and trust companies and the city of Louisville and these defendants were, but, having the uncertainty of the law in view and for the mutual benefit of all parties concerned, and in the spirit of a fair and honorable compromise and adjustment of the questions in issue between them in so far as that was possible, the plain-
84 tiff and the other banks and trust companies of the city of Louisville and the city of Louisville and these defendants entered into the contract herein set forth, and all of the money paid by the plaintiff, as set forth in its petition, into the sinking fund of the city of Louisville was paid in pursuance of said contract and in execution thereof; that on their part the defendants and the city of Louisville faithfully carried out their part of said contract until all of the litigation heretofore mentioned as pending in the court of appeals had been settled, it having been determined by said court that the banks, among whom was the plaintiff, had an irrevocable contract under the 'Hewitt bill,' as set forth in the petition. Neither plaintiff nor any other bank or trust company in the city of Louisville has ever paid anything further in the way of taxes or license.

Defendants further state that during all the negotiation for the two contracts set forth in this answer between the banks and trust companies and the city of Louisville and these defendants the plaintiff and the other banks and trust companies of the city of Louisville were represented by Messrs. James P. Helm and A. P. Humphrey, who were their counsel, and who, at each and every stage of the proceeding, advised with the plaintiff and these defendants and the city of Louisville and agreed to and consented to every part of the said agreement and contract and advised the execution and carrying out of the same, and that all of the payments made by the plaintiff and the other banks and trust companies into the sinking fund of the city of Louisville, as aforesaid, were made under the immediate supervision and advice of said counsel, Messrs.
85 Helm and Humphrey; and defendants state that all of said payments were all made voluntarily by the plaintiff, as aforesaid, and without any sort of threat or force or demand on the part of these defendants or the city of Louisville."

H. S. BARKER.

The parties hereto, being present by attorney, waive all exceptions except as to competency and relevancy.

STATE OF KENTUCKY, }
County of Jefferson. }

I, J. P. Martine, examiner, do certify that the foregoing deposition of H. S. Barker was taken pursuant to agreement before me and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said wit-

ness having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statements reduced to writing by me in his presence.

Complainant and defendants, by attorney, being present.

Given under my hand this 7th day of July, 1897.

J. P. MARTINE, *Examiner.*

86 Exhibit of the foregoing deposition is as follows:

"EXHIBIT COPY."

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing-house and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment,
87 not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said

loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893 and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest: J. M. TERRY,
Secretary & Treasurer.

88 Exhibit "A" of the foregoing deposition is as follows:

"EXHIBIT A."

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named to wit:

89 A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had

accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of Febru-
90 ary 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com. Sinking Fund City of Lou.

91 The deposition of J. M. Terry, taken before me on July 6, 1898, at the office of the commissioners of the sinking fund of the city of Louisville in the city hall, Louisville, Kentucky, to be read as evidence on behalf of the defendant City of Louisville in an action pending in the United States circuit court for the sixth circuit, district of Kentucky, in which The Bank of Commerce is complainant and S. H. Stone and others are defendants, No. 6567, taken by agreement of parties thereto.

The witness, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the

matter of controversy herein, did thereupon depose, testify, and says as follows, viz:

Examined in chief by H. L. STONE, city attorney and counsel for defendant City of Louisville:

Q. State your age, residence, and occupation.

A. Fifty-four years old; Louisville, Ky.; # 2125 Third street; I am treasurer and secretary of the sinking fund.

Q. How long have you held your present official position?

A. Since the first day of August, 1875.

Q. Are you the custodian of the records and proceedings of the commissioners of the sinking fund of the city of Louisville?

A. Yes, sir.

Q. I will ask you to state what appears on the journal or record of the proceedings of the members or commissioners of the sinking fund of the city of Louisville, if anything, with respect to the license tax imposed by the ordinance of January 29, 1894, and the banks and trust companies in this city.

92 A. On February 13, 1894, I find a resolution adopted by the commissioners in regard to the license to be paid by the banks and trust and title companies.

Q. There is already in this record a copy of this resolution referred to of February 13, 1894. I will now ask you if you find any resolution or proceedings taken by the commissioners of the sinking fund with respect to the same subject at any subsequent date; if so, give the date, and file a certified copy of the order or minute which you find on the journal of the board.

A. There is no other resolution, so far as I know, that is on the journal regarding the subject.

Q. Is there any other order or minute on the journal of said commissioners having any connection with that subject in any way? If so, state when it was entered, and furnish a copy of the same.

A. At present I have no recollection of any other record, except the one of February 13, 1894. I will examine the books, and if there is any I will furnish a certified copy of it.

(Witness examines his books.)

Q. Do you find any action taken by the said commissioners, as shown by the journal, with respect to any note or notes given by the commissioners to any of the banks or trust companies for portions of the amounts paid by them under the resolution of February 13, 1894? If so, state what you find on that subject or furnish a copy of the entry.

A. I find nothing except the original resolution of February 13, 1894. (After examining the book further witness continues:) I find an entry on February 12, 1895, of which I herewith file a

93 copy certified by me as secretary and make it a part of my deposition, marked Exhibit "J. M. T. # 2." I also find an entry on April 9, 1895, of which I file a certified copy, marked Exhibit "J. M. T. # 3."

Q. Do you find any other minute or entry upon the journal of said commissioners pertaining to the banks and trust companies for the license taxes against them in the ordinance of January 29, 1894?

A. Well, on December 12, 1895, I find an entry, a copy of which, certified by me as secretary, is filed with this deposition, marked Exhibit "J. M. T. # 4."

By Mr. HELM: Those notes were paid finally?

A. Well, here on January 24, 1896, at a called meeting, I find an entry, a certified copy of which is filed herewith, marked Exhibit "J. M. T. # 5."

Q. Do you find any other entries on the journal of the commissioners pertaining to this subject?

A. None that I call to mind now, sir.

Q. Well, you find none?

A. (Witness, after looking further:) No, sir; I do not, except on March 10, 1896, marked "J. M. T. # 5½," filed herewith.

Q. I will ask you if you have made off a statement showing the institutions which paid licenses under the ordinance of January 29, 1894, to the sinking fund commissioners for the year 1894 and showing the dates and amounts of such payments.

A. Yes, sir.

Q. Will you file that and make it a part of your deposition?

A. Yes, sir; marked Exhibit "J. M. T. # 6."

94 Q. I notice a considerable number of these payments are under date of December 31, 1894. Will you please explain that?

A. That is explained by the fact that the banks on that date surrendered to the commissioners the notes of the commissioners which they held for the stated amounts.

Q. I will ask you to state if you have made a similar statement showing the amounts paid under the license ordinance by the different banks and other institutions for the year 1895?

A. Yes, sir.

Q. Does or not that statement also show the amounts of notes executed by the commissioners to the Louisville Banking Company, Bank of Kentucky, and Third national bank which the commissioners paid back to said institutions?

A. It shows it on that statement, but the notes that were executed to the Bank of Kentucky and the Louisville Banking Company and the Third national bank were executed in 1894 and were not paid until 1896. That statement will show the dates that the notes were paid; also the amounts and interest.

Q. Will you file the last-named statement for the year 1895, as well as the statement concerning the notes executed and paid by the commissioners?

A. Yes, sir; and mark it Exhibit "J. M. T. # 7."

Q. I now invite your attention to a document which purports to be a stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville, which is without date and appears to have been signed by Humphrey & Davie, Helm &

Bruce, for the banks, trust and title companies of the city of Louisville—H. S. Barker, city attorney—and approved by C. H.
95 Gibson, president of the commissioners of the sinking fund of the city of Louisville, and made an exhibit with the deposition of H. S. Barker in this case, and ask you whether you ever saw or know anything about that document in any way.

A. No, sir; I never saw it.

Q. Was that document ever presented at any meeting of the board of commissioners and approved or ratified by it?

A. Not to my knowledge.

Q. Is there any minute on the journal of the board of sinking fund commissioners as to that document?

A. No, sir.

Q. Did you ever have it in your custody or control or keep a duplicate of it?

A. No, sir.

Cross-examined by Hon. A. P. HUMPHREY, attorney for the complainants:

Q. Mr. Terry, I will get you to read to the commissioner a copy of the note executed by the commissioners of the sinking fund to the Bank of Kentucky.

A. In the upper left-hand corner, "No. 19."

$8,063.48. LOUISVILLE, KY., *M'ch* 13, 1894.

"The commissioners of the sinking fund of the city of Louisville acknowledge themselves indebted to the Bank of Kentucky, of Louisville, Kentucky, in the sum of eight thousand & sixty-three $\frac{48}{100}$ dollars, this day loaned to them, and agree to repay said sum, with interest thereon at the rate of four per centum per annum, when and if it shall be finally adjudged by the court of last resort that the said payee is not liable to pay to the city of Louis-
96 ville or said sinking fund commissioners a license fee for the year 1894, equal to four per centum of its gross earnings in the year 1893, and if it shall be finally adjudged that the said payee is liable to pay said license fee, then the sum above named shall be taken and deemed as paid on account of said license fee, as of this date, and this obligation shall be of no effect.

CHAS. H. GIBSON, *President.*
[SEAL.] J. M. TERRY, *Sec'ty & Tr.*"

Q. The notes that were given to the other banks were of similar import, were they not?

A. That is my impression.

Q. They have been destroyed?

A. They have been destroyed.

Q. But it is your impression that they were all written in the same form?

A. That is my impression—that they were all written in the same—wording was exactly the same.

Q. Now, is it not a fact that instead of a note being given to the

Bank of Louisville it paid 32½ cents on each share of its capital stock, which was more than four per cent. on its gross earnings?

A. I could not say whether it equalled more than four per cent. on its gross earnings. I know that the bank sent down here on February 20, 1894, and paid the license. That was the first license that was paid.

Q. Well, that was paid when?

A. February 20, I think, 1894.

97 Q. Now, you do not recollect what its gross earnings were returned?

A. No; I do not.

Q. Is there any memorandum in the office that will show that?

A. I think there is. I think their affidavit is here on file.

By Mr. HELM: Get that if you can.

A. I don't know whether I can or not. I can look for it. I cannot say whether I have it. We cleaned out here some time ago and may have sent them up to the archives. Maybe I can find it. I will not be certain.

Q. When you were taking those notes from the various banks you had from each of them a statement of their gross earnings for the year 1893; that is a fact, is it not?

A. Yes, sir.

Q. It is a fact, is not it, that under this resolution of the sinking fund commissioners of February 13, 1894, the three banks—Bank of Kentucky, Third national bank, and the Louisville Banking Company—gave to the commissioners of the sinking fund four per cent. upon their gross earnings, and the commissioners of the sinking fund executed to each of those banks a note for that amount in the form that you have just now read? That was true in regard to these three banks?

Q. No. It was true in regard to the Bank of Kentucky.

Q. I say in regard to these three banks.

A. No. It is true in regard to the Bank of Kentucky and to the Louisville Banking Company. As to the Third national

98 bank, you will remember that the First national bank was the bank selected by you all in the suit to litigate the question, but it had not accepted the provisions of the Hewitt bill.

Q. Well, what note did you execute to the Third national bank?

A. We executed to the Third national bank a note for $1,493.91. They paid us $1,300.

Q. And you executed them a note for how much?

A. And we executed a note for $1,493.91.

Q. And the note that you gave was of this same form?

A. Yes, sir, and my recollection is that all the notes were of the same form.

Q. Now, in regard to the other banks, as I understand it, what they did was this: the computation was made as to what would be four per cent. upon their gross earnings for the year 1893; they paid that sum into the sinking fund; the sinking fund gave a note to each of those banks for the whole of that amount, less 32½ cents upon each share of the capital stock of each bank?

A. Yes, sir.

Q. And you say you do not now recollect whether the failure to give the Bank of Louisville a note came from the fact that when you deducted this 32½ cents on each share of the capital stock from the amount paid it left nothing; is not that a fact?

A. The best of my recollection is that the bank sent a statement down here and the figures were so close and the difference was so little either way that they concluded to pay the license and not take any note. The difference, I think, was a little bit in their favor.

99 That is my recollection. I do not know whether I have that statement or not. I file affidavit of said bank herewith and mark it "Exhibit J. M. T. # 1."

Re-examined by Col. H. L. STONE:

Q. No notes were given by the commissioners of the sinking fund for any amounts paid for the license tax for the year 1895?

A. No, sir; the money was all paid in absolutely and without any protest at all, as I understood it.

Q. I see under the head of German Security bank, in the statement for 1895, that two amounts are given. Will you please explain what that is?

A. Well, this first amount is for the license.

Q. The second amount is for what?

A. $1,237.87 represents a note that was given by the commissioners of the sinking fund to the German Security bank.

Q. In 1894?

A. In 1894—March 7, 1894—and they did not surrender it until February, 1895.

Q. Then, if I understand you, the German national bank did not surrender its note until 1895, that was given in 1894?

A. Yes, sir.

Q. When those license taxes were paid for the years 1894 and 1895 by those banks and institutions, was a license issued by you as secretary of the commissioners of the sinking fund?

A. Yes, sir; a license was issued to each one of them.

Q. In both years?

A. Yes, sir.

Recross-examined by Judge HUMPHREY:

Q. In the year 1895, neither the Bank of Kentucky nor

100 the Bank of Louisville paid anything at all. That is a fact, is not it?

A. I think that statement shows that the Bank of Kentucky and the Bank of Louisville paid nothing at all.

And further sayeth not.

J. M. TERRY.

UNITED STATES OF AMERICA,
State of Kentucky, County of Jefferson, } ss:

I, John F. Groene, a notary public in and for the State and county aforesaid, hereby certify that the foregoing deposition of J. M. Terry

was taken before me at the time and place and for the purpose stated in the caption; that the witness, being of sound mind and of lawful age, was first cautioned and sworn to testify the whole truth; that said deposition was taken by — in shorthand by agreement, and then carefully transcribed in writing on the typewriter, after which the same was read over by the witness and subscribed in my presence; and I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any was interested in the event of the cause named in the said caption. There were present during the taking of said deposition H. L. Stone, city attorney, and James P. Helm and A. P. Humphrey, attorneys for complainant.

Given under my hand and official seal this July 8, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,

[SEAL.] *Notary Public, Jefferson Co., Ky.*

101 Exhibit J. M. T. #1 with the deposition of J. M. Terry is as follows:

Bank and trust companies.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

E. A. Hewett, being duly sworn, says that he is the cashier of the Bank of Louisville, doing business in the city of Louisville, Kentucky, and that the gross earnings of said bank during the year from the 1st day of February, 1893, to the 1st day of February, 1894, amounted to the sum of $50,906.54, exclusive of rent from real estate paying taxes to the city of Louisville.

This affidavit is made for the purpose of obtaining license to do business in said city for one year from the 1st day of February, 1894.

E. A. HEWETT, *Cashier.*

Subscribed and sworn to before me *by* this 20th day of Feb'y, 1894.

JAS. A. KERRY,
Notary Public, Jefferson County, Ky.

A copy.
Attest: J. M. TERRY,
Sec'l'y & Treas.

102 Exhibit "J. M. T. #2" with the deposition of J. M. Terry is as follows:

(Copy.)

Office- commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *February* 12, 1895.

At a regular meeting of the commissioners of the sinking fund held at office Tuesday afternoon, Feb'y 12, 1895, at 4 o'clock, the

following members were present: Charles H. Gibson, president; Mr. Henry Glover, and Hon. Charles F. Grainger, president of the board of aldermen.

The treasurer presented to the commissioners notes of the commissioners executed to various banks under an arrangement entered into Feb'y 13, 1894, which were voluntarily surrendered, and were ordered to be destroyed by fire. The following is a list of notes surrendered, date of execution, and amount:

German bank,	March 7, 1894....	$5,547.28
German Insurance bank,	"	5,478.58
Bank of Commerce,	"	3,972.81
First national bank,	"	3,868.95
Western bank,	"	2,024.37
German Security bank,	"	1,239.87
Kentucky national bank,	"	1,019.28
Second national bank,	"	987.86
Farmers' & Drovers' bank,	"	662.13
Louisville City nat. bank,	"	635.26
Fidelity Trust and Safety Vault Co.,	March 8, 1894....	2,881.58
The Louisville Trust Co.,	"	1,922.74
The Kentucky Trust Co.,	"	171.35
103		
Columbia Finance and Trust Co.,	March 10, 1894....	1,870.16
Union national bank,	March 10, 1894....	2,320.27
Germania Safety Vault and Trust Co.,	"	898.33
Citizens' national bank,	March 13, 1894....	2,817.20
Merchants' national bank,	March 24, 1894....	1,161.21

On motion of Mr. Glover, seconded by Mr. Grainger, the secretary was directed to furnish each of the assistant license inspectors with a copy of resolution adopted January 8, 1895, regulating the compensation of assistant license inspectors.

The following bills were allowed and ordered paid:

Bradley & Gilbert Co.....	$256.30
Bennett Bros.' Co....	3.20

When, on motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY, *Sect. & Tr.*

A copy.
Attest: J. M. TERRY,
Sec't'y & Treasurer.

Exhibit "J. M. T. # 3" with the deposition of J. M. Terry is as follows:

(Copy.)

Officers commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *April* 9, 1895.

At a regular meeting of the commissioners of the sinking fund held at office Tuesday afternoon, April 9, 1895, at 4 o'clock, the following members were present: Chas. H. Gibson, president; W. R. Ray, Henry Glover, and Hon. Henry S. Tyler, mayor.

104 The treasurer presented to the commissioners note of the commissioners, dated March 13, 1894, for one hundred and eighty-one $\frac{55}{100}$ dollars, executed to the German national bank under an agreement entered into Feb'y 13, 1894. Said note was voluntarily surrendered and was ordered destroyed by fire.

* * * * * * *

When, on motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY,
Sec't'y & Tr.

A copy.
Attest: J. M. TERRY,
Sec't'y & Treasurer.

Exhibit J. M. T. # 4 with the deposition of J. M. Terry is as follows:

Officers commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *December* 12, 1895.

At an adjourned meeting of the commissioners of the sinking fund held at office Tuesday afternoon, December 12, 1895, at 3 o'clock, the following members were present: Chas. H. Gibson, president; W. R. Ray, Wm. F. Mayer, Hon. Henry S. Tyler, mayor, and Hon. R. E. King, president of the board of aldermen.

* * * * * * *

The secretary submitted to the board a letter received by him from the German Security bank demanding a return to it of the amount heretofore paid by it for license taxes for the years 1894–'95. The board having considered the matter, the president was instructed to notify said German Security bank that the board refused to refund any part of the amount so paid by it.

105 The president thereupon called the attention of the board to the demand made upon him by the Louisville Banking Company and Third national bank to pay the notes now held by those institutions, which were given by the sinking fund commissioners in adjustment of their license taxes for the year 1894 pending litigation. The board, after fully considering the matter, directed

the president to inform said Louisville Banking Company and Third national bank that it would not pay the said notes.

* * * * * * *

When, on motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY,
Sec't'y & Tr.

A copy.
Attest: J. M. TERRY,
Sec't'y & Treasurer.

Exhibit J. M. T. #5 of the deposition of J. M. Terry is as follows:

Office- of commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *January* 24, 1896.

At a called meeting of the commissioners held at their office in the city hall on January 24, 1896, there were present Charles H. Gibson, president; R. E. King, mayor *pro tem.;* William F. Mayer, Esq., and H. S. Barker, Esq., city attorney.

The president explained that he had called the board together to consider several matters that had been presented to him for decision and on which he desired the action of the board.

* * * * * * *

The president next informed the board that the Bank of
106 Kentucky, Louisville Banking Company, and Third national bank were threatening to institute suits on the notes held by them which were executed in pursuance to the authority given at the meeting of the board held on the 13th day of February, 1894, and he desired the board to reconsider the matter and decide whether it would adhere to the decision formerly made on the 12th day of December, 1895, to resist the payment of the notes referred to.

The president explained that unless there had been some arrangement between the city attorney and the banks named, whereby they were to surrender their notes, as the other banks did, he could see no possible ground to avoid payment of them, and that he had, therefore, requested the city attorney to be present, in order that the board might act with a full understanding of the facts.

The city attorney, Mr. Barker, being present, explained the circumstances under which the banks, other than the three above named, had agreed to surrender their notes, and stated that there was no agreement or understanding of any character which affected the liability of the sinking fund on the notes held by those three banks. He further advised the board (and the president concurred with him) that even if the court of appeals should hereafter overrule its opinion and decision rendered in the bank-tax cases, to which the three banks referred to were parties, it would not relieve the sinking fund from liability to pay the notes held by them, be-

cause there had been a final adjudication to the effect that those banks were not subject to license tax for the year 1894, and that adjudication would not be affected by any subsequent decision of the court of appeals on the same question.

After further discussion and consideration, on motion of Mr. King, seconded by Mr. Mayer, the president was, by a unanimous vote, directed to inform the three banks referred to
107 that the commissioners of the sinking fund recognize the notes held by them as valid obligations, which will be paid, and to ask that they will, in view of the present condition of the finances of the sinking fund, indulge the board until it is able to accumulate funds out of which they can be paid.

The president next called attention to a written demand from the Bank of Louisville for the repayment of the sum paid by it for bank license for the year 1894, and asked the city attorney for his opinion as to the liability of the sinking fund in the premises. The city attorney and the president concurred in the opinion that the Bank of Louisville was entitled to recover the amount paid by it, unless the court of appeals, in the cases now pending or which will soon be pending before it, shall overrule the decision heretofore made by it. In view of the uncertainty of the action of the court of appeals he advised that the Bank of Louisville be notified that if the court adheres to its opinion the sinking fund will repay the amount paid for license, with interest at five per cent. per annum from the date of the demand for repayment (January 24, 1896), and ask to have the matter left in abeyance until the court has again passed on the question.

On motion of Mr. King, seconded by Mr. Mayer, the president was, by a unanimous vote, directed to act in accordance with the advice so given by the city attorney.

On motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY,
Sec't'y & Tr.

A copy.
Attest: J. M. TERRY,
Secretary & Treasurer.

108 Exhibit "J. M. T. # 5½" with the deposition of J. M. Terry is as follows:

Office- commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *March* 10, 1896.

At a regular meeting of the commissioners of the sinking fund held at office Tuesday morning, March 10, 1896, at 10 o'clock, the following members were present: Chas. H. Gibson, president; W. R. Ray, Wm. F. Mayer, Hon. R. E. King, president of board of aldermen, and Hon. Geo. D. Todd, mayor.

* * * * * * *

The president reported that in accordance with a resolution adopted January 24, 1896, he directed, on February 21, the secretary

and treasurer to pay the notes of the commissioners executed by them to the Louisville Banking Company Feb'y 26, 1894, for $5,938.78; the Third national bank, March 8, 1894, for $1,493.91; March 13, 1894, to the Bank of Kentucky, for $8,063.48, and interest at four per cent. from date of execution to Feb'y 21, 1896; that the secretary and treasurer had paid said notes, with interest, as directed, when, on motion, the action of the president and secretary and treasurer was approved.

* * * * * * *

When, on motion, the board adjourned.

CHAS. H. GIBSON, *Pres't.*

J. M. TERRY,
Sec'y & Tr.

A copy.
Attest: J. M. TERRY,
Secretary & Treasurer.

Exhibit J. M. T. # 6 of J. M. Terry's deposition is as follows:

109 *Amount Paid by Banks and Trust Companies During Year* 1895 *into the Sinking Fund.*

1895.				
Jan'y	25.	Banks: German-American Title Co., license ...	121 60	
Feb'y	4.	The Dime savings bank, " ...	36 34	
	4.	Union national bank, " ...	4,689 32	
	6.	Third national bank, " ...	2,620 27	
	7.	Farmers' & Drovers' bank, " ...	1,614 50	
	8.	Fidelity Trust and Safety Vault Co., license	6,849 76	
	8.	First national bank, license.....	4,147 51	
	8.	Louisville Banking Co., license.....	4,223 62	
	11.	German Security bank, "	1,466 64	
	11.	" " " "	1,239 87	
	11.	Kentucky Title Co., "	346 07	
	13.	German Insurance bank, "	5,661 40	
	19.	German bank, "	6,021 40	
	25.	Germania Safety Vault & Trust Co., license.....	1,122 33	
	26.	Western bank, license	2,365 20	
	27.	Citizens' national bank, license	4,700 81	
	14.	Bank of Commerce, "	7,263 00	
March	13.	Kentucky Title Co., "	243 20	
	29.	Columbia Finance & Trust Co., license..	5,415 58	
	29.	Louisville Trust Co., " ..	4,751 63	
April	3.	Louisville City national bank, " ..	1,306 89	
	7.	German national bank, " ..	181 55	
	7.	" " " " ..	1,222 17	
	15.	American national bank, " ..	3,993 45	
				71,604 11
1894.				
		Bills payable, notes of commissioners, and being four per cent. of gross earnings from Feb'y 1, 1893, to Jan'y 31, 1894, per agreement of Feb'y 13, 1894:		
Feb'y	26.	Note No. 1, Louisville Banking Co.....	5,938 78	
M'ch	13.	" No. 19 to Bank of Kentucky.....	8,063 48	
		" No. 14 to Third national bank	1,493 91	
				15,496 17

1896.				
Feb. 21.	Bills payable:	Paid note No. 1 of commissioners to Louisville Banking Co., dated Feb'y 26, 1894	5,938 78	
110		Paid note No. 19 of commissioners to Bank of Kentucky, dated M'ch 13, 1894	8,063 48	
		Paid note No. 14 of commissioners to Third national bank, dated March 8, 1894	1,493 91	
				15,496 17
Feb'y 21.	Interest:	On note No. 1 to Louisville Banking Co. from Feb'y 26, 1894, to Feb'y 21, 1896	475 12	
		On note No. 19 to Bank of Kentucky from March 13, 1894, to Feb'y 21, 1896	625 33	
		On note No 14 to Third national bank from March 8, 1894, to Feb'y 21, 1896	117 86	

Amount Paid by Banks and Trust Companies During the Year 1894 *into the Sinking Fund.*

1894.				
Feb'y 20.	Bank of Louisville			2,036 26
March 1.	Kentucky Title Company			195 58
7.	German Security bank			581 75
7.	Bank of Commerce		2,600 00	
Dec. 31.	" "		3,972 81	
				6,572 81
March 7.	Kentucky national bank		1,625 00	
Dec. 31.	" " "		1,019 28	
				2,644 28
March 7.	Second national bank		975 00	
Dec. 31.	" " "		987 86	
				1,962 86
March 7.	Louisville City national bank		1,300 00	
Dec. 31.	" " " "		635 26	
				1,935 26
March 7.	German bank		975 00	
Dec. 31.	" "		5,547 28	
				6,522 28
March 7.	Farmers' & Drovers' bank		980 52	
Dec. 31.	" " "		662 13	
				1,642 65
March 7.	Western bank		812 50	
Dec. 31.	" "		2,024 37	
				2,836 87
March 7.	German Insurance bank		810 88	
Dec. 31.	" " "		5,478 58	
				6,289 46
March 8.	Fidelity Trust & Safety Vault Company		3,250 00	
Dec. 31.	" " " " "		2,881 58	
				6,131 58
March 8.	The Louisville Trust Company		2,600 00	
Dec. 32.	" " " "		1,922 74	
				4,522 74
March 8.	Third national bank			1,300 00
8.	Kentucky Trust Company		471 20	
Dec. 31.	" " "		171 35	
				642 55
March 10.	Columbia Trust Company		3,250 00	
Dec. 31.	" " "		1,870 16	
				5,120 16
March 10.	Union national bank		2,437 50	
Dec. 31.	" " "		2,320 27	
				4,757 77

111

March 10.	Germania Safety Vault and Trust Company	650 00		
Dec. 31	" " " " " "	898 33		
			1,548 33	
March 13.	German national bank			817 37
" 13.	Citizens' national bank	1,625 00		
Dec. 31.	" " "	2,817 20		
			4,442 20	
March 24.	Merchants' national bank	1,625 00		
Dec. 31.	" " "	1,161 21		
			2,786 21	
May 28.	The Dime savings bank			33 25
Dec. 31.	First national bank			3,868 95
				69,191 17

112 The deposition of John H. Leathers, taken on the 8th day of July, 1898, at the office of Helm & Bruce, Louisville Trust bldg., at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the plaintiff in an action between The Bank of Commerce, plaintiff, and S. H. Stone, &c., defendants, now pending in the United States circuit court for sixth circuit & dist. of Kentucky.

Appearances:

For plaintiff: J. P. Helm, Esq.
For defendants: Col. Stone.

JOHN H. LEATHERS, being duly sworn and examined by Judge Humphrey as attorney for the plaintiff, deposed as follows:

1 Q. Will you please state what is your present occupation and how long it has been such?

A. I am cashier of the Louisville Banking Company and have occupied that position for the last twelve years.

2 Q. The Louisville Banking Co. is a member of the Louisville Clearing-house Association, is it not?

A. Yes, sir.

3 Q. I hand you a copy of the minutes of the Louisville Clearing-house Association held at the clearing-house on the 30th day of October, 1893. I will get you to look at those minutes and state whether they represent correctly the action taken at that meeting.

Counsel for defendant The City of Louisville objects to the competency and relevancy of the testimony, and, without waiving the objection to the testimony, does not require the custodian of the record to be introduced.

113 A. I was present at that meeting, and the action taken by the meeting, as set forth in the paper I hold in my hand, is correct.

4 Q. Wil- you file that paper and make it a part of your deposition?

A. I do so, marked Exhibit J. H. L. No. 1.

5 Q. Will you please look at what purports to be a copy of the minutes of the Louisville Clearing-house Association held at the

clearing-house on the 2nd day of February, 1894, and state whether or not you were present and whether that paper correctly represents what occurred at that time; and, if so, will you please file it and make it a part of your deposition, marked Exhibit J. H. L. No. 2?

Counsel for the defendant The City of Louisville makes the same objection to this question for relevancy and competency as made to the previous question.

A. I was present. I assume that the date given is correct, but I cannot recall the dates from memory of these meetings. I also remember the proceedings held on that day. That paper represents the proceedings of that meeting—what took place at that meeting. I file the paper as part of my deposition, marked as requested.

6 Q. I will ask you to look at a similar paper, purporting to give a record of what occurred at a meeting of the clearing-house on the 12th of February, 1894, and ask if you were present and whether that paper correctly represents what occurred at that meeting.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

111 A. I remember this meeting very distinctly, and what that paper sets forth is what took place.

7 Q. Will you file that, please, and make it a part of your deposition, marked J. H. L. No. 3?

A. I do so.

8 Q. I will ask you if you were present at a meeting of the commissioners of the sinking fund of the city of Louisville held February 13th, 1894, and in connection with this question I show you a certified copy of the minutes of that meeting, which is filed with the deposition of Judge Barker in this case. Were you so present?

A. I was present with the committee and accompanied by our attorneys.

9 Q. Please state whether or not the committee composed of yourself and Messrs. Barret and Swearingen assented to the arrangement as therein set up.

A. We did, unanimously.

10 Q. Now, I will ask you to look at a paper which I now show you, purporting to be the proceedings of a meeting of the clearing-house held on the 14th of February, 1894, and I will get you to state whether you were present at that meeting and whether that paper correctly represents what occurred; and, if it does, please file it and make it a part of your deposition, marked Exhibit J. H. L. No. 4.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. This meeting of the clearing-house held on the day following the meeting with the sinking fund commissioners was called
115 in order that the committee might make a report of the agreement that had been entered into with the city. I was

present at that meeting. This paper recites exactly what occurred. I file it as part of my deposition, marked as requested.

11 Q. I will ask you now to look at what purports to be a copy of the proceedings of the clearing-house at a meeting held on the 17th day of December, 1894, and ask you whether you were present and whether that correctly represents what occured at that time.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. Yes, sir; I was present at this meeting and made the report for the committee, and this paper correctly recites what took place. I file it as part of my deposition, marked Exhibit J. H. L. No. 5.

12 Q. Will you please state what the Louisville Clearing-house Association is?

A. The Louisville Clearing-house Association is an association composed of all the banks of the city of Louisville, or, in other words, the associated banks of the city of Louisville.

13 Q. Are the trust companies members, and what about the trust companies; are they or have they at any time been members?

Objected to by counsel for defendant The City of Louisville.

A. The trust companies are not members of the Louisville Clearing-house Association, as they do not take checks to clear, but in all this matter of taxation they were invited to co-operate with us, and did.

14 Q. Please state the names of the four trust companies
116 represented by Mr. John Stites.

A. The Fidelity Trust & Safety Vault Co., the Louisville Trust Co., the Columbia Finance & Trust Co., and the Germania Safety Vault & Trust Co.

15 Q. Now, what, if any, of the banks did not go into this arrangement?

A. None of them that I recall.

16 Q. What, if any, failed to go in?

A. None of them failed to go in that I can recall except the Fourth national.

17 Q. How were the expenses of this litigation, including counsel fees, paid?

A. The counsel fees were paid by the banks, and including in this matter the trust companies, as we usually apportion such charges—that is, based upon the capital, surplus, and deposits of the banks, arriving at what the per cent. is, and then dividing the amount between them on that basis.

18 Q. Now, I have called your attention to a meeting of the sinking fund commissioners, at which the committee was present, on the 13th of February, 1894. I have also called your attention to the proceedings of the meeting of the clearing-house held on the next day, February 14th, 1894, at which the committee made a report. Now, I will ask you to state whether or not the banks and trust companies represented by your committee carried out this arrangement that the committee had made with the sinking fund commis-

sion by paying them certain sums and taking notes for certain parts of such sums.

A. They did so immediately.

117 19 Q. The Louisville Banking Co., I believe, took a note for the whole of the amount paid by it, as did the Bank of Kentucky at that time. That is a fact, is it not?

A. We took a note from the sinking fund for the amount we paid them?

20 Q. Yes.

A. We did.

21 Q. Do you recollect the three banks that were selected to bring suit?

A. I do.

22 Q. What were they?

A. The Bank of Kentucky, the Third national bank, and the Louisville Banking Co.

23 Q. Will you please state what counsel were employed by the committee to conduct this litigation?

A. The firms of Humphrey & Davie and Helm & Bruce.

24 (Q.) Will you please state what authority was given by your committee to these lawyers in regard to the conduct of this litigation?

A. The clearing-house authorized the committee to select the attorneys, which they did, and the attorneys selected were afterwards approved by the clearing-house, but the committee itself had full power to act.

25 Q. I hand you an agreement purporting to be made between the counsel for the banks and trust companies on the one side and H. S. Barker, city attorney, on the other side, approved by C. H. Gibson, president of the sinking fund commission of the city of Louisville, being the original contract filed with the deposi-

118 tion of Judge Barker. I will get you to read that contract and state whether the counsel, Messrs. Humphrey & Davie and Helm & Bruce, had authority from your committee to enter into that contract.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. Yes, sir; the attorneys for the banks and trust companies, Messrs. Humphrey & Davie and Helm & Bruce, had full authority to act for the banks in making this contract with the sinking fund, and were instructed by the committee to do so.

26 Q. I will get you to state what was the position of the banks making the test cases and the banks not making the test cases, in regard to the result of the litigation?

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. Well, we were all to share exactly alike. We had to have three banks of certain classes to make the test cases, by instructions of our attorneys, and it was, in reality, no easy thing to get any of the banks

to agree to become the ones selected for that purpose, but the Bank of Kentucky and the Third national bank and the Louisville Banking Co. finally agreed that their names should be used in this litigation, as representing all the banks of their respective classes in the clearing-house.

Cross-examination by Col. STONE:

Q. You have been shown what purports to be a stipulation signed by counsel for the banks and trust companies, City Attorney Barker, and approved by C. H Gibson, president of the commissioners of the sinking fund. I will get you to state when you first saw that original document.

119 A. I first saw that original document today, but I was a member of the clearing-house committee on taxation; was present at the meeting; was present at the clearing-house meeting that approved the action of the attorneys, and am familiar in a general way with all this litigation.

Q. What has your presence at any meeting of the clearing-house members to do with this document that I have asked you about?

A. In behalf of the clearing-house, the associated banks of Louisville, and being a member of the committee on taxation appointed by said clearing-house, I was present at the sinking fund office when that agreement was entered into.

Q. You are now referring to the resolution of February 13th, 1894, are you not?

A. I am referring to the meeting that took place and the agreement on the part of our committee and attorneys with the sinking fund commission.

Q. That was February 13th, 1894, was it not?

A. Whatever the date may be.

Q. You are recited there as one of the committee that was present?

A. Yes, sir; and was present.

Q. How long after that was this stipulation referred to executed, or do you know?

A. I don't know.

Q. You for the first time saw it today?

A. Yes, sir.

Q. Was that original document ever filed or referred to in

120 the clearing-house?

A. Yes, sir.

Q. When?

A. In the report referred to here today. The committee made report.

Q. Which one? Just point out the one now that refers to that document.

A. The paper I refer to was the meeting of the clearing-house held on the 14th day of February, one day after the meeting held with the sinking fund commissioners, in which the committee on taxation makes report to the clearing-house of what was done at

the meeting held with the sinking fund commissioners, which is practically what is contained in that agreement.

Q. Do you mean the resolution of the day before—those first two pages? Do you mean that was practically the same as embraced in that?

A. In speaking of any agreements, I had no reference to any resolution of the sinking fund mentioned either at that time or thereafter. I am speaking of the agreement that was entered into by and between the attorneys and committee for the banks and the city of Louisville, and the meeting of the clearing-house association held on the 14th recites in this paper what the committee and sinking fund commissioners had agreed to.

Q. Not knowing when this document that is signed by the attorneys and which has been exhibited to you today for the first time was executed, you don't pretend to say that that particular document was ever presented in the clearing-house or filed as part of its proceedings in any way?

121 A. I could not say that that paper was, but the agreement and contract entered into by the committee and attorneys with the sinking fund was reported to the clearing-house.

Q. You mean the contract between the committee of the clearing-house and the attorneys employing them?

A. And the sinking fund commissioners.

Q. You mean that that had been agreed on the day before you made your report, on February 14th, 1894?

A. Yes, sir.

Q. You are not the president or secretary of the clearing-house?

A. I am secretary of the committee on taxation.

Q. That is a special committee growing out of this bank-tax matter?

A. Yes, sir; growing out of this bank-tax matter.

Q. Have you had the original record of the clearing-house proceedings before you in comparing these copies to lay?

A. I have not.

Q. Do you know who made those copies?

A. I do not. I presume they were made by the manager.

Q. Who is the manager?

A. Isham Bridges.

Q. Did the title companies of this city existing in 1894 have anything to do with this arrangement you have spoken about?

A. No, sir; not that I know of.

Q. There are now three trust companies in the city of Louisville that were then in existence, the Louisville Trust Co., the

122 Fidelity Trust & Safety Vault Co., and the Columbia Finance & Trust Co. If I understand you, neither of those trust companies was a member of the clearing-house association?

A. They were not members of the clearing-house association in the ordinary sense of clearing through it.

Q. Are they in any sense?

A. They were invited to co-operate and did, and bore their expense of all the costs of litigation in this tax matter.

Q. I understand that; but they were not and are not members of the clearing-house association?

A. They were not members of the clearing-house association.

Q. As to whether or not the members of each of these three classes, which you say the suits that were brought that the banks who brought suit were to represent, were on the same footing you never undertook to investigate; you left that to the attorneys entirely, as to whether they had the same legal standing in court as the banks that did bring suit?

A. It was not part of our business to look into that; but all the banks shared alike exactly in the costs of the litigation, and it was clearly understood that they were to share alike in the benefits that were derived from it.

Q. That agreement was not made with the courts?

A. No; it was made by and between the clearing-house association and the attorneys. We were not at that time dealing with the courts.

Q. A number of these banks had not accepted the Hewitt bill at all; were not in existence at that time. How did you arrange about that?

123 A. We did not make any arrangements whatever about that. They went into this litigation.

The parties hereto, being present by attorney, waive all exceptions except as to competency and relevancy.

JOHN H. LEATHERS.

STATE OF KENTUCKY, }
Jefferson County. }

I, W. C. Furnas, examiner, do certify that the foregoing deposition of John H. Leathers was taken, pursuant to agreement of counsel, before me, and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said witness having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statement reduced to writing by me in his presence, both parties, by attorney, being present. My commission expires Jan. 13, 1900.

Given under my hand this 8th day of July, 1898.

W. C. FURNAS,
Notary Public, Jeff. Co., Ky.

Exhibit J. H. L. #1 of the deposition of John H. Leathers is as follows:

At a meeting of the Louisville Clearing House Association held at the clearing-house on the 30th day of Oct., 1893.

Present: All of the members except the Louisville City national bank, the Farmers' and Drovers' bank, the German national bank, and the German Security bank.

The German national bank and the German Security bank were excused.

124 The president explained that the meeting had been called to consider the question of taxation and such other matters as might be brought before the association.

Mr. Swearingem moved the following resolution, viz:

"Resolved, That it is the sense of this association that in any and all legal contests that may be instituted or arise concerning taxation, whether it be to sustain the chartered rights of the old banks, the contract under the Hewitt law, or on any other lines, the members of this association will act jointly and bear their proportion of the fees and costs incurred, to be calculated and fixed by a uniform assessment on their respective capital, surplus, and deposits.

"Resolved, That Messrs. Jas. P. Helm and Alex. P. Humphrey be employed to represent the interests of this association in such legal proceedings."

Mr. Lindenberger moved to amend by striking out the word "deposits," so as to make the assessment in capital and surplus, and the question being taken, it was decided in the negative. The yeas and nays, being required, were as follows: Those voting in the affirmative were the Merchants' national bank, the Western bank, and the German bank; in the negative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, the Kentucky national bank, the Second national bank, the Citizens' national bank, the Third national bank, the Louisville Banking Co., the Fourth national bank, and the Union national bank.

And so said amendment was lost.

Mr. Russell moved to amend said resolutions by adding
125 thereto the following:

"Resolved, That Messrs. Swearingen, Thos. L. Barret, and H. M. Burford be appointed to carry out the objects of these resolutions."

The question being taken thereon, it was decided in the negative. The ayes and nays, being required, were as follows: Those voting in the affirmative were the Bank of Louisville, the Merchants' national bank, the Citizens' national bank, the Western bank, the Third national bank, and the German bank; in the negative, the Bank of Kentucky, the Bank of Commerce, the Kentucky national bank, the Second national bank, the Louisville Banking Co., the Fourth national bank, and the Union national bank.

And so the said amendment was lost.

The question was then taken on the adoption of the original resolution, and it was decided in the affirmative. The ayes and nays, being required, were as follows: Those voting in the affirmative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, the Merchants' national —, the Kentucky national bank, the Second national bank, the Citizens' national bank, the Western bank, the Third national bank, the German bank, the Louisville Banking Co., the Fourth national bank, and the Union national bank; in the negative, none.

And so the resolutions were adopted.

Mr. Russell moved "that a committee of three be appointed by

the president to carry out and execute the objects of the foregoing resolutions."

Which was adopted, and Messrs. Swearingen, Thos. L. Barret, and Leathers were appointed.

Mr. Leathers moved "that the committee on the Swearingen resolution be requested to communicate to the State banks the action taken by this association and invite their co-operation."

126 Which was adopted.

A true copy.

CLINTON McCLARTY, *Manager.*

Exhibit J. H. L. No. 2 with the deposition of John H. Leathers, is as follows:

Copy.

At a called meeting of the Louisville Clearing House Association held at the clearing-house, on the 2nd day of February, 1894.

Present: All the members except the Farmers' & Drovers' bank, the German Insurance bank, and the German national bank.

Mr. Swearingen, from the committee on taxation, made a verbal report that it was the opinion of the committee that the members of this association should resist by lawful method municipal taxation.

Whereupon Mr. Barret moved the following resolution:

"Resolved, That the committee heretofore appointed at the meeting of Oct. 30th, 1893, be, and are hereby, authorized to determine the matter of resisting the city ordinance providing license taxes and to determine whether each bank shall resist or test cases be made by banks selected by the committee, and also to determine whether any portion of said license tax be paid, or, if any portion, what shall be, and how it shall be paid, and by what banks. In the event the committee make test cases, it is understood that any expense or penalties suffered by any bank making such test cases shall be borne by the clearing-house in the proportion of capital, surplus, and deposits.

This resolution shall be binding on each member of this association when approved by its board of directors, and it is the

127 sense of this association that each member hereof should have its board take action hereon at once and report result to the manager hereof, who shall note the result on his minutes.

Resolved, That a copy of the resolution just adopted by this association giving certain powers to a committee with reference to contesting municipal taxes be sent to each of the trust companies in this city and their concurrence and co-operation be requested, and that they signify to this association within one week from the reception of the resolution aforesaid, but not later than the tenth day of February, 1894, whether or not they will co-operate with the association."

Which was adopted, and then the association adjourned.

CLINTON McCLARTY, *Manager.*

Exhibit J. *L.* H. L. No. 3 of the deposition of John H. Leather, is as follows:

Copy.

At a meeting of the Louisville Clearing House Association held at the clearing-house on the 12th day of February, 1894.

Pr-sent: All the members except the Merchants' national bank, the German national bank, and the Western bank

On motion of Mr. Leathers, John Stites, Esq., the representative of the trust companies of the city, was added to and made a member of the special committee on taxation.

The committee on taxation beg leave to submit the following report:

"We have had several conferences with Messrs. Humphrey
128 & Davie and Helm & Bruce with reference to the probable expense of the banks in the matter of the tax litigation. The committee is confident that the fees of these attorneys will be fair and equitable and satisfactory to the banks. It is a matter of considerable difficulty for the attorneys to make a definite statement at this time as to how many suits may have to be brought or how much litigation may ensue or, from the character of the litigation, how many courts such suits may have to be prosecuted in and through before a decision is finally reached. The committee are able to report to the association that under no circumstances will the expense exceed the sum of $16,000. Of this sum, $1,000 is estimated as the expense of clerk's cost, travelling expenses, printed briefs, etc. The $15,000 for fees is placed at the maximum, not to exceed that sum under any circumstances. The charge for services will be based upon the amount of labor performed, will be finally determined at the end of the litigation, and, while it cannot exceed, may be less than the amount named.

Taking the maximum sum as the basis, the cost of each bank and trust Co., upon the basis of the capital, surplus, and deposit, will be about 40 cents on the $1,000.

We submit herewith a table showing the capital, surplus, and deposits of each of the banks and the trust companies, as furnished by the latest reports of the manager of the clearing-house association, and we give the amount of expense to each institution on the basis of the amount charged at the highest rate.

The services so rendered by the attorneys will include all the legal attention that is required, of whatsoever kind, growing
129 out of this tax question, for every bank in the city of Louisville, with preparation and argument of the cases before the court of appeals and the Supreme Court of the United States, if necessary; and for such services the fees to be charged shall in no event exceed the amount named as the maximum, and with the further understanding that the fees charged shall be based upon the reasonable value of services rendered.

Your committee are further advised to say that if this litigation is placed in its hands it proposes to have regard to that which will be of permanent benefit to the banks, rather than any effort to gain

mere temporary success. It may well be that the present system of taxation proposed by the State and city can be entirely avoided temporarily, but if such a defect were pointed out and urged as a defense the result might well be that the State would by legislation cure this defect, and be led to adopt a system of taxation which is much more onerous than the present one. Your committee will expect, in conducting this litigation upon the part of the banks, to have regard to sound policy and commercial reasons and prospects to a greater extent than to mere questions of law. In other words, it will be the purpose of the committee to secure to the banks what are their rights, but to endeavor, in making the effort to secure them, not to involve the banks in such questions as will lead to their being much more heavily taxed than is at present proposed if the litigation should be unsuccessful.

It will be the purpose of the committee to maintain as friendly and pleasant relations with the taxing power as are possible, and to do nothing to stir up any public sentiment against the banks, and to so nothing that will give any one occasion to say that the
130 banks are making mere technical objections in order to escape their fair proportion of public burdens.

In reposing the power in the committee to conduct this litigation a very large discretion must necessarily be given. The committee will endeavor to use it wisely and to the best interests of all concerned.

Respectfully,
(Signed) GEO. W. SWEARINGEN,
THOS. L. BARRET,
JOHN H. LEATHERS, *Committee.*"

On motion duly made and seconded—

Resolved, That the foregoing report be received and approved.

Which was adopted.

The yeas and nays, being required, were as follows:

Those voting in the affirmative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, the First national bank, the Kentucky national bank, the Second national bank, the Louisville City national bank, the Citizens' national bank, the Farmers' & Drovers' bank, the German Insurance bank, the Third national bank, the German Security bank, the German bank, the Louisville Banking Company, and the Union national bank—total, 15.

Also John Stites, representing the four trust companies.

Voting in the negative, the Fourth national bank—total, 1.

And so said report was received and approved.

The manager was directed to call on the banks not present or represented at this meeting and present the report just adopted and ascertain whether they will concur in the action of the association in reference thereto, and then the association adjourned.

CLINTON McCLARTY,
Sec'ty and Manager.

131 Exhibit J. H. L. #4 with the deposition of John H. Leathers is as follows:

(Copy.)

At a called meeting of the Louisville Clearing House Association held at the clearing-house on the 14th day of February, 1894.

Present: All the members except the German national bank, the Third national bank, and the Fourth national bank.

The minutes of the last meeting were read and approved.

The special committee on taxation presented the following report:

Your committee on taxation would respectfully report that in pursuance of their authority to arrange in reference to testing all of the legal rights of the banks in regard to taxation, and at the same time to prevent any unnecessary friction with the taxing authorities, your committee, in company with the counsel selected by the clearing house, have had a conference with the board of sinking fund commissioners of the city of Louisville. This conference was held upon yesterday afternoon, and we have called this meeting so as to lay before you the result of the joint action of your committee and the sinking fund commissioners. As you are aware, the four per cent. tax on gross earnings prescribed by the ordinance is payable to the sinking fund. It so happens that this year the maturities of the sinking fund are to a very considerable amount in excess of any probable income. You are further aware that the council, in making its levy of ad valorem taxes, omitted the usual levy that is made for the benefit of the sinking fund under the idea that the new
132 licenses which, under the charter, the council had the authority to impose would make up an income to the sinking fund commensurate with the former ad valorem tax. It would be, therefore, a matter of considerable disappointment to the city, as well as to the sinking fund commissioners, should this substituted income to the sinking fund commissioners not be collected; and as the credit of the city is a subject upon which the community is naturally very sensitive, we believe that it is our duty to do everything we can to avoid giving any sort of shock to it.

The proposition that has been formulated by the conference between your committee and the sinking fund is as follows:

All of the banks which are not selected to make the test cases shall pay to the sinking fund 32½ cents on each share of capital stock of the bank. This 32½ cents is the difference between the 42½ cents paid to the State on the first of July and the 75 cents which would have been paid under the Hewitt law. Besides the payment of this 32½ cents to the sinking fund, it is further propored that each of the banks not selected to make the test cases shall lend to the sinking fund commissioners, at four per cent. interest, an amount equal to the difference between the 32½ cents on each share of capital stock and the 4 per cent. on gross receipts. The sinking fund commissioners are to execute to each of the banks making such loan a non-negotiable security, payable if and when it shall be decided that the city had not the right to exact the 4 per cent. on gross receipts from the banks.

The result of this will be that if our litigation turns out favorable

to the banks these obligations will become due to the banks;
133 if it turns out to be unfavorable they will be simply used as a payment by the banks of the tax which is exacted by the ordinance.

It is further proposed that as to the testing banks, viz., those banks that are selected to make the test cases, they shall lend to the sinking fund, upon a similar obligation and at the same rate of interest, the 4 per cent. on their gross receipts, payable in the same way as the other obligations above described.

The reason why the difference is made between the banks that make the test cases and those who do not is that it is thought desirable by our counsel that those banks that make test cases shall not have paid anything at all upon the tax. It is, however, thought desirable that they shall lend the money so as not to disappoint the sinking fund in its present necessities.

If this plan is followed out the sinking fund will have all of the money that it expected to get, and will have had it at a low rate of interest, even though it should turn out hereafter that they had no right to collect any of it.

Your committee, after full conference with their counsel and the sinking fund commissioners, believe that this proposition is a fair one on both sides; that it is as much as the banks can be asked to do, and that the sinking fund has the right, if our litigation is to be a friendly one, to ask that this much be done.

Your committee in this matter have deemed it of the highest importance that this litigation shall be carried on in a way that will show a friendly spirit on the part of the banks, will show that they
134 are not standing upon their rights in any mere technical spirit, and that what they are doing is not with any motive or purpose to embarrass the city or to escape the payment of what is justly due or to make a litigation which is for the purposes of embarrassment or delay; but that the banks are doing everything they can to aid the sinking fund upon the one side and at the same time not sacrifice any of their legal rights upon the other.

We strongly recommend to every bank in the clearing-house that it follow out this arrangement this proposed by the joint action of your committee and the sinking fund commissioners, and to which — is unanimously agreed on both sides.

(Signed) THOS. L. BARRET,
GEO. W. SWEARINGEN,
JOHN H. LEATHERS,
JOHN STITES, *Committee.*"

On motion of Mr. Burford—

Resolved, That the report of the committee be received, approved, and adopted.

And the question being taken thereon, it was decided in the affirmative.

The yeas and nays, being required thereon, were as follows:

Those voting in the affirmative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, Merchants' national bank, First national bank, Kentucky national bank, Second national

bank, Louisville City national bank, Citizens' national bank, Farmers' & Drovers' bank, German Insurance bank, Western bank, German Security bank, German bank, Louisville Banking Company, Union national bank (total, 16), and John Stites, Esq., representing 4 trust companies.

In the negative, none.

135 And so said resolution was received, approved, and adopted.

And then the association adjourned.

CLINTON McCLARTY, *Manager.*

Exhibit J. H. L. # 5 with the deposition of John H. Leathers is as follows:

(Copy.)

At a called meeting of the Louisville Clearing House Association held at the clearing-house on the 17th day of December, 1894.

Present: All members.

Captain Leathers, from the committee of taxation, reported as follows: That it was expedient that all the banks except the Bank of Kentucky, Bank of Louisville, Third national bank, and the Louisville Banking Co. should surrender the notes given them by the sinking fund in 1894, and that all the banks except the Bank of Kentucky and the Bank of Louisville should, for the year 1895, pay the four per cent. license tax without reservation, provided always that the general council shall pass a levy ordinance that does not include in its terms tax on capital stock, surplus of banks and trust companies.

On motion of Mr. Burford, seconded by Mr. Viglini—

It was resolved that the above report be received and adopted. The Bank of Kentucky and Bank of Louisville were excused from voting on account of their position in the suit.

The question being taken thereon, it was decided in the affirmative.

136 The yeas and nays, being required, were as follows:

Bank of Commerce, First national bank, Louisville City national bank, Citizens' national bank, Farmers' & Drovers' bank, German Insurance bank, German national bank, Western bank, Third national bank, German Security bank, German bank, Louisville Banking Co., Union national bank, American national bank—total, 14; nays, none.

And so the said report was received, approved, and adopted, and the meeting adjourned.

ISHAM BRIDGES, *Secretary.*

The exceptions to said depositions of H. S. Barker and J. H. Leathers are as follows:

137 *Exceptions to Complainant's Depositions, Exhibits, Documentary and Record Evidence.*

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } # 6567.

The defendant City of Louisville excepts to the depositions, exhibits, documentary and record evidence offered and read in evidence by complainant on the final hearing of this cause as follows:

1. Questions Nos. 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 24, and 25 of the main examination in the deposition of H. S. Barker call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

2. The two exhibits filed with said Barker's deposition, marked Exhibit "Copy" and Exhibit "A," are incompetent and irrelevant evidence against this defendant.

3. The answers to questions Nos. 75, 76, and 82 of the cross-examination in the deposition of said Barker are not responsive to the questions asked, and, so far as they detail or refer to conversations or matters not shown by the proceedings of the commissioners of the sinking fund of record on their journal or minute book, said answers are incompetent and irrelevant testimony against this defendant.

4. The third paragraph of the answer of the commissioners of the sinking fund in the suit of The German Security Bank against said commissioners, copied into the deposition of said Barker on his own motion, is incompetent and irrelevant testimony against this defendant.

5. Questions Nos. 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, and 26 of the main examination in the deposition of
138 J. H. Leathers call for incompetent and irrelevant testimony against this defendant.

6. Exhibits 1, 2, 3, 4, and 5, made part of said Leathers' deposition, are incompetent and irrelevant testimony against this defendant.

7. The record in the suit of The Louisville Banking Company against R. H. Thompson, judge of the police court of Louisville, is incompetent and irrelevant evidence against this defendant.

HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

And on the 14th day of July, 1898, the following order was entered:

This cause having come on to be heard for final decree, the parties filed stipulations Nos. 1 and 2 and complainant read, 1st, its bill of complaint; 2nd, the record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge, &c., lately

pending in the Jefferson court of common pleas and in the court of appeals of Kentucky, being an exhibit to the bill of com-
139 plaint in the case of The Louisville Banking Company *vs.* Samuel H. Stone, &c., lately pending in this court.

3rd, stipulation No. 1 between the complainant and the defendants; 4th, deposition of Henry S. Barker, taken herein, with the exhibits thereto attached; 5th, the deposition of John H. Leathers, taken herein, with the exhibits thereto attached.

The defendant The City of Louisville read on the hearing, 1st, its answer; 2nd, stipulation No. 2 between the complainant and defendants, with documents therein referred to; 3rd, deposition of J. Moss Terry, taken herein, and the exhibits thereto attached, and, the court being now advised, it is adjudged, ordered, and decreed as follows:

1. That the complainant is entitled to the benefit of the proceedings taken in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge, &c., in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the court of appeals of Kentucky, wherein The Louisville Banking Company was appellant and the said R. H. Thompson, judge, &c., and The City of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

2. That it is *res adjuducata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11th, 1892, or certifying the same to the
140 city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the constitution of the State of Kentucky and any provision of the said act of November 11th, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant.

3. That the complainant do recover of the defendants its costs herein expended. The defendants now in open court pray an appeal from this decree to the Supreme Court of the United States, which is allowed. The complainant waives citation upon said appeal in open court.

The defendants filed herein their assignment of error, and it is ordered that said appeal may be perfected by the execution of a bond by the defendants, with surety, to be approved by the clerk, in the penalty of one thousand dollars.

Stipulations Nos. 1, 2, and 3 are as follows:

141 *Stipulation No. 1.*

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6567.

It is agreed between the complainant and the defendants herein as follows:

1st. That the complainant complied with the revenue act of May 17th, 1886, known as the Hewitt law, in the manner and within the time provided for in said law, and that said agreement upon the part of complainant was within proper time certified by the proper officer of the bank to the governor of the State of Kentucky.

2nd. That the complainant may read on the hearing the record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson court of common pleas, and the same case on appeal in the court of appeals of Kentucky, Louisville Banking Company, appellant, *vs.* City of Louisville and R. H. Thompson, appellees, the same being filed in a case pending in this court styled "Louisville Banking Company *vs.* Samuel H. Stone and others."

HELM & BRUCE,
For Complainant.
H. L. STONE,
City Attorney.

Stipulation No. 2 is as follows:

142 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } Stipulation No. 2.

I. It is stipulated and agreed between the complainant and the defendant City of Louisville that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1893," approved December 17, 1892 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 248–250).

2. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (*ib.*, pp. 219–222).

3. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

4. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance, referred to in complainant's bill, requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

143 5. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1895," approved December 22, 1894 (*ib.*, pp. 256, 257).

6. An ordinance entitled "An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

7. An ordinance entitled "An ordinance provising for cerditing as volorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, 205 206).

8. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from am ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

9. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and the State board of valuation and assessment," approved April 9, 1897 (*ib.*, 28, 29).

The ordinances above referred to are to be read subject to legal exceptions for competency and relevancy.

II. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated and organized, and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City

144 Code, 1884, pp. 691–705, which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

III. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act, on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

IV. That the complainant's franchise was prior to the institution of this action assessed by the State board of valuation and assessment under the act of November 11, 1892, for the year 1893 at $1,320,683, and for the year 1894 at $1,406,713; that these assessments were certified by the State auditor to the clerk of the Jefferson county court and by the latter to the collecting officer of the defendant City of Louisville for collection, and that the assessor, under the ad valorem tax levy ordinances of the defendant city, has since April 12, 1897, made out on said respective assessments and listed with the tax receiver for collection against the complainant a tax

bill for the year 1893, at the rate of 74½ cents on each $100, for $26,446.20, both of which tax bills remain unpaid.

V. It is agreed by counsel for complainant and defendant herein that the corporate existence which complainant had when it accepted the provisions of the Hewitt act expires, by then existing statute, on 10th day of February, 1910.

HELM & BRUCE,
Solicitors for Complainant.
H. L. STONE,
City Attorney, Solicitor for Defendant
City of Louisville.

145 Stipulation No. 3 is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
S. H. STONE, &c., Defendants.
} #6567. Stipulation No. 3.

It is agreed between the parties complainant and defendant herein that in copying this record for the Supreme Court of the United States the clerk may omit all such parts of the record as are contained in the copy made for the Supreme Court of the record in the case of The Louisville Banking Company *vs.* Samuel H. Stone, &c. Each party is to be at liberty to refer to those records for the depositions and documents in exactly the same way as if they were contained in this record.

HELM & BRUCE,
For Complainant.
L. H. STONE, *City Att'y.*

Petition and assignment of errors is as follows:

146 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} #6567. Petition and Assignment of Errors of the City of Louisville and Board of Valuation and Assessment.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioners and defendants, City of Louisville and Samuel H. Stone, auditor; George W. Long, treasurer, and Charles Finley, secretary of state, constituting the board of valuation and assessment, and state that the record, proceedings, and decree of the court rendered herein July 14, 1898, contain manifest errors to their prejudice committed, as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of their respective demurrers to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against these defendants or either of them.

II.

The court erred in overruling the exceptions of the defendant City of Louisville to the depositions, exhibits, documents, and records offered and read in evidence by complainant on the final hearing of this cause.

III.

147 The court er-ed in decreeing that complainant has an irrevocable or *irreparable* contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of the Louisville Banking Company against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Louisville Banking Company in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, on account of the alleged agreement with Ex-City Attorney Barker and the commissioners of the sinking fund of the city of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant members of said State board, enjoining and restraining them from valuing and assessing the franchise of intangible property of complainant, and from certifying such assessments for State and municipal taxation for the
148 years 1895, 1896, 1897, and 1898 and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act, the city charter and the State constitution, or either of them, impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore these petitioners and defendants say the said decree of the court herein is erroneous, and pray this honorable court to grant them an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so they will ever pray.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.
W. S. TAYLOR,
Attorney General, Solicitor for Defendants Constituting the Board of Valuation and Assessment.

149 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE,
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, & The Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Bank of Commerce in the sum of one thousand dollars, to be paid to the said Bank of Commerce, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1898.

Whereas the above-named Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND,
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

150 Agreement for record on appeal to Supreme Court is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
S. H. STONE, &c., Defendants. } # 6567.

Agreement for Record on Appeal to Supreme Court.

In order to prevent unnecessary expense and the making of the record larger than is useful, the complainant and defendants have agreed as follows:

In copying the record in this case on appeal to the Supreme Court of the United States, the clerk may omit (1) the opinion and dissenting opinion in the bank-tax cases, decided June 1, 1895, (see opinion, 97 Ky., 590); (2) the clerk need not copy the special acts relating to the sinking fund commissioners of the city of Louisville nor the ordinances recited in stipulation No. 2 filed herein, but counsel may print such parts of said acts and ordinances as seem to him relevant in an appendix to his brief.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

151 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 150 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,947. Kentucky C. C. U. S. Term No., 362. Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the Commonwealth of Kentucky, and City of Louisville, appellants, *vs.* The Bank of Commerce. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 355.

CITY OF LOUISVILLE, APPELLANT,

vs.

BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1895.

(16,948.)

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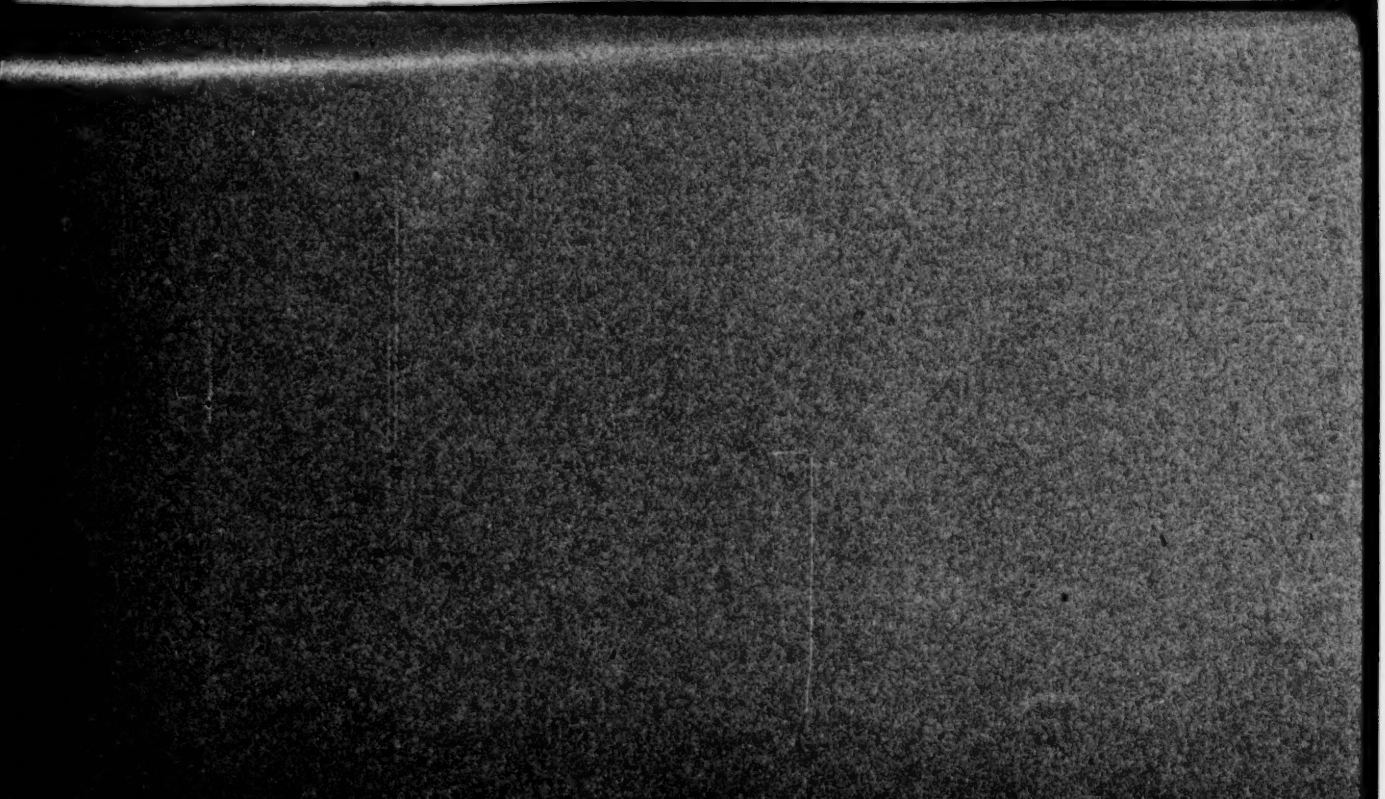

(16,948.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 363.

CITY OF LOUISVILLE, APPELLANT,

vs.

BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on February 21, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

BANK OF COMMERCE, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6568.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, Bank of Commerce, by its counsel, Helm & Bruce, and filed in the clerk's office of our said court *their* bill of complaint and exhibits against the above-named defendants, S. H. Stone, etc., which bill of complaint is in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Bank of Commerce, a citizen and resident of the State of Kentucky, brings this bill against the city of Louisville, a municipal corporation of the State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled "An act to incorporate the Western Financial Corporation," approved 10th February, 1865; and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract and to be contracted with, to sue and be sued, and generally to do such banking business as is usually granted to such corporations. The amendments to the charter of your orator were adopted March 2, 1865, February 15, 1869, February 27, 1882 and March 8, 1884. By this last act
2 the name was changed from the Western Financial Corporation to the Bank of Commerce.

Your orator says it is, and has been since its organization, engaged in the banking business in the city of Louisville, Ky.

Your orator respectfully shows that one Samuel H. Stone is now the auditor of public accounts for the Commonwealth of Kentucky, having been duly elected and qualified according to law.

Your orator says it is and has been since its organization engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this: to wit, that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the "old banks." These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the
3 national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations, desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national

banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it was provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, should be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, should, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumu-
4 lations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation should thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; *provided*, they pay the tax

provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth, and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that it did not until February, 1894, own the building in which it did business, and since that date it has regularly each year paid its taxes thereon to the city of Louisville.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years

1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill," and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individ-
6 uals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $ —. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view

of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual
7 payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to

all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract
8 which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigations.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies of the city of Louisville, including your orator, paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against banks claimed by the city had been transferred to the sinking f of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid, with the minute aforesaid, is filed herewith as part hereof, marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered

would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself and the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted
9 subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill," which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits, though really against the city of Louisville, were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel, and the Commonwealth of Kentucky appeared by its attorney general, and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the

"Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68, of the General Statutes,"

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only question- involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A certified transcript of the record and proceedings in the case of Louisville Banking Company against R. H. Thompson, police judge of city court of Louisville, is filed with the bill of said bank in this court in the case of said bank *vs.* Samuel H. Stone, &c., and by reference is made a part hereof.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes, imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised. The auditor, treasurer, and secretary of state is by said act constituted a board of valuation and

assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise, the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and in-
11 clude the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at the price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that rea-

son in violation of the provision of the Federal Constitution
12 prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect and is threatening to collect from your orator has not been assessed by the city of Louisville, but the assessment has been made by the auditor, secretary of state and treasurer of the State under the pretended authority of the act of November 11, 1872, heretofore referred to.

Your orator respectfully shows to the court that the taxes which the defendant The City of Louisville is threatening to collect is upon the assessments for the years 1893 and 1894. The amount of the pretended assessment made by the said State board of valuation and assessment against your orator upon its franchise for the year 1893 is $1,320,683.64, and for the year 1894 is $1,406,713.16. Your orator further shows that for the year 1893 the tax rate of the city of Louisville was $2.17, and for the year 1894 it was $1.88, so that the total amount involved in this controversy is $55,000, which exceeds the amount of taxes which your orator would have to pay under the "Hewitt bill" in the sum of $42,500.

Your orator further shows *shows* that the auditor of the State acting under the authority of said void law certified the assessment against your orator's franchise for the years aforesaid to the clerk of the county court of Jefferson county; and the said clerk has certified said assessment to the tax collector of the city of Louisville, and your orator further respectfully shows that the said city of Louisville will by its officers, unless restrained by this honorable court, proceed by distraint and otherwise to collect said illegal tax upon said illegal assessment when it has no lawful right to do so, and the claim of the defendant, The City of Louisville, that it has the right to collect said taxes against your orator, casts a cloud upon your orator's right to pay taxes under and in accordance with its contract and your orator will furthermore be subjected to much harassment and litigation, and unnecessary costs; and your orator and its stockholders will be greatly and irreparably injured by the false claims of the defendant, The City of Louisville, and its attempts by distraint and by a suit to collect said taxes.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the City of Louisville, and that it may be spared the irreparable injury which it will suffer by attempts to collect said taxes by distraint and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of sub-

pœna against the defendant, The City of Louisville, to appear
13 and make full and true answer to this bill (but not under oath answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said City of Louisville, its officers and agents to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to it as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

H. M. Burford says he is the president of complainant, and that the statements contained in the foregoing bill are true.

H. M. BURFORD.

Subscribed and sworn to before me by H. M. Burford this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

Here follows "Exhibit A," referred to in foregoing bill:

SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

14 After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title com-

panies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it, or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making above payments the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company representing class B, and the Third national bank representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named in the minutes of the sinking fund commissioners of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in
16 the test cases, paid the whole of the amount of taxes claimed

as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Louisville.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

The President of the United States of America to The City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by the Bank of Commerce, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:
[SEAL.]

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office, on or before the 7th day of June next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

Endorsed on the back of said subpœna is the following return:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of within spa. in ch'y to George D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Fees $2.00.

17 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6568. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Commerce, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer, states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

18 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6568. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time, without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6568. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Commerce, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

19 This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national

banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks, except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2), of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to

the complainant, or the amendment or amendments to its charter by the legislature of State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12) of said act of May 17, 1886.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom, or amend or repeal the same, as provided for in section six (6), article two (2), of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of Nov. 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $—.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

21 This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments

or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney,
22 mayor, any other officer of this defendant to execute or deliver or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been a separate and distinct corporation from this

defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer
23 than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to *to* the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied
24 with the provision- of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time

should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States,
25 that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so, or that the alleged claim of this defendant, that it has the right to collect said

taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making, any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *vs.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *vs.* Deposit Bank of Frankfort, Same *vs.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national,
26 trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict

therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit, sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final
27 and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

28 United States Circuit Court for the Sixth Circuit, District of Kentucky, at Louisville.

BANK OF KENTUCKY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

FIDELITY TRUST AND SAFETY VAULT COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

GERMAN SECURITY BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

CITIZENS' NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

FIRST NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

THIRD NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

FARMERS' AND DROVERS' BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

LOUISVILLE CITY NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

UNION NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

29 WESTERN BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

BANK OF LOUISVILLE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

This day came the complainants in each of the above-entitled causes and filed herein notices duly served on the defendant, and moved the court to grant to them severally an injunction, until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in the said bill of complaint.

And came the said City of Louisville by H. L. Stone its city attorney, and objected to the said motion, and the same coming on to be heard, was submitted, and the court not being advised takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the said City of Louisville; and the same were argued by counsel and submitted to the court, and the court not being advised takes time.

WM. H. TAFT,
Circuit Judge.

May 28th, 1897.

30 And on the 4th day of June, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until the 25th day of June, 1898.

And on 25th day of June, 1898, the following order was entered:

This cause coming on to be heard, *and* the court, being advised, delivered its opinion herein, which is ordered to be filed. It is now adjudged, ordered, and decreed by the court as follows:

First. That the demurrer of the defendant, The City of Louisville, to the bill of complaint be, and it is hereby, overruled; to which the City of Louisville excepts.

Second. Until the further order of the court the said defendant, The City of Louisville, is enjoined and restrained from attempting

in any manner to enforce against the complainant the taxes mentioned in the bill of complaint herein for the years 1893 and 1894.

And then came complainant and filed herein its general replication.

Replication referred to above is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

Replication.

31 This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

And on the 14th day of July, 1898, the following order was entered:

This day came the defendant and filed exceptions to the depositions of H. S. Barker and J. H. Leathers and the exhibits filed therewith and the *the* other documentary and record evidence offered and read by complainant on the final hearing of this cause; which exceptions were overruled by the court; to which ruling of the court defendant excepted.

Said exceptions above referred to are as follows:

32 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant, *versus* CITY OF LOUISVILLE, Defendant.	#6568. Exceptions to Complainant's Depositions, Exhibits, Documentary and Record Evidence.

The defendant, City of Louisville, excepts to the depositions, exhibits, documentary and record evidence offered and read in evidence by complainant on the final hearing of this cause, as follows:

1. Questions Nos. 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 24, and 25 of the main examination in the deposition of H. S. Barker call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

2. The two exhibits filed with said Barker's deposition, marked Exhibit "Copy" and Exhibit "A," are incompetent and irrelevant evidence against this defendant.

3. The answers to questions Nos. 75, 76, and 82 of the cross-examination in the deposition of said Barker are not responsive to the questions asked, and so far as they detail or refer to conversations or matters not shown by the proceedings of the commissioners or matters not shown by the proceedings of the commissioners of the sinking fund, of record on their journal or minute book, said answers are incompetent and irrelevant testimony against this defendant.

4. The third paragraph of the answer of the commissioners of the sinking fund in the suit of the German Security bank against
33 said commissioners, copied into the deposition of said Barker on his own motion, is incompetent and irrelevant testimony against this defendant.

5. Questions Nos. 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, and 26, of the main examination in the deposition of J. H. Leathers, call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

6. Exhibits Nos. 1, 2, 3, 4, and 5, made part of said Leathers' deposition, are incompetent and irrelevant testimony against this defendant.

7. The record in the suit of the Louisville Banking Company against R. H. Thompson, judge of the police court of Louisville, is incompetent and irrelevant evidence against this defendant.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

And on the 14th day of July, 1898, the following decree was entered:

This cause having now come on to be heard for final decree, the parties filed stipulations Nos. 1 and 2, and the complainant read:

1st. Its bill of complaint.

2nd. The record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge, &c., lately pending in the Jefferson court of common pleas and in the court of appeals of Kentucky, in which latter court the Louisville Banking Company was appellant and R. H. Thompson, police judge aforesaid, and The City of Louisville were appellees, being an exhibit to the bill of complaint in the case of Louisville Banking Company *vs.*
34 Samuel H. Stone, &c., lately pending in this court.

3rd. Stipulation No. 1 between complainant and the defendant.

4th. Deposition of Henry S. Barker, with the exhibits thereto at-

tached, taken in the cause of same complainant against S. H. Stone, &c., pending in this court.

5th. The deposition of John H. Leathers, with the exhibits thereto attached, taken in said cause.

The defendant, The City of Louisville, read on the hearing—

1st. Its answer.

2nd. Stipulation No. 2 between the complainant and defendant, with documents therein referred to.

3rd. Deposition of J. Moss Terry taken in said cause and the exhibits attached; and the court now being advised, it is adjudged, ordered, and decreed as follows:

I. That the complainant is entitled to the benefit of the proceedings taken in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge, &c., in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the court of appeals of Kentucky, wherein The Louisville Banking Company was the appellant and R. H. Thompson and The City of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

II. That it is *res adjudicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law, and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendant,
The City of Louisville, is perpetually enjoined and restrained
35 from collecting and tax against the complainant under the
assessments for the years 1893 and 1894, as set out in complainant's bill, and that any provision of the Constitution of the State of Kentucky and any provision of the act of November 11th, 1892, or of the charter of the city of Louisville which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises or shares of capital stock other than as allowed by the said Hewitt law, is during the corporate existence of the complainant unconstitutional and void, and the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed by said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant.

III. That the complainant do recover of the defendant its costs herein expended.

The defendant now in open court prays an appeal from this decree to the Supreme Court of the United States, which is allowed. The complainant waives citation upon said appeal in open court. The defendant filed herein its assignment of error, and it is ordered that said appeal may be perfected by the execution of a bond by the defendant, with surety to be approved by the clerk, in the penalty of one thousand dollars.

Stipulation No. 1 above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } # 6568.

36 It is agreed between the complainant and the defendants herein as follows:

1st. That the complainant complied with the revenue act of May 17th, 1886, known as the Hewitt law, in the manner and within the time provided for in said law, and that said agreement upon the part of complainant was, within proper time, certified by the proper officer of the bank to the governor of the State of Kentucky.

2nd. That the complainant may read on the hearing the record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson court of common pleas, and the same case on appeal in the court of appeals of Kentucky, Louisville Banking Company, appellant, *vs.* City of Louisville and R. H. Thompson, appellees, the same being filed in a case pending in this court styled "Louisville Banking Company *vs.* Samuel H. Stone and others."

HELM & BRUCE,
For Complainant.
H. L. STONE, *City Att'y.*

Stipulation No. 2 is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } # 6568. Stipulation No. 2.

It is stipulated and agreed between the complainant and the defendant, City of Louisville, that the following ordinances of
37 the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1893," approved December 17, 1892. (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, 248–250.)

2. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (*ib.*, pp. 219–222).

3. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

4. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance referred to in complainant's bill requiring banks to pay to the sinking fund of the city of Louisville an annual license

of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit " L."

5. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1895," approved December 22, 1894 (*ib.*, pp. 256–'7).

6. An ordinance entitled " An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

7. An ordinance entitled " An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

38 8. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

9. An ordinance entitled " An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

The ordinances above referred to are to be read subject to all legal exceptions to their competency and relevancy.

II. It is further stipulated and agreed that the " commissioners of the sinking fund of the city of Louisville " were incorporated and organized and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinance- and special statutes are made part of the record, as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

III. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

IV. That the complainant's franchise was prior to the institution of this action assessed by the State board of valuation and assessment, under the act of November 11, 1892, for the year 1893,

39 at $1,320,683, and for the year 1894 at $1,406,713; that these assessments were duly certified by the State auditor to the clerk of the Jefferson county court, and by the latter to the collecting officer of the defendant, City of Louisville, for collection, and that the assessor, under the ad valorem tax levy ordinances of the defendant city, has, since April 12, 1897, made out on said respective assessments and listed with the tax receiver for collection against the complainant a tax bill for the year 1893, at the rate of 74½ cents on each $100, for $9,839.09, and a tax bill for the year 1894, at the rate of $1.88 on each $100, for $26,446.20, both of which tax bills remain unpaid.

V. It is agreed by counsel for complainant and defendant herein

that the corporate existence which complainant had when it accepted the provisions of the Hewitt act expires by then existing statute on the 10th day of February, 1910.

VI. It is agreed that all depositions and evidence taken by complainant and defendants in case No. 6567 of Bank of Commerce, complainant, against S. H. Stone, &c., defendants, in this court shall be read and have the same effect (subject to all legal exceptions by either party for competency or irrelevancy) as though the same were taken by the parties respectively in this action.

HELM & BRUCE,
Solicitors for Complainant.
H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

Stipulation No. 3 is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

40 BANK OF COMMERCE, Complainant, *vs.* CITY OF LOUISVILLE, Defendant. } # 6568. Stipulation No. 3.

It is agreed between the parties, complainant and defendant herein, that in copying this record for the Supreme Court of the United States the clerk may omit all such parts of the record as are contained in the copy made for the Supreme Court of the record in the case of The Louisville Banking Company *vs.* Samuel H. Stone, &c., and in the case of The Bank of Commerce *vs.* Samuel H. Stone, &c. Each party is to be at liberty to refer to those records for the depositions and documents in exactly the same way as if they were contained in this record.

HELM & BRUCE,
For Complainant.
H. L. STONE, *City Att'y.*

Petition and assignment of errors of the City of Louisville above referred to *is* as follows:

41 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } # 6568.

Petition and Assignment of Errors of the City of Louisville.

To the honorable the judge of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant, City of Louisville, and states that the record, proceedings, and decree of the court rendered herein July 14, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in overruling the exceptions of the defendant to the depositions, exhibits, documents, and records offered and read in evidence by complainant on the final hearing of this cause.

III.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence
42 with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of Louisville Banking Company against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Louisville Banking Company in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville, — of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant, City of Louisville, to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the board of valuation and assessment of the State of Kentucky under the act of November 11, 1892, on account of the alleged agreement with ex-City Attorney Barker and the commissioners of the sinking fund of the city of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against this defendant, enjoining and restraining it from collecting or taking any steps to collect its taxes on such assessments for municipal taxation for the years 1893 and 1894 and during the corporate existence of the complainant, under said act of November 11, 1892, and in decreeing that the latter act, the city charter, and State constitution or
43 either of them impaired the obligation of the said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the

end that said decree may be reversed, and that said errors may be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

Agreement for record of appeals to Supreme Court is as follows:

44 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant, *vs.* CITY OF LOUISVILLE, Defendants. } #6568. Agreement for Record of Appeals to Supreme Court.

The defendant having taken an appeal in this case to the Supreme Court of the United States, this agreement is now made to avoid cost of copying and printing unnecessary parts of the record. It is therefore agreed as follows:

1. The clerk, in making up the record, need not copy any paper in this record which he has already copied in the record of the case of the same complainant *vs.* Samuel H. Stone, &c.

2. The two cases presenting questions so similar, it is agreed that either party may refer in this case to the record of the other case to the same effect as if such record was a part of this case.

3. The clerk need not copy the special acts relating to the commissioners of the sinking fund of the city of Louisville nor the ord-nances recited in stipulation No. 2 filed herein, but appellant's counsel may print such parts thereof as seems to him relevant in an appendix to his brief.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant.

45 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE *vs.* CITY OF LOUISVILLE.

Know all men by these presents that we, the City of Louisville & the Fidelity & Deposit Company of Maryland, are held and firmly bound unto Bank of Commerce in the sum of one thousand dollars, to be paid to the said Bank of Commerce, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1898.

Whereas the above-named City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the de-

cree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named City of Louisville shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND, [L. S.]
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

46 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 45 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,948. Kentucky C. C. U. S. Term No., 363. City of Louisville, appellant, *vs.* Bank of Commerce. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 364.

CITY OF LOUISVILLE, APPELLANT,

vs.

THE THIRD NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1898.

(16,949.)

(16,949.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 364.

CITY OF LOUISVILLE, APPELLANT,

vs.

THE THIRD NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at it- regular term begun and held at the Federal court hall, in the city of Louisville, on February 21, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } # 6574.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, Third National Bank, by its counsel, Helm & Bruce, and filed in the clerk's office of our said court their bill of complaint and exhibits against the above-named defendant, which bill of complaint is in words and figures as follows, to wit:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Third National Bank a citizen and resident of the State of Kentucky brings this bill against the city of Louisville a corporation of the State of Kentucky deriving its rights and powers from the statute law of Kentucky duly enacted for the government of cities of the first class; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the acts of Congress of the United States, and especially under the acts in relation to national banks, commonly known as the national banking act, on the 22 day of August, 1874, and its charter rights under its said organization lasted for twenty years, & was extended & renewed on Aug. 6th, 1894, for twenty years, & all the rights & privileges enjoyed by your orator under its first organization, including its rights of contract with the State of Kentucky hereinafter described, passed to your orator under its extended or renewed charter.

Your orator shows that it has all the powers, privileges and immunities granted by said national banking acts to banks incorporated and organized thereunder, and is, and has been since its organization engaged in the banking business in the city of Louisville, Kentucky.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers

branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax
3 to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to

ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the

acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity
4 with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator has never owned any real estate.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the pro-

scribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $10,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks

and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed
6 rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself as the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust com-

panies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies,

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

7 Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A transcript of the record & proceedings in your orator's suit *vs.* R. H. Thompson, judge of the police court of the city of Louisville, filed herewith as part hereof, marked Exhibit "B."

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state was by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be

made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State
8 of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville is claiming the right and is threatening to collect from your orator has not been assessed by the said city of Louisville, but said pretended assessment has been made or attempted to be made

by the State board of valuation and assessment, consisting of the auditor, secretary of state, and treasurer of the State.

Your orator further shows that the auditor of the State acting under said pretended authority has heretofore certified said assessments to the county clerk of Jefferson county for the years 1893 and 1894 who in turn has certified the same to the proper tax-collecting officer of the defendant, The City of Louisville.

Your orator respectfully shows that the pretended assessment against your orator's franchise by the State board of valuation and assessment for the year 1893 amounts to $516,860.39 and for the year 1894 amounts to $496,359.12. Your orator further shows that the tax rate for the city of Louisville for the year 1893 was $2.17, and for the year 1894 was $1.98, and that said illegal taxes claimed by the defendant, The City of Louisville, upon said pretended assessment for the year 1893 is $11,107, and for the year 1894 is $9,331, and exceeds the amount which your orator would have to pay under the "Hewitt bill" by $16,000.

Your orator further shows that the claim of the defendant, The City of Louisville, that it has the right to collect said taxes from your orator by distraint as well as by suit casts a cloud upon your orator's right to pay taxes under and in accordance with its contract contained in the "Hewitt bill," and the claim of the said city of Louisville of its right to collect said taxes by distraint or suit injures your orator's stock and stockholders irreparably.

Par. 7. Your orator respectfully shows to the court that the existing laws of the State do not provide for taxing the shares of stock of your orator as permitted by the act of Congress, but attempts to tax its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress; and your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks, except for the taxation of their tangible property.

Your orator further shows that in addition to the complication in reference to taxing the old banks in the manner hereinbefore set out, the national banks in the State claimed the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky held that they could not be subjected to a heavier burden of taxation than said old banks. And now your orator respectfully submits to the court that in view of the fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, that your orator is entitled to be put upon a foot-

ing as to taxation equally favored with said old banks, and cannot be taxed at a higher rate than said banks without an unjust discrimination against your orator and the other national banks, contrary to the act of Congress; and your orator especially
9 insists that this is true in view of the fact that the Commonwealth of Kentucky had the power to keep all the banks upon the same footing as to taxation as hereinbefore specificially set out, and having such power has deliberately undertaken to violate its contract with said banks, and if as a result of the voluntary action of the State it shall be held that the said four old banks have been restored to their original contract right to discharge themselves of all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, then your orator insists that it and the other national banks of the city of Louisville, being located in the same city with two of the old banks above named, is entitled under the act of Congress to be put upon the same footing as to taxation with said old banks.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the City of Louisville, and that it may be spared the irreparable injury which it will suffer by attempts to collect said taxes by distraint and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendant, The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said City of Louisville, its officers and agents to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to it as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

H. W. Reese says he is president of complainant, and that the statements contained in the foregoing bill are true.

H. W. REESE.

Subscribed and sworn to before me by H. W. Reese this 20 day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 Exhibit "A" referred to is as follows, to wit:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in
11 any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend to the sinking fund the sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the

premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest: J. M. TERRY,
Secretary & Treasurer.

12 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interests of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

13 A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the

existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions
14 named in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to The City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by the Third National Bank, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal
15 of our said circuit court heretofore affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:
[SEAL.]

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN,
His Deputy.

And the marshal made the following return thereon:
Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in chancery to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAMES, *D. M.*

And on the 27th day of May, 1897, came the parties, by counsel, and filed stipulation herein.
Said stipulation is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6574. Stipulation.

It is stipulated and agreed that the defendant, City of
16 Louisville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

And on the 27th day of May, 1897, the defendant filed its demurrer to bill of complaint, which is as follows:

17 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6574. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Third National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEORGE D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

And on May 27th, 1897, came the defendant and filed its answer herein, which is as follows:

18 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6574. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Third National Bank, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to

so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of sec-

tion eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $10,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said

license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was be-

yond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that, the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for

carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law

of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so, or that the alleged claim of this defendant, that it has the right to collect said taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making, any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or
23 national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obli-

gation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant denies that the existing laws of the State of Kentucky do not provide for taxing the shares of stock of the complainant as permitted by act of Congress, or that the franchise law of said State taxes the franchise granted by the Congress of the United States, or taxes its intangible property, surplus, undivided profits, and investments without lawful right to do so, or contrary to the act of Congress in such cases made and provided, or that the complainant has never consented to said method of taxation, or that such consent was ne-essary, or that the complainant has always, or at any time, protested against the same as illegal or contrary to the act of Congress; and this defendant denies that said

statute is repugnant to the act of Congress in such cases made and provided, or because of such alleged repugnancy it is void or of no binding force as against the complainant.

This defendant denies that the capital of the four old banks was about equal to the combined capital of all the other State banks, or that the courts of Kentucky for that reason, or on any other ground, held that the national banks could not be subjected to a heavier burden of taxation than said old banks, or that in view of the alleged fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, the complainant is entitled to be put upon a footing as to taxation equally favored with said old banks, or cannot be taxed at a higher
24 rate than said old banks without an unjust discrimination against the complainant and other national banks, or contrary to the act of Congress.

This defendant denies that the Commonwealth of Kentucky has deliberately or at all undertaken to violate, or that it has violated, its alleged contract with the banks of said State, or any of them, or that by the voluntary action of the State the said four old banks, or either of them, have been restored to their original alleged contract right to discharge themselves from all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, or that complainant and the other national banks of the city of Louisville, or either of them, is or would be entitled to be put upon the same footing as to taxation with said old banks.

This defendant denies that by reason of the alleged formal contract alleged to have been entered into by all the other banks and trust companies establishing the validity of said alleged contracts, they or either of them will escape local taxation, except on the houses owned by them respectively, in which they respectively do business, or that the complainant, coming in competition with said institutions, will be driven out of business if subjected to local taxation, or that any unjust or other discrimination between the complainant and said other institutions will result.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,

City Attorney, Solicitor for the Defendant, City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on May 28th, 1897, came the complainant in the above-entitled cause and filed herein notice, duly served on the defendant, and moved the court to grant it an injunction until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in the said bill of complaint.

And came the City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same coming on to be heard, was submitted, and the court not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the City of Louisville, and the same were argued by counsel and submitted to the court, and the court, not being advised, takes time.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This day came complainant, by Helm & Bruce, its counsel; came also the defendant, The City of Louisville, by H. L. Stone, its counsel, and the said parties, by their said counsel, filed a stipulation herein. The court, being advised, filed its opinion herein. It is therefore adjudged, ordered, and decreed as follows:

First. The demurrer *to* the defendant, City of Louisville, to the bill of complaint is hereby overruled, to which the City of
26 Louisville excepts.

Second. And thereupon came the complainant, by Helm & Bruce, counsel, and filed herein its replication to the answer of the City of Louisville, and by consent this cause came on to be heard for final decree. The complainant read upon the hearing its bill of complaint and the following exhibits, which are on file in the case pending in this court styled Third National Bank *vs.* Samuel H. Stone and others, viz:

1. The exhibit, being the record of the proceedings in the case of the Third National Bank *vs.* R. H. Thompson, judge of the police court of the city of Louisville.

2. The order of the Jefferson circuit court, common pleas division, upon the mandate of the court of appeals.

3. A copy of the notice to the stockholders calling them to consider whether they would accept the provisions of the revenue act, known as the Hewitt law, approved May 17, 1886; the resolutions of said stockholders accepting the provisions of said law, and the certificate to the governor of the State of said acceptance by the cashier of said bank.

The defendant, The City of Louisville, read its answer and the stipulation between complainant and said defendant filed herein June 25, 1898, together with the ordinances and special statutes therein mentioned and referred to, and it is now adjudged, ordered, and decreed that the said defendant, City of Louisville, is perpetually enjoined and restrained from proceeding to collect from the complainant the taxes mentioned in the bill of complaint for the years 1893 and 1894.

27 It is further adjudged, ordered, and decreed by reason of the plea of *res judicata* relied on by complainant in its bill, and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky under the provisions of article 2, of the act of the General Assembly of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property or franchise or chares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article II of the said act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendants its costs in this action expended.

Then came defendant & prayed an appeal in open court and tendered its assignment of errors whereupon the court allowed the appeal and orders the assignment of errors to be filed and

28 fixes the appeal bond at $1,000.

Stipulation above referred to is as follows:

In the United States Circuit Court for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant, *vs.* CITY OF LOUISVILLE, Defendant.	# 6574.	Stipulation.

It is stipulated and agreed between the complainant and the defendant, City of Louisville, that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893. (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 219–222.)

2. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

3. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance referred to in complainant's bill requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

29 4. An ordinance entitled "An ordinance providing for the retrospective assessments of ommitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

5. An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

6. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

7. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib*, pp. 28, 29).

II. It is further stipulated and agreed between the complainant and the defendant, City of Louisville, that the complainant, Third National Bank, did not pay any sum for license for the year 1894, under the said license ordinance, approved January 29, 1894, but loaned to the commissioners of the sinking fund of the city of Louisville $1,300.00, for which said commissioners executed their note to complainant March 8, 1894, bearing interest at the rate of four per cent. (4 %) per annum, which note said commissioners paid in full to complainant February 21, 1896, with $117.86 accrued interest thereon, and said complainant paid to said commissioners of the

sinking fund for license for 1895, under said ordinance, the sum of $2,620.17 February 6, 1895.

III. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated
30 and organized, and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

IV. It is further stipulated and agreed that during the time the complainant's action against R. H. Thompson, judge, mentioned in complainant's bill, was pending in the Jefferson circuit court and in the court of appeals of Kentucky on appeal, Hon. Henry S. Barker, who appeared as counsel for the defendant in said action, was the employed attorney of the commissioners of the sinking fund of the city of Louisville on an annual salary, as well as the city attorney of said city.

V. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act on May 17, 1886, was required by statute at the latter date to be and was in fact on Friday, December 30, 1887.

HELM & BRUCE,
Solicitors for Complainant, Third National Bank.
HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

The replication above referred to is as follows:

31 Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

Replication.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient on law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall

direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

32 And on the 25th day of June, 1898, came parties by counsel and filed the following agreements which are as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} # 6574. Agreement for Record on Appeal to the Supreme Court.

In order to prevent unnecessary expense the complainant and defendant have agreed as follows:

1. The opinion and dissenting opinion in the bank tax cases, decided June 1, 1895, need not to be copied by the clerk. (See said opinion, 97 Ky., 590.)

2. The clerk need not copy the special acts relating to the sinking fund commissioners of the city of Louisville nor the ordinances recited in the stipulation filed herein, but appellant's counsel may print such parts of said acts and ordinances as seem to him relevant in an appendix to his brief.

3. The issue and service of citation on the appeal is waived.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
} # 6574. Agreement as to Record on Appeal.

It is agreed that the record of this suit of complainant,
33 Third National Bank, against R. H. Thompson, judge, &c., in the Jefferson circuit court, common pleas division, and in the court of appeals of Kentucky, made an exhibit with complainant's bill in this case, need not be copied by the clerk in making out the transcript on the appeal to the Supreme Court of the United States herein, but as the record of said suit is also made an exhibit with complainant's bill in its action against Samuel H. Stone, &c., in this court, and is copied into the transcript on the appeal in the last-named case, either party may refer thereto in the same manner and with the same effect as if the said exhibit was copied in the transcript on the appeal in this case.

HELM & BRUCE,
Solicitor- for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

34 The petition for appeal and assignment of errors above referred to are as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } #6574.

Petition and Assignment of Errors of the City of Louisville.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant, City of Louisville, and states that the record, proceedings, and decree of the court rendered herein June 25, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Third National Bank, against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the war-
35 rant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant, City of Louisville, to ad valorem taxes on the assessments of complainant's franchise or intangible property, made for the years 1893 and 1894 by the board of valuation and assessment of the State of Kentucky under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant, City of Louisville, enjoining and restraining it from collecting its taxes on assessments of the franchise or intangible property of complainant, and from taking any steps to collect its said taxes for said years, as

provided by said act of November 11, 1892, and in decreeing that the latter act impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

36 Circuit Court of the United States, District of Kentucky.

THIRD NATIONAL BANK
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, City of Louisville & Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Third National Bank in the sum of one thousand dollars, to be paid to the said Third National Bank, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1898.

Whereas the above-named City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Third National Bank shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND,
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

37 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 36 pages contain a true and correct transcript of the

record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,949. Kentucky C. C. U. S. Term No., 364. City of Louisville, appellant, *vs.* The Third National Bank. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 265.

CITY OF LOUISVILLE, APPELLANT,

vs.

THE CITIZENS' NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 15, 1898.

(16,950.)

3/5
185

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(16,950.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 365.

CITY OF LOUISVILLE, APPELLANT,

vs.

THE CITIZENS' NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

CITIZENS' NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendants.

Be it remembered that heretofore, to wit, on 17th day — May, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendants.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Citizens' national bank a citizen and resident of the State of Kentucky brings this bill against the city of Louisville a corporation of the State of Kentucky deriving its rights and powers from the statute law of Kentucky duly enacted for the government of cities of the first class; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the acts of Congress of the United States, and especially under the acts in relation to national banks, commonly known as the national banking act, on the 8 day of August, 1874, and its charter rights under its said organization lasted for 20 years, and its charter life was extended on April 1, 1894, for 20 years, and thereby all the charter rights & privileges, including the contract with the State hereinafter described, passed to your orator under its present organization.

Your orator shows that it has all the powers, privileges and immunities granted by said national banking acts to banks incorporated and organized thereunder, and is, and has been since its organization engaged in the banking business in the city of Louisville, Kentucky.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the

other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax
3 to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is

assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted

to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity
4 with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator says it has always paid city taxes on its real estate in Louisville to said city.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the pre-

scribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had

accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed
6 rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself *as* the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent

to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the

payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies,

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature
7 and lasted throughout the charter existence of the several banks and trust companies. A certified transcript of the record in the case of Third National Bank *vs.* R. H. Thompson, judge of police court of city of Louisville, is filed with the bill of said bank in this court against Sam'l H. Stone, &c., and is made a part hereof by reference.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state was by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal

and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State
8 of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of

Louisville is claiming the right and is threatening to collect from your orator has not been assessed by the said city of Louisville, but said pretended assessment has been made or attempted to be made by the State board of valuation and assessment, consisting of the auditor, secretary of State, and treasurer of the State.

Your orator further shows that the auditor of the State acting under said pretended authority has heretofore certified said assessments to the county clerk of Jefferson county for the years 1893 and 1894 who in turn has certified the same to the proper tax-collecting officer of the defendant, The City of Louisville.

Your orator respectfully shows that the pretended assessment against your orator's franchise by the State board of valuation and assessment for the year 1893 amounts to $626,771.47, and for the year 1894 amounts to $629,324.23. Your orator further shows that the tax rate for the city of Louisville for the year 1893 was $2.17, and for the year 1894 was $1.88, and that said illegal taxes claimed by the defendant, The City of Louisville, upon said pretended assessment for the year 1893 is $13,600, and for the year 1894 is $11,800, and exceeds the amount which your orator would have to pay under the "Hewitt bill" by $16,000.

Your orator further shows that the claim of the defendant, The City of Louisville, that it has the right to collect said taxes from your orator by distraint as well as by suit casts a cloud upon your orator's right to pay taxes under and in accordance with its contract contained in the "Hewitt bill," and the claim of the said city of Louisville of its right to collect said taxes by distraint or suit injures your orator's stock and stockholders irreparably.

Par. 7. Your orator respectfully shows to the court that the existing laws of the State do not provide for taxing the shares of stock of your orator as permitted by the act of Congress, but attempts to tax its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress; and your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks, except for the taxation of their tangible property.

Your orator further shows that in addition to the complication in reference to taxing the old banks in the manner hereinbefore set out, the national banks in the State claimed the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky held that they could not be subjected to a heavier burden of taxation than said old banks. And now your orator respectfully sub-

mits to the court that in view of the fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, that your orator is entitled to be put upon a footing as to taxation equally favored with said old banks, and cannot be taxed at a higher rate than said banks without an unjust discrimination against your orator and the other national banks, contrary to the act of Congress; and your orator especially
9 insists that this is true in view of the fact that the Commonwealth of Kentucky had the power to keep all the banks upon the same footing as to taxation as hereinbefore specificially set out, and having such power has deliberately undertaken to violate its contract with said banks, and if as a result of the voluntary action of the State it shall be held that the said four old banks have been restored to their original contract right to discharge themselves of all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, then your orator insists that it and the other national banks of the city of Louisville, being located in the same city with two of the old banks above named, is entitled under the act of Congress to be put upon the same footing as to taxation with said old banks.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the City of Louisville, and that it may be spared the irreparable injury which it will suffer by attempts to collect said taxes by distraint and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendant, The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said City of Louisville, its officers and agents to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to it as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

W. R. Ray says he is president of complainant, and that the statements contained in the foregoing bill are true.

W. R. RAY.

Subscribed and sworn to before me by W. R. Ray this 20 day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 Exhibit "A" with bill of complaint is as follows:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to
11 be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per

centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

12 A true copy.
Attest: J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interests of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law-, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

13 Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charter- had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C,

and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof
14 under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund of the City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to The City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Mon-
15 day in June next, to answer a bill in equity exhibited against you in our said court, by the Citizens' National Bank, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our

said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 7th day of June next, *to* day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

And the marshal returned said subpœna with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in chancery to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

And on May 27th, 1897, came parties, by counsel, and filed stipulation herein.

Said stipulation is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

16 CITIZENS' NATIONAL BANK, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } No. 6578. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6578. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Citizens' National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

17 2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant city of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by George D. Todd, mayor, this 27 day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer filed May 27th, 1897, is as follows:

18 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6578. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Citizens' National Bank, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend and repeal to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that

this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or

others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of

any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed

rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is

true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes

of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so; or that the alleged claim of this defendant, that it has the right to collect said taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making, any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or

23 national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its ac-

ceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant denies that the existing laws of the State of Kentucky do not provide for taxing the shares of stock of the complainant, as permitted by act of Congress, or that the franchise law of said State taxes the franchise granted by the Congress of the United States, or taxes its intangible property, surplus, undivided profits, and investments without lawful right to do so, or contrary to the act of Congress in such cases made and provided, or that the complainant has never consented to said method of taxation, or that such consent was necessary, or that the complainant has always, or at any time, protested against the same as illegal or contrary to the act of Congress; and this defendant denies that said statute is repugnant to the act of Congress in such cases made and provided, or because of such alleged repugnancy it is void or of no binding force as against the complainant.

This defendant denies that the capital of the four old banks was about equal to the combined capital of all the other State banks, or that the courts of Kentucky for that reason, or on any other ground, held that the national banks could not be subjected to a heavier burden of taxation than said old banks, or that in view of the alleged fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, the complainant is entitled to be put upon a footing as to taxation equally favored with said old banks, or cannot be taxed at a higher
24 rate than said old banks without an unjust discrimination against the complainant and other national banks, or contrary to the act of Congress.

This defendant denies that the Commonwealth of Kentucky has deliberately or at all undertaken to violate, or that it has violated, its alleged contract with the banks of said State, or any of them, or that by the voluntary action of the State the said four old banks, or either of them, have been restored to their original alleged contract right to discharge themselves from all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, or that complainant and the other national banks of the city of Louisville, or either of them, is or would be entitled to be put upon the same footing as to taxation with said old banks.

This defendant denies that by reason of the alleged formal contract alleged to have been entered into by all the other banks and trust companies establishing the validity of said alleged contracts, they or either of them will escape local taxation, except on the houses owned by them respectively in which they respectively do business, or that the complainant, coming in competition with said institutions, will be driven out of business if subjected to local taxation, or that any unjust or other discrimination between the complainant and said other institutions will result.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being sub-

jected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant, City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on the 28th day of May, 1897, the following order was entered:

This day came the complainant in the above-entitled cause and filed herein notice, duly served on the defendant, and moved the court to grant an injunction, until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in said bill of complaint.

And came the said City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same, coming on to be heard, was submitted, and the court, not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrer, general and special, heretofore filed herein by the said City of Louisville, and the same were argued by the counsel and submitted to the court, and the court, nor being advised, takes time.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction hereto-

fore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This cause *coming* on to be heard, and the court, being advised, delivered its opinion herein, which is ordered to be filed. It is now adjudged, ordered, and decreed by the court as follows: First, that the demurrer of the defendant, The City of Louisville, to the bill of complaint be, and it is hereby, overruled; to which the City of Louisville excepts.

26 Second. Until the further order of the court the said defendant, The City of Louisville, is enjoined and restrained from attempting in any manner to enforce against the complainant the taxes mentioned in its bill of complaint herein for the years 1893 and 1894.

And then came complainant and filed herein its general replication.

Said replication is as follows:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } Replication.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court
27 shall direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

And on the 14th day of July, 1898, the following order was entered:

This day came the defendant and filed exceptions to the depositions of H. S. Barker and J. H. Leathers and the exhibits filed therewith and to the other documentary and record evidence offered and read by complainant on the final hearing of this cause; which ex-

ceptions were overruled by the court; to which ruling of the court defendant excepted.

Exceptions above referred to *is* as follows:

28 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant, *versus* CITY OF LOUISVILLE, Defendant.	#6578. Exceptions to Complainant's Deposition-. Exhibits, Documentary and Record Evidence.

The defendant, City of Louisville, excepts to the depositions, exhibits, documentary and record evidence offered and read in evidence by complainant on the final hearing of this cause, as follows:

1. Questions Nos. 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 24, and 25 of the main examination in the deposition of H. S. Barker call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

2. The two exhibits filed with said Barker's deposition, marked Exhibit "Copy" and Exhibit "A," are incompetent and irrelevant evidence against this defendant.

3. The answers to questions Nos. 75, 76, and 82 of the cross-examination in the deposition of said Barker are not responsive to the questions asked, and so far as they detail or refer to conversations or matters not shown by the proceedings of the commissioners of the sinking fund of record on their journal or minute book said answers are incompetent and irrelevant testimony against this defendant.

4. The third paragraph of the answer of the commissioners of the sinking fund in the suit of the German Security bank against said commissioners, copied into the deposition of said Barker on his own motion, is incompetent and irrelevant testimony against this
29 defendant.

5. Questions Nos. 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, and 26 of the main examination in the deposition of J. H. Leathers call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

6. Exhibits Nos. 1, 2, 3, 4, and 5, made part of said Leathers' deposition, are incompetent and irrelevant testimony against this defendant.

7. The record in the suit of The Third National Bank against R. H. Thompson, judge of the police court of Louisville, is incompetent and irrelevant evidence against this defendant.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

And on the 14th day of July the following decree was entered:

This cause having now come on to be heard for final decree, the parties filed stipulations Nos. 1 and 2, and the complainant read:

1st. Its bill of complaint.

2nd. The record of the proceedings in the case of Third National Bank *vs.* R. H. Thompson, judge, &c., lately pending in the *the* Jefferson court of common pleas and in the court of appeals of Kentucky, being an exhibit with the bill of complaint in the case of The Third National Bank *vs.* Samuel H. Stone, &c., lately pending in this court.

30 3rd. Stipulation No. 1 between the complainant and the defendant.

4th. Deposition of Henry S. Barker, with exhibits thereto attached, taken in the case of Bank of Commerce *vs.* Samuel H. Stone, &c., pending in this court.

5th. The deposition of John H. Leathers and the exhibits filed therewith taken in the same case.

The defendant, The City of Louisville, read on the hearing:

1st. Its answer.

2nd. Stipulation No. 2 between the complainant and the defendant, with documents therein referred to.

3rd. Deposition of J. Moss Terry taken in the case of Bank of Commerce *vs.* Samuel H. Stone, &c., pending in this court, and the exhibits thereto attached.

And the court being now advised, it is adjudged, ordered, and decreed as follows:

I. That the complainant is entitled to the benefit of the proceedings taken in the case of Third National Bank *vs.* R. H. Thompson, judge, &c., in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the court of appeals of Kentucky, wherein The Third National — was appellant and R. H. Thompson and The City of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

II. That it is *res adjudicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the de-

31 fendant, The City of Louisville, is perpetually enjoined and restrained from collecting any tax against the complainant under the assessments for the years 1893 and 1894 as set out in the complainant's bill, and that any provision of the constitution of the State of Kentucky and any provision of the act of November 11th, 1892, or of the [illegible]y charter which may be construed as authorizing the levy or as[illegible]ient of any tax against the complainant, its rights, properties, or [illegible]anchises or shares of capital stock other than is allowed by said Hewitt law for the years aforesaid, is unconstitutional and void, and the complainant and its shares of stock are exempt from all other taxation whatsoever for said years except as provided by the said Hewitt law.

III. That the complainant do recover of the defendant its costs herein expended.

The defendant now in open court prays an appeal from this decree to the Supreme Court of the United States, which is allowed. The complainant waives citation upon said appeal in open court.

The defendant filed herein its assignment of errors, and it is ordered that said appeal may be perfected by the execution of a bond by the defendant, with surety to be approved by the clerk, in the penalty of one thousand dollars.

Stipulation No. 1, above referred to, is as follows:

Stipulation No. 1.

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } # 6578. Stipulation.

32 It is agreed between the complainant and defendant as follows:

1st. That the complainant complied with the revenue act of May 17th, 1886, known as the Hewitt law, in the manner and within the time provided for in said law, and that said agreement upon the part of complainant was within proper time certified by the proper officer of the bank to the governor of the State of Kentucky.

2nd. That the complainant may read on the hearing of this case the record of the proceedings in the case of The Third National Bank *vs.* R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson court of common pleas, and the same case on appeal in the court of appeals of Kentucky, Third National Bank, appellant, *vs.* City of Louisville and R. H. Thompson, appellees, the same being filed in a case pending in this court styled Third National Bank *vs.* City of Louisville.

HELM & BRUCE,
For Complainant.
H. L. STONE, *City Att'y.*

Stipulation No. 2 is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } # 6578. Stipulation No. 2.

It is stipulated and agreed between the complainant and the defendant, City of Louisville, that the following ordinances of the said city shall be read as evidence in its behalf on the trail of this
33 action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1893," approved December 17, 1892 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, — 248–250).

2. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (*ib.*, pp. 219–222).

3. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

4. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance referred to in complainant's bill requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

5. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1895," approved December 22, 1894 (*ib.*, pp. 256–'7).

6. An ordinance entitled "An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

7. An ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, pp. 205, 206).

8. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted
34 from an ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

9. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and State board of valuation and assessment," approved April 9, 1897 (*ib.*, pp. 28, 29).

The ordinances above referred to are to be read subject to legal exceptions for competency and relevancy.

II. It is further stipulated and agreed that the "commossioner- of the sinking fund of the city of Louisville" were incorporated and organized, and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City Code, 1884, pp. 691–705, which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

III. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act, on May 17, 1886, was required by statute at the latter date to be and was in fact on Friday, December 30, 1887.

IV. That the complainant's franchise was prior to the institution of this action assessed by the State board of valuation and assessment, under the act of November 11, 1892, for the year 1893 at $626,771, and for the year 1894 at $629,324; that these assessments were duly certified by the State auditor to the clerk of
35 the Jefferson county court, and by the latter to the collecting officer of the defendant, City of Louisville, for collection, and

that the assessor, under the ad valorem tax levy ordinances of the defendant city, has, since April 12, 1897, made out on said respective assessments and listed with the tax receiver for collection against the complainant a tax bill for the year 1893, at the rate of 74½ cents on each $100, for $4,669.45, and a tax bill for the year 1894, at the rate of $1.88 on each $100, for $11,831.29, both of which tax bills remain unpaid.

It is agreed that all depositions and evidence taken by complainant and defendants in case No. 6567, of Bank of Commerce, complainant, against S. H. Stone, &c., defendants, in this court, shall be read and have the same effect (subject to all legal exceptions by either party for competency or irrelevancy) as though the same were taken by the parties respectively in this action.

HELM & BRUCE,
Solicitors for Complainant.
H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

36 Stipulation No. 3 is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant, *vs.* CITY OF LOUISVILLE, Defendant. } # 6578. Stipulation No. 3.

It is agreed between the parties, complainant and defendant, herein that in copying this record for the Supreme Court of the United States the clerk may omit all such parts of the record as are contained in the copy made for the Supreme Court of the record in the case of The Third National Bank *vs.* Samuel H. Stone, &c., and Same Complainant *vs.* City of Louisville and in the case of Bank of Commerce *vs.* Samuel H. Stone, &c. Each party is to be at liberty to refer to those records for the depositions and documents in exactly the same way as if they were contained in this record.

HELM & BRUCE,
For Complainant.
H. L. STONE, *City Att'y.*

Assignment of errors above referred to is as follows:

37 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } # 6578. Petition and Assignment of Errors of the City of Louisville.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioner and defendant, City of Louisville, and states that the record, proceedings, and decree of the court rendered

herein July 14, 1898, contain manifest errors to its prejudice, committed as follows, to wit:

I.

The court er-ed in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

II.

The court erred in overruling the exceptions of the defendant to the depositions, exhibits, documents, and records offered and read in evidence by complainant on the final hearing of this cause.

III.

The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence
38 with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of Third National Bank against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Third National Bank in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the giverment of cities of the first class, and in decreeing that the claims and rights of the *first class, and in decreeing that the claims and rights of the* defendant, City of Louisville, to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the board of valuation and assessment of the State of Kentucky under the act of November 11, 1892, on account of the alleged agreement with ex-City Attorney Barker and the commissioners of the sinking fund of the city of Louisville, were by the judgment aforesaid *res adjudicata*, and in decreeing a perpetual injunction against this defendant, enjoining and restr*i*aning it from collecting or taking any steps to collect its taxes on such as-
39 sessments for municipal taxation for the years 1893 and 1894 and during the corporate existence of the complainant under said act of November 11, 1892, and in decreeing that the latter act, the city charter, and State constitution or either of them impaired the obligation of saod alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore this petitioner and defendant says the said decree of

the court herein is erroneous, and prays this honorable court to grant it an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so it will ever pray.

HENRY L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

40 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

CITIZENS' NATIONAL BANK
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, the City of Louisville & the Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Citizens' National Bank in the sum of one thousand dollars, to be paid to the said Citizens' National Bank, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1898.

Whereas the above-named City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named city of Louisville shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND,
By WILLIS S. MULLEN, [L. S.]
[SEAL.] *Gen'l Ag't & Att'y-in-fact.*

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

41 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
6578. Agreement for Record on Appeal to the Supreme Court.

In order to prevent unnecessary expense and making the record larger than useful, the complainant and defendant have agreed as follows:

1. The opinion and dissenting opinion in the bank tax cases, decided June 1, 1895, need not be copied by the clerk. (See said opinion, 97 Ky., 590.)

2. The clerk need not copy the special acts relating to the sinking fund commissioners of the city of Louisville nor the ordinances recited in stipulation No. 2, filed herein, but appellant's counsel may print such parts of said acts and ordinances as seem to him relevant in an appendix to his brief.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant.

42 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 41 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,950. Kentucky C. C. U. S. Term No., 365. City of Louisville, appellant, *vs.* The Citizens' National Bank. Filed August 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 404.

THE THIRD NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

SAMUEL H. STONE, AUDITOR OF PUBLIC ACCOUNTS; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE STATE OF KENTUCKY, AND THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 15, 1898.

(16,989.)

(16,989.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 404

THE THIRD NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

SAMUEL H. STONE, AUDITOR OF PUBLIC ACCOUNTS; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE STATE OF KENTUCKY, AND THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, A. D. 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6573.

Be it remembered that heretofore, to wit, on the 17th day of April, A. D. 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendants.

Said bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Third national bank, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and The City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of Congress known as the "national banking acts" on August 22nd, 1874, and was extended and renewed on August 6th, 1894, for twenty years, and all the rights and privileges enjoyed by your orator under its first organization, including its rights of contract with the State of Kentucky, hereinafter described, passed to your orator under its extended or renewed charter.

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the

other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks
3 and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is

assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted

to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from
4 that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes

mentioned, during the period above described. Your orator has never owned any real estate.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $10,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

5 First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had

accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

6 The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself and the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent

to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the

payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies,

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A transcript of the record and proceedings in your orator's suit against R. H. Thompson, judge of the police court of the city of Louisville, is filed herewith as part hereof, marked "B."

7 Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state was by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was

sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect and is threatening to collect from your orator has not been assessed by the said city of Louisville,

but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities, respectively, as auditor, secretary, and treasurer of the State.

Your orator says that this board thus constituted will, unless restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon
8 your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said legal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent, and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed and harassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost and the taxes claimed by the city of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost.

Your orator respectfully shows that the city of Louisville is insisting that the auditor of the State, the defendant Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessment, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

Par. 7. Your orator respectfully shows to the court that the existing laws of the State do not provide for taxing the shares of stock of your orator as permitted by the act of Congress, but attempts to tax its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits

and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress; and your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks, except for the taxation of their tangible property.

Your orator further shows that in addition to the complication in reference to taxing the old banks in the manner hereinbefore set out, the national banks in the State claimed the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky held that they could not be subjected to a heavier burden of taxation than said old banks. And now your orator respectfully submits to the court that in view of the fact that said four old banks

9 have a capital stock about equal to the combined capital of the other State banks, that your orator is entitled to be put upon a footing as to taxation equally favored with said old banks, and cannot be taxed at a higher rate than said banks without an unjust discrimination against your orator and the other national banks, contrary to the act of Congress; and your orator especially insists that this is true in view of the fact that the Commonwealth of Kentucky had the power to keep all the banks upon the same footing as to taxation as hereinbefore specifically set out, and having such power has deliberately undertaken to violate its contract with said banks, and if as a result of the voluntary action of the State it shall be held that the said four old banks have been restored to their original contract right to discharge themselves of all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, then your orator insists that it and the other national banks of the city of Louisville, being located in the same city with two of the old banks above named, is entitled under the act of Congress to be put upon the same footing as to taxation with said old banks.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H. Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long in their respective official capacities to

refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, auditor aforesaid, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants, including the City of Louisville and each of them be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

H. W. Reese says he is the president of complainant, and that the statements contained in the foregoing bill are true.

H. W. REESE.

Subscribed and sworn to before me by H. W. Reese this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 Exhibit "A" of bill of complaint is as follows:

SINKING FUND OFFICE, *Feb.* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, *true*, and title companies, who

will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the
11 court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.
Attest:

J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interests of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and
12 trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue laws, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named
13 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes

claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

14 EXHIBIT "B" WITH THE BILL OF THIRD NATIONAL BANK *vs.* STONE.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the first day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting.

THIRD NATIONAL BANK, Appellant,
vs.
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.

Be it remembered that heretofore, to wit, on the 24th day of August, 1894, the appellants, by their counsel, filed in the office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit:

STATE OF KENTUCKY, *Jefferson County:*

Pleas before the Honorable Emmet Field, judge of the Jefferson circuit court, common pleas division, at the court-house in Louisville, Ky., on the dates hereinafter mentioned.

Be it known that heretofore, to wit, on the 18th day of June, 1894, came plaintiff by Humphrey & Davie, &c., attorneys, and filed its petition in the office of the clerk of the aforesaid court.

Said petition is as follows, to wit:

Jefferson Circuit Court.

THIRD NATIONAL BANK, Plaintiff,
vs.
R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Defendant. } # 4685.

The plaintiff, The Third National Bank, states that it is a banking corporation located in the city of Louisville, and organized and doing business under that law of the United States known as
15 the national bank act; that its capital stock at the date hereinafter mentioned was $300,000, divided into shares of $100.00 each, which shares of stock are owned by and in the hands of divers persons.

That the defendant R. H. Thompson is judge of the police court of the city of Louisville.

The plaintiff says that under the national bank act, which is its act of incorporation, it is declared that its stock and the stock of all national banks shall not be taxed at a greater rate than is assessed upon other moneyed capital similarly employed in the State.

The plaintiff says that the bank of Kentucky with its branches, the Bank of Louisville, the Northern bank with its branches, and the Farmers' bank with its branches, all corporations of Kentucky, were duly chartered and organized prior to the year 1856; that by said charters the said banks and each of them entered into a contract with the State by which it was agreed that said bank would pay fifty cents on each $100 of stock held and paid for in it, which should be in full of all tax or bonus, and this contracy was in full force and virtue at the time of the organization of the plaintiff, and by the laws of Congress as construed, the plaintiff was entitled to be placed upon an equally favored footing and it was not within the province of the legislature of Kentucky to put a greater burden upon it than was put upon other capital, in the hands of the banks named, similarly employed.

The plaintiff says that from the date of its organization it each and every year paid said fifty cents on each share of its stock as required by law up to the year 1886. Plaintiff states that during the most, if not the whole, of said time said rate of taxation was higher upon said bank than was imposed by the State upon other persons and corporations except banking corporations.

By an act approved May 17th, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," it was provided that the cashier of all State and national banks should annually, on the first day of July of each year, make report of their condition to the auditor, and should pay into the State treas-
16 ury seventy-five cents on each share of its capital stock and should in addition pay into said treasury, ona its surplus undivided profits and accumulations in excess of ten per centum of ots capital stock, a tax at the same rate as the real property should be assessed. And it was distinctly provided by said act that the said taxation should be in full of all tax, state and municipal, except that the real estate or building owned and used by the banks in

conducting their business should not be exempt from taxation for county or municipal purposes, but that such real estate alone might be taxed for county and municipal purposes as other real estate is taxed. As a condition to its operation upon any of the banks referred to therein said act in the fourth section thereof provided as follows:

"SEC. 4. That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof may give its consent to the levying of said tax and agree to pay the same as herein provided and to waive and release all right under the act of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent and agreement to and with the State of Kentucky, shall be evidenced by a writing under the seal of said bank and delivered to the governor of the Commonwealth; and upon such agreement and consent being delivered and in consideration thereof such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of the bank."

The consent provided for by this act and the notice to the governor was further required to be given before the meeting of the next General Assembly, provided the tax should be paid by the bank from the passage of the act.

At a meeting of the stockholders of the plaintiff's bank held on the 25th day of June, 1887, a quorum of the stockholders and a majority thereof being present, said stockholders and a majority in interest thereof did give their consent to the levying of said tax and the waiver and release of all right under its charter to a different mode or a smaller rate of taxation and said consent of the
17 bank to the waiver and release aforesaid, and the said agreement was certified in writing, under the seal of the bank, by the proper corporate authority, to the governor of the Commonwealth and delivered to him before the next meeting of the General Assembly after the passage of said act. There is filed herewith as part hereof a duly certified copy of said resolution, consent, and agreement, marked A.

The plaintiff bank also, through its cashier, made its report and paid into the State treasury on the first day of July, 1887, the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time, and has, until the year 1893, paid to the State treasury on each first day of July in every year from 1887 the full tax required by said act, being seventy-five cents on each share of its capital stock, and a tax at the same rate as real property was assessed by the State upon its surplus undivided profits and accumulations in excess of ten per cent. of its capital stock. It was only prevented from paying the whole of said tax on the first day of July, 1893, by the refusal of the auditor, the fiscal agent of the State, to receive the same.

Plaintiff says that at the times herein stated it did not own nor

has it since owned any real estate of any character whatever in this city or elsewhere.

On the first day of July, 1893, the plaintiff's cashier did as he regularly had done for years before, make a written report to the auditor of public accounts, verified by his oath, required by law, of the true amount of the capital of the bank and of its surplus undivided profits and accumulations, and did then and there successively tender and offer to pay into the treasury of the State the sum of $——, the full amount of the tax required and due under the aforesaid act to amend the revenue laws, approved May 17th, 1886, but said offer and tender was refused and rejected by the said auditor of public accounts, the fiscal agent of the State, under the claim made by him, that the provisions of the contract heretofore quoted, made under the act to amend the revenue laws, approved May 17th, 1886, had been superseded and repealed by the new constitution of the State of Kentucky, which went into operation on the 28th of September, 1891, and by the act of the legislature entitled "An act relating to revenue and taxation," which went into effect on November 11th, 1892, the said auditor, as the agent of the State, refused and declined to accept any other sum than the sum of $—, the amount claimed by him to be due to the State on the franchise of said bank under the provisions of the aforesaid act of November 11th, 1892. The plaintiff, protesting against said bank as illegal, in its application to it, acceded to the said auditor's demand and under protest, as aforesaid, paid into the State treasury the last-named sum.

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Plaintiff further states that by an act entitled "An act for the government of cities of the first class," approved July 1st, 1893, and which is applicable to the city of Louisville, it was provided, among other things, that the general council may, by ordinance, provide for the following licenses to be paid into the sinking fund, with adequate penalties, for doing business for following the calling, occupation, profession, or using or holding or exhibiting the article herein named without the required license: For each bank, trust and title company the license tax shall not be less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city.

In pursuance of the said charter, as aforesaid, the general council of the city of Louisville did pass an ordinance, which was approved January 29th, 1894, by which it was provided, among other things, that hereafter the following licenses shall be paid into the sinking fund of the city of Louisville: Each bank and trust company shall pay an annual license tax of four per cent. of its gross earnings, exclusive of rent from real estate paying taxes in the city of Louisville.

The plaintiff states that the said act granting a charter to cities of the first class and the said ordinance passed in pursuance thereof are both unconstitutional and void, in that they impair the obligation of the contract between the plaintiff and the Commonwealth of Kentucky as embodied in its agreement, as aforesaid, made under

the said revenue law of May 17th, 1886, and are in violation
19 of the Constitution of the United States, and especially the section thereof providing that no State shall pass any law impairing the obligation of a contract.

The plaintiff avers that the said act chartering cities of the first class and the said ordinance, as aforesaid, are both unconstitution- and void, as above set forth; that the agreement executed by it, as heretofore stated, constituted a contract between the State, on the one part, and the plaintiff bank and its stockholders, on the other part, continuing during the legal existence of the corporation, and the State possessed no power or right to repeal or annul said agreement or the rights conferred thereunder limiting the right of the State to impose a tax on the plaintiff bank in excess of the amount states in the aforesaid act of May 17th, 1886, without the consent of said bank and its said stockholders.

The plaintiff further states that it did give its consent to the said act of May 17th, 1886, and did, upon the considerations therein recited, waive and release its right to a different mode or smaller rate of taxation than is therein provided. Said consent and waiver was made on the belief that by the said act it was intended to put in operation a permanent legislative policy governing the taxation of all banks then existing which would accept its provisions, to endure at least during the corporate existence of all assenting banks.

The Bank of Kentucky, the Bank of Louisville, the Northern bank, and the Farmers' bank having all agreed to accept the provisions of the said act of May 17th, 1886, this plaintiff also agreed to do the same, and accordingly did so. Now the plaintiff states that in view of the action of the State in disregarding its contract and endeavoring to put into effect a system of taxation on all the banks in the State, including plaintiff, much higher and more onerous than that described in the act of May 17th, 1886, in that all of said banks, including the plaintiff, are required to pay full municipal taxes in addition to State taxes, the consideration which induced the plaintiff to consent to be taxed und- and in accordance with the terms of said act has wholly failed, and it insists and submits to the court that by the action of the State the Bank of Kentucky, the Bank of Louisville, the Northern Bank of Ken-
20 tucky, — Farmers' bank have been restored to their original charter right to be discharged from all kinds of taxation by the payment of fifty cents on each share of their capital stock, and they are respectively claiming to be so restored to their original charter rights, and that, by reason of that fact, this plaintiff, being entitled to be put upon an equally favo- footing, is likewise entitled to be discharged from all kinds of taxati- by the payment of fifty cents on each share of its capital stock; but if this be not true, still the plaintiff insists and submits to the court that it cannot be taxed in excess of the amount named in the contract duly executed by this bank under its corporate seal and delivered to the governor of the Commonwealth, in accordance with the provisions of said act of May 17th, 1886.

Plaintiff states that it was provided in said ordinance that all

licenses should be paid in advance, and in every case where it is based upon a percentage of earnings or income of the corporation the computation shall be made upon the earnings or income of said corporation for the year immediately preceding the time the license is to be dated or is payable, and the corporation to whom the license shall be granted shall at the end of the year pay the amount due for the excess over the estimates made at the time of issuing the license under the same penalty as if it had failed or refused to secure a license; and it was further provided that any corporation violating any of the provisions of said ordinance shall be fined not less than $5 nor more than $100 for each offense each day that the violation is continued to constitute a separate offense. The plaintiff states that, notwithstanding the premises aforesaid, the commissioners of the sinking fund of the city of Louisville have demanded of the plaintiff that it shall pay to them the sum of $—, and upon its failure to pay have caused a warrant to be issued out of the police court of the city of Louisville, wherein this plaintiff is charged with the offense of conducting a bank without a license, and, unless prohibited by this honorable court, the defendant R. H. Thompson, judge of the police court of the city of Louisville aforesaid,
21 will cause this plaintiff to be tried under the said warrant, and will cause the said plaintiff to be fined for failing to comply with the said ordinance and not procuring a license to do business in accordance therewith.

The plaintiff further states that, as aforesaid, the said ordinance is null and void and of no effect, an- the said R. H. Thompson, judge of the police court of the city of Louisville, has no rightful power or authority to enforce the same or to cause this plaintiff to be tried upon the said warrant.

Wherefore plaintiff prays that this court, by a writ of prohibition or order addressed to the police court of the city of Louisville, prohibit it from proceeding in the matter of the warrant sued out in said court against plaintiff for failure to pay said license if and that on final hearing it be adjudged that said license, ordinance, and said act for the government of cities of the first class, in so far as they authorize a tax in any form to be levied against and collected from plaintiff, be declared unconstitutional and void, and for all general and proper relief.

HUMPHREY & DAVIE,
HELM & BRUCE,
Att'ys for Plaintiff.

H. W. Reese says he is president of plaintiff, and that the facts in the foregoing petition are true as he believes.

H. W. REESE.

Subscribed and sworn to before me by H. W. Reese this 18th day of June, 1894.

A. F. MERMAN, [SEAL.]
N. P., J. Co., Ky.

Commission expires January 26th, 1898.

And thereupon the clerk issued summons and copy, which is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

22 We command you to summon R. H. Thompson, judge of the police court of the city of Louisville, to answer a petition filed against him in our Jefferson circuit court by Third National Bank, and warn him that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days, if elsewhere in the State, judgment may be rendered by default or answer compelled or proof taken, at petitioner's option, and make due return hereof within sixty days from date hereof.

Witness John S. Cain, clerk of said court, this 18th day of June, 1894.

JOHN S. CAIN, *Clerk*,
By E. WHITEHEAD, *D. C.*

The sheriff returned said summons with the following endorsement thereon:

I accept the service of the within summons this 18th day of June, 1894.

R. H. THOMPSON,
Judge Police Ct.

At a court held for the court aforesaid on the 19th day of June, 1894, came parties, by counsel, and said case, being heard, was submitted, and the court, not being advised, takes time.

At a court held for the court aforesaid on the 24th day of July, 1894, the court, being sufficiently advised, filed an opinion herein. Said opinion is as follows:

Jefferson Circuit Court, Common Pleas Division.

BANK OF KENTUCKY, &c., }
vs.
R. H. THOMPSON, Judge, &c. }

These cases involved the liability of the several plaintiffs to municipal taxation. The Bank of Kentucky represents the class of banks chartered before 1856; the Louisville Banking Co. represents the banks chartered since that date, and the Third national the interests of the national banks of the city.

A bank chartered before 1856 and one whose charter is
23 subsequent to that date were made plaintiffs, because in that year the following general statute became a law:

"All charters and grants of or to corporations, or of amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contracry interest be therein plainly

expressed. Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Gen. Stats., chap. 68, sec. 8, p. 861.)

Before that act was passed there was no general law giving the legislature control over charters; if the right to amend or repeal was not reversed in the charter, it did not exist; but, as to charters granted since that date, the act quoted becomes a part as fully as if its was incorporated therein, unless a plain intent to exclude it is shown.

The charter of the Bank of Kentucky was approved Feb'y 22n-, 1834; that of the Louisville Banking Company Jan'y, 1867. In the charters of all the banks interested in this litigation it is provided, in substance, that at no time shall the tax exceed fifty cents on each $100 of stock therein.

In 1886 an act generally known as the "Hewitt bill" was passed to amend the revenue laws, by which it is provided that all banks in the State shall pay a tax of seventy-five cents upon the $100 of their stock and certain other taxes for which they were not theretofore liable, but knowing that the rate of taxation could not be increased beyond the limit fixed in their charters, so far as banks created before Feb'y, 1856, were concerned, without their consent, the law required of all the banks as follows:

"That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the
24 State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

SEC. 5. The said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly. Provided: They pay the tax provided in section 1 from the passage of this act.

SEC. 6. This act shall be subject to the provisions of section eight (8) chapter sixty-eight (68) of the General Statutes."

All of the banks concerned filed their written consent in due time to pay the tax thus provided for.

The present constitution seeks to have all property taxed in proportion to its value.

"All property whether owned by natural persons or corporations shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution

shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises." Sec. 176.

The General Assembly in the charter for cities of the first class now *proper* to adopt a license tax for banks and certain other monied corporations whereby each of them is required to pay not less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city. The city council passed an ordinance conforming to the charter requiring each bank to pay an annual license tax of four per cent.

The banks ask in this action for a writ of prohibition against the city to prevent it from enforcing the tax levied by the ordinance,
for the reason mainly that the "Hewitt bill" constitutes a
25 contract which the State has no right to violate either by constitutional provisions or legislative enactment.

As the law touching all questions raised by the demurrer of the city has recently undergone a thorough investigation by two distinguished circuit judges, who delivered carefully prepared and able opinions, I shall merely state the conclusions to which an attentive consideration of the authorities submitted by counsel has led.

As to the Bank of Kentucky and the banks represented by it there is little room for argument in this court, because in the present case of The Franklin Circuit Court *vs.* Deposit Bank, &c., 87 Ky., 387, the court of appeals decided the identical questions now presented. The city of Frankfort assessed the corporate property of the Bank of Kentucky for municipal taxation. The bank relied upon its charter to defeat the tax.

The court held that the agreement in its charter that it should pay to the State a tax of fifty cents on each of its shares of stock, and that this should be in full of all other tax, constituted a contract which cannot be violated or changed without the consent of the bank.

Referring to the Dartmouth College case, where this principal first obtained prominence, the opinion says:

"This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States and so uniformly recognized by the courts of last resort of all the States that a decision by us holding the contrary would be regarded as eminently sporadic."

The Dartmouth College case was decided in 1819, and has been steadily adhered to ever since. The doctrine established by it has sometimes been questioned, but never overthrown.

It would be idle now to theorize whether or not, in view of the mighty changes that have occurred in our social polity during the three-quarters of a century which have elapsed, one legislature should be permitted to make a contract curtailing the sovereign power of taxation by which all succeeding legislatures and the law-making bodies are to be bound through all the coming years. The
Dartmouth College case is a fact in our jurisprudence, and
26 Mr. Justice Miller realized it when he said, in the opinion in the case of New Jersey *vs.* Yard, 95 U. S., 354:

"The writer of this opinion has always believed and believes now that one legislature of a State has no power to bargain away

the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit; but so long as a majority of this court adhere to the contrary doctrine he must, when the question arises, join with the other judges in considering whether such a contract has been made."

It is true that in this State such power has been taken from the legislature by constitutional provision, but contracts of that character heretofore made and not affected by the statute of 1856 are as binding and inviolable as they ever were.

The demurrer to the petition of the Bank of Kentucky will have to be overruled.

Concerning the Louisville Banking Co. and the banks it represents, it is sufficient to say that, notwithstanding the definite and formal terms of the contract entered into between them and the State by means of the "Hewitt bill," the legislature which passed that law gave them notice that the right was reserved to any succeeding legislature to amend or repeal it. "This act shall be subject to the provisions of section eight (8) of chapter sixty-eight (68) of the General Statutes."

The fact that the right was reserved by the State to repeal or modify the Hewitt bill and abrogate the contract with the banks under it presents no valid objection in their behalf.

As long as the law stood unrepealed they were entitled to enjoy all the benefits of their contract, and they were not and could not be taxed except in the manner and to the extent indicated by their written consent. The obligation rested equally upon both parties as long as it lasted.

Section 8 of chapter 68 was as much a part of the contract as if it had been embodied in the writing. This question was fully considered in Griffin *vs.* Kentucky Ins. Co., 3rd Bush, 592, and Clark *vs.* Louisville Water Co., 143 U. S., page 1. The demurrer to the petition of the banking Co. will have to be sustained.

27 The national banks *desire* all their powers from Congress and their corporate rights cannot be abridged nor in any manner interfered with by a State legislature, but with reference to taxation they occupy the same position that State banks of issue hold, the only limitation placed by Congress upon the power of the State to tax them being that they shall not be discriminated against in this particular. City National Bank of Paducah *vs.* City of Paducah, 10 Ky. Law Rep., 506.

The fact that there are banks in the State which by contracts in their charters, made before national banks came into existence, pay a smaller tax than is assessed against national banks and other similar institutions organized since the national banking act became a law can make no difference. All that is required is that as far as the State has the power to control the matter national banks shall not be taxed at a higher rate than it taxes the State banks. In the case of Lionberger *vs.* Rowe, 9 Wallace, 468, it is said:

"Congress meant no more by the second limitation in the proviso to the 41st section of the national banking act than to require of each State as a condition to the exercise of the power to tax the

shares in national banks that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.—Syllabus.

The measure had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing as that the power of the State to tax should depend on its doing an act which it obliged itself not to do."

As the national banks will be taxed in the same manner and only to the same extent that the State banks organized since February, 1856, will be taxed, it follows that there is no discrimination against them; therefore the demurrer to the petition of the Third national will have to be sustained.

It would be more satisfactory to hold that all the plaintiffs are equally liable or that none of them is subject to municipal
28 taxation, but the law must be given as it is.

EMMET FIELD, *Judge.*

At a court held for the court aforesaid on the 24th day of July, 1894, this cause having been heard and submitted and the court being advised, it is considered by the court that the petition herein does not set forth a cause of action, and the demurrer to the said petition is sustained; and the plaintiff declining to plead further, it is adjudged that the petition of the plaintiff be, and the same is hereby, dismissed, and it is adjudged that the defendants recover of the plaintiff their costs herein expended, for which they may have execution; to all of which the plaintiff excepts and prays an appeal to the court of appeals of Kentucky, which is granted.

STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing 19 pages, this included, contain a full, true, and complete transcript of the record and proceedings had in the case wherein Third National Bank is plaintiff and R. H. Thompson is defendant, #4685, as the same appears of record and on file in my said office.

Witness my hand this 17th day of August, 1894.

JOHN S. CAIN,
Cl'k Jeff. Cir. Ct.

Upon which transcript was endorsed the following statement:

THIRD NATIONAL BANK, Appellant,
vs.
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.
} Appeal from the Jefferson Circuit Court, Common Pleas Division.

The judgment appealed from was rendered July 24th, 1894, and is on page 19 of the record; appeal granted in court below.

HELM & BRUCE,
HUMPHREY & DAVIE,
For Appellant.
HENRY S. BARKER,
For Appellees.

29 At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 9th day of October, A. D. 1894, the following order was made:

THIRD NATIONAL BANK, Appellant,
vs.
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.
} Jefferson.

Ordered that this case be continued for oral argument.

Afterwards, at a court of appeals held, as aforesaid, on March 5th, A. D. 1895, the following order was entered:

THIRD NATIONAL BANK, Appellant,
vs.
THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.
} Jefferson.

By agreement of all the parties and on their motion, it is ordered that these 17*th* cases be heard together, and said causes, coming on to be heard, were argued by A. P. Humphrey, for the banks and Ira Julian, for the Commonwealth, counties, and cities, and laid over until tomorrow for further hearing.

Afterwards, on the 6th day of March, A. D. 1895, the following order*ed* was entered herein:

These causes, coming on to be heard, were argued by D. W. Lindsay, for the banks, W. McD. Shaw and Hugh Rodman, for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, on March 7, 1895—

These cases, again coming on to be heard, were argued by Wm. Goebel, for the banks, and H. C. Barker, for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, on March 8, 1895, these causes, again coming on to be heard, were argued by John W. Rodman and T. L. Edelen, for the banks, and laid over for further hearing on tomorrow.

30 Afterwards, on March 9, 1895, these causes, again coming on to be heard, were argued by James P. Helm, for the banks, and laid over for further hearing on next Tuesday.

Afterwards, on March 12, 1895, the following order was entered herein: These causes, again coming on to be heard, were argued by Wm. J. Hendrick, for the Commonwealth, and submitted.

Afterwards, at a court of appeals held, as aforesaid, on the 1st day of June, A. D. 1895, the following judgment was entered:

THIRD NATIONAL BANK, Appellant, *vs.* THE CITY OF LOUISVILLE, R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Appellees.	Appeal from the Jefferson Circuit Court, Common Pleas Division.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appel-ants recover of the appellees their cost herein expended.

Judge- Lewis, Paynter, and Guffy dissenting.

At the same time, to wit, on June 1, 1895, the court, through Chief Justice Pryor, delivered the following opinion:

COMMONWEALTH, for Use, &c., *v.* FARMERS' BANK OF KY.	Franklin.
FARMERS' BANK OF KY. *v.* BOARD OF COUNCILMEN OF CITY OF FRANKFORT.	Franklin.
FARMERS' BANK OF KY. *v.* COUNTY OF FRANKLIN, &C.	Franklin.
BANK OF KY. *v.* ARMSTRONG, Sheriff, &c.	Franklin.
PRESIDENT, DIRECTORS, & COMPANY OF THE BANK OF KY. *v.* BOARD OF COUNCILMEN OF CITY OF FRANKFORT, &C.	Franklin.
COMMONWEALTH, for Use, &c., *vs.* BANK OF KY.	Franklin.

	SAME *vs.* DEPOSIT BANK OF FRANKFORT.	Franklin.
	DEPOSIT BANK OF FRANKFORT *vs.* FRANKLIN CO., &C.	Franklin.
	COMMONWEALTH, for Use, &c., *vs.* FRANKFORT NATIONAL BANK.	Franklin.
	SAME *vs.* STATE NATIONAL BANK.	Franklin.
31	THIRD NATIONAL BANK *vs.* CITY OF LOUISVILLE, &C.	Jefferson C. P. Div.
	LOUISVILLE BANKING CO. *vs.* SAME.	Jefferson C. P. Div.
	CITY OF LOUISVILLE, &C., *vs.* PRESIDENT, DIRECTORS, & COMPANY OF THE BANK OF Kentucky.	Jefferson C. P. Div.
	PRESIDENT, DIRECTORS, & COMPANY OF THE NORTHERN Bank of Ky. *vs.* BOURBON COUNTY.	Bourbon.
	CITY OF COVINGTON *v.* FIRST NATIONAL BANK OF COVINGTON.	Campbell.
	SAME *vs.* GERMAN NATIONAL BANK OF COVINGTON.	Campbell.
	FARMERS' BANK OF KY. *vs.* CITY OF HENDERSON.	Henderson.

(Filed June 1, 1895.)

Opinion of the Court by Chief Justice Pryor.

The Bank of Kentucky, the Northern bank, the Farmers' bank, and other State banks, the National Bank of Covington and other national banks are in this court, by their president and directors, some of them appealing from judgments imposing upon them taxation for county and municipal purposes, and others sta-ding as appellees in cases relieving them from such local burdens. The legis-

lation imposing such burdens is found in the Kentucky statutes, under the title of "Revenue and taxation," and is based on sections 174 and 175 of the present constitution. Section 174 provides:

"All property whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Section 175 provides:

"The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

It is manifest, by reason of section 175, the right of the legislature no longer exists of surrendering the power to tax property or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging
32 to corporations or individuals, must pay the same rate of taxation. The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State by which, in consideration of the surrender by them of certain rights found in their respective charters and by their consent and agreement to pay a larger State tax than individuals paid or their charters required, the State agreed not to impose upon them any local burden; and the important inquiry in these cases is, Was such a contract entered into between the banks and the State based on a consideration binding the State on the one side and the banks on the other?

The statute under which this contract is claimed to have been made is found in the General Statutes under the title of "Revenue and taxation," sections 1 and 4 of article 2, and known as the "Hewitt bill." Counsel for the banks in the discussion of these cases classified the banks as follows:

1st. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law.

2nd. Banks chartered after that date, when by general law the right to amend or repeal the charters was expressly reserved.

3rd. National banks.

We shall treat all the cases as one in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation and requiring them to pay a larger tax to the State upon their property than that paid by the individual taxpayer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation and made all taxation alike upon

property, whether for State or municipal purposes, applying
33 the rule for municipal purposes to the territory in which the tax is imposed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed and like institutions in more favored localities where lighter or no local burden exists; and while the fact that the banks in the commercial centers of the State are taxed $2.25 on the hundred, under the present system (local and State), and those in an adjoining town or county only one per cent. may work a hardship and prevent competition or drive the bank thus heavily taxed to locate elsewhere, yet this, under the old system, was a question of policy only, and the framers of the present constitution, in adopting the ad valorem system, left no room for classifying property so as to make any discrimination in the subjects of taxation, and the suggestions of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act and that of the banks in accepting it.

It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856) with reference to taxation and the circumstances attending the legislation resulting in the passage of the Hewitt bill in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contract, by which only a tax of fifty cents on each share of $100 of stock could be imposed. The national banks claimed they were entitled to be taxed like the State banks and were not liable for local burdens, and, besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government. The State claimed that the old banks were taxed for too small an amount, and the banks chartered since the year 1856 were resisting any discrimination between such institutions and the old banks.

Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all the banks, State and national, We will impose a tax of seventy-five cents on
34 each share of your capital stock equal to $100, and in addition a tax on your surplus, and this shall be in full of all tax, State, county, and municipal, provided you will accept the act imposing the tax, with the conditions annexed. This act reads: "Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to $100 of the stock therein, owned by individuals, corporations or societies, and such banks, institutions and corporations shall, in addition, pay on each $100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real

estate, which shall be in full of all tax, State, county and municipal."

The 7th section of the act further providing that "nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business; but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of this act provided: "That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement with the State of Kentucky shall be evidenced by writing, under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

Section 5 of the act provided:

35 "The said banks may take the proceeding authorized by section 4 of this act any time, until the meeting of the next General Assembly, provided they pay the tax provided for in section I from the passage of the act."

Section 6 provides:

"This act shall be subject to the provisions of section 8, chapter 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptances with the governor, under their corporate seal. The banks incorporated before the act of 1856 surrendered what they claimed to be their charter contracts, by which they were taxed only fifty cents on their shares of stock of $100. The national banks yielded their right to deduct from the value of their stock their surplus consisting of non-taxable securities and their claim to be taxed as the old banks; and, most of the State banks uniting to prevent any discrimination, all accepted the proposition made by the State and agreed to pay seventy-five cents on each share of stock of $100 in value and the additional tax mentioned in the article.

It is conceded (and we think it clear) by counsel for the city of Louisville that prior to the passage of the Hewitt bill, in the year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of $100, and the same may be said of all the banks chartered prior to the act of 1856; but it is further contended that the act, as well as the contract under it, were both subject to repeal by reason of the reserved power contained in section 6 of article 2. Again, it is contended by counsel for the city of Frankfort that the grant to the banks was without any

consideration, and the renewals of the charters of the old banks, as they are designated, placed them within the provisions of the act of 1856 and by the attorney general, that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court, in the case of The Franklin Count Court against The Bank of Kentucky, reported in 87th Kentucky, in an opinion
36 delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant, and, if disposed to reconsider the decision rendered in that case, it could not affect the issue involved on the present appeals. At the date of the passage of the Hewitt bill the Franklin circuit court had decided that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill this court affirmed that judgment. It is apparent that article 2 in the Hewitt bill was adopted by the legislature with the view of equalizing the burdens of taxation as between the banks and to relieve them from the burden of local taxation during their corporate existence; but it is insisted that there was no consideration for this partial exemption.

If there was a binding contract between the old banks and the State to pay a tax of only fifty cents on each share of stock and the banks surrendered their contract or their rights under it and agreed to pay seventy-five cents to the State instead of forty-two and a half cents, it seems to us this would be a consideration sufficient to uphold any such contract with the State if the power existed with the State to make it, and the fact that such a power existed has been too often decided by this court, as well as the Supreme Court, to require authority in support of it. It is plain, also, that these banks, including the national banks, surrendered their rights not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in the commercial centers of the State and those outside of such localities, where no heavy burdens for local taxes were being levied, and therefore the consideration moving from the old banks was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discriminations between these monied institutions, and therefore, its exactions from the old banks and the national banks being acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856 as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute imposing the tax of seventy-
37 five cents and its acceptance on the conditions proposed there exists every element of a contract between the State and the banks and with such a consideration as will uphold it. No reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into the provisions of the present constitution and subsequent legislation under it operated to repeal not only the statutes, but the contract made by virtue of its provisions, and this power existed by reason of the 6th

section of the article, making it subject to the provisions of section 8, chapter 68, General Statutes, declaring that—

"This shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be plainly expressed; Provided that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, and as we think was the legislative intent, the word "act" in section 2 of the Hewitt bill was used as synonomous with the "article," and therefore the reservation of power on the part of the legislature was the right to amend or repeal the article, in which is contained the proposition by the State to the banks in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act and the right to annul by repeal or otherwise a contract made under it is manifest, and, while under our present constitution the State can make no contract by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous decisions of the Supreme Court.

The general rule in regard to legislation is that one legislative body cannot bind a subsequent legislature by its action in purely legislative matters, but when it comes to matters of contract,
38 if the State has the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens, and an attempt to cancel such a contract without the consent of the party with whom it is made is in direct violation of that clause of the Federal Constitution providing that "no State shall * * * pass any law impairing the obligation of contracts." (Section 10 of article I, United States Constitution.)

That the State may enter into such contract was held by this court as early as the year 1839 in the case of Johnson *v.* Commonwealth, 7 Dana, 442, where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract, and this court held that the contract placed a limitation on the power.

In the case of The Farmers' Bank *v.* Commonwealth, 6 Bush, —, it was held that the bank could not be taxed beyond its charter rate as fixed by the contract, and in the late case of The City of Frankfort *v.* Bank of Kentucky and others, 87 Ky., —, the same doctrine was announced.

The question then arises, Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature or the framers of the constitution to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it never contemplated or intend- that the act of 1856 should apply to this con-

tract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties.

The legislature, at the time this contract was made, recognized the right of the Bank of Kentucky and the banks chartered prior to 1856 to stand upon their charter rights; or, if not, the right of the bank as against the State on this subject of taxation had found its way to the courts and had been decided adversely to the State.

The legislature thought the tax of fifty cents too small; the old banks could only be taxed as authorized by the Federal Congress; the new State banks were subject to such taxation as the
38½ State might see proper to place upon them, and to make their liable for these local burdens would be to end their existence or cause them to seek shelter under the Federal banking act; and with the view of placing the entire matter at rest and placing the banks on an equal footing the legislature said to all of the banks, "If you will agree to pay seventy-five cents on each share of stock equal to $100, etc., it shall be in full of all tax, State, county, and municipal."

It said to the old banks, "You must relinquish your right to a smaller rate of tax, and this must be done not by your president and directors, but by the consent of the stockholders, in writing, and delivered to the governor, as evidence of your good faith." The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution the contract was adhered to by both the State and the banks; it is now agreed that the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights and agreed to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business men at the head of these institutions would relinquish any right they had acquired under their charters that an increased burden might be placed upon the banks they represented. In the contention that the 6th section of the article reserves this power of repeal counsel overlook the fact that, by the express terms of the section by which this reserved power is retained, it is provided that "no amendment or repeal shall impair other rights previously vested."

The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself, connected with the acceptance of the banks, vested in the latter rights of which they could not be divested without their consent, the chief of which wa- the payment of a specified tax to the State during their corporate existence. The State waived its right to tax those banks for local purposes (except their realty), and required
39 in lieu thereof an additional tax to be paid into the State treasury. In this way the State, granting the franchise, derived the benefit instead of the municipal government, which, under the present system, the difference between forty-two and a half cents and seventy-five cents, with tax on surplus amounting to

$125,000, is taken from the revenue proper and applied to the municipalities where the banks are located.

In the case of The State against The Green & Barren River Navigation Co., 79 Ky., this court held, with the act of 1856, in full force, that the State had no power to annul a contract that had been executed between the State and the company, and the repeal of the charter to the extent that it deprived the company of its contract rights acquired under it was in violation of the constitution. In that case that court said: "We cannot assent to a doctrine that will allow the State to alter or abolish such contracts whenever in the opinion of the legislature the necessities of the public or the interest of the State require it."

The case of The Commonwealth against The Owensboro, &c., R. R. Co., 95 Ky., 60, determines in effect the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroad-, and in doing so relieved them from taxation for a limited period. The act provided "that all railroads which may hereafter be built within this Commonwealth, under existing charters or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of this Commonwealth for the period of five years from the date of the beginning of the construction of the new roads."

The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes when the five years from the beginning of the construction of these roads had not expired. The court in response to the argument to exact the tax and the application of the act of 1856 to its provisions said: "It is sufficient to say of this proposition, which, even at first blush, strikes us as extraordinary and unjust if attempted to be applied to those of the appellees who accepted the offer of the State and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges, has no application to the law of 1884, which, as said before, was a general law and affected all alike who accepted its provisions or acted on the strength of them."

Counsel for the local governments argue the question involved as if there was a perpetual grant to these corporations, and therefore the power of repeal must, of necessity, have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence the policy of the State, if viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

The framers of the constitution, in adopting that instrument, were not looking to past legislation on this particular subject, but were creating an organic law for the future welfare of the State, leaving the rights of those protected by either the State or Federal Constitution undisturbed; and if the attempt to repeal vested rights had been made, the framers of the present constitution would have

been as powerless to accomplish such a purpose as the legislature in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the court of appeals of New Jersey in the case of New Jersey *vs.* Yard, reported in 95th United States, 110. By an act of the legislature passed in March, 1865, the legislature of New Jersey enacted that the Morris & Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amounted to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open and in use to Phillipsburg and annually thereafter, "which tax shall be in lieu and satisfaction of all other taxation and imposition whatever by or under the authority of this State."

The 20th section of the original act of incorporation reserved to the legislature the right to alter, amend, or repeal the act whenever it should think proper. The act of 1865 was an amendment
41 to the original grant, and, in regulating the amount of taxation, contained this proviso: "Provided, that this section shall not go into effect or be binding on the company until the said company, by an instrument duly executed under its corporate seal and filed in the office of the secretary of state, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller, in delivering the opinion in that case, said: "The main question here is, Did the legislature intend to make such a contract? That its meaning and its terms are clear enough, and taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States."

And in like manner will the contract in question be upheld; and as said by Mr. Justice Miller, in New Jersey *v.* Yard, "The legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms, but they required of the company a formal, written acceptance within sixty days, else it became wholly inoperative."

And it may be said t— in the New Jersey case there was no consideration other than is found in ordinary railroad charters. It is said, however, in that case, the repealing clause, or what is known ain this State as the act of 1856, was appended to the original charter, and when amended formed no part of the amendment, as is found in this case, and therefore the court concluded the amendment was no- subject to repeal. The question is asked, Why the necessity of making the act of 1856 apply to article 2 if the legislature did not intend to reserve the right of annulling the contract?

In response to this it might be asked, if such was the legislative intent, why the necessity of having a formal written acceptance from the b-nks surrendering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the $100 so long as their charter continued, if the power
42 was reserved of abrogating the contract at any moment? If such was the legislative purpose, there could have been no

necessity for any consideration moving from the banks or any formality attending the execution of the contract. The act of 1856 was enacted to avoid the effect of the decision of the Supreme Court in the Dartmouth College case, reported in 4th Wheaton, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the legislature without such a reservation; but under this act of 1856 it has been held by this court, as well as every other court having the question before it, that property rights or contracts rights acquired by virtue of the charter in exercising the privileges conferred could not be interfered with by legislation, and in fact the act expressly provides "that, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contracts rights sustained by the adjudication of the courts of the State that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill. (City National Bank of Paducah *v.* City of Paducah, 10th Kentucky Law Reporter; Covington City National Bank *v.* City of Covington, 21st Federal Reporter.)

The legislature saw the obstacle in the way of increasing the taxation of these banks, and, the national banks standing on the same footing with the State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks that equality as between them might exist, and at the same time increase the taxation. The banks had not asked for any amendments to their charters, nor was the effort made by the legislature to repeal or amend the charters. The State was attempting to enact a general law entitled "Revenue and taxation," applying to all subjects of taxation and *yo* all kinds of property. The tax in regard to banks under this general title was fixed at seventy-five cents as to all banks and to all corporations required by law to be taxed
43 on their capital stock; and as to the old banks and the *old banks and the* national banks, the surrender of their rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the Hewitt bill and be released from other taxation so long as their charters continued. Why, then, did the legislature annex to article 2 of the revenue bill the provisions of the act of 1856?

No contract had been made when the bill passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consummated. It was providdd in article 2 that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition, if within the period fixed there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privileges granted was not involved in the legislation, but the banks, with their

charters in full force, were asked by the legislature to make an agreement as to a rate of taxation that could not have otherwise been enforced against either the old banks or the national banks.

The corporations had the right to contract by reason of their charters, and, dealing at arm's-length with the State, accepted the terms and conditions offered in good faith; and the question here is not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract without the consent of the banks.

The right of the State to repeal the franchise or amend the charter is not here questioned, when subject to the act of 1856, but the repudiation of the contract will not be sanctioned.

There was in fact a necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not, and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side and the State on the other, by which the taxation on these banks might be increased, and,
44 at the same time, placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856, but neither the banks nor the State ever intended to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed, and no meaning given a statute that will lead to an absurdity. The case before us is much stronger for the banks than that of Yard *v.* New Jersey. Here the old banks had contract rights, sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation, and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there was any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article, the intention of the legislature, it seems to us, is manifest.

This increased tax under the former constitution, as before stated, went to the State, and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms so as to withdraw from the State treasury this additional tax the banks have been paying, amounting to $125,000 annually, and transfer it to the cities to aid in discharging local burdens. It requires no judicial utterance to show that under the national banking act, where the rate of interest is fixed at six per cent., or as the State law provides, and a forfeiture of the entire interest if more is charged, that these banks, by the imposition of local burdens, cannot be taxed as much as two and a half per cent. in any locality when the average taxation of State banks will not exceed half that sum.

In the case of Lionberger *v.* Rouse, reported in 105 U. S., after the national banking act system went into effect, the legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks
45 became national banks and two of them declined to do so. The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent., and the State was powerless to increase this tax. The assessment of the plaintiff's shares of stock in the national bank was at the rate of nearly two per cent. It was contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said as this national bank, or its shares, was not taxed for a greater sum than other monied institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere. While there are exceeding sixty State banks, the Bank of Kentucky and its branches, the Northern bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches were at the time of the passage of the Hewitt bill and are now regarded as the prominent banking institutions of the State, and if, with their capital and business rank, placed before the Supreme Court with a tax of only one per cent. and the tax on the national banks placed at two per cent. the judgment of the Supreme Court upon such a state of fact-doubtless would have been similar to the decision of this court in the case of The National Bank *v.* City of Paducah.

The case of Lionberger *v.* Rouse has no bearing on this question of contract. Here the State was not powerless to remedy the evil or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however great or even insignificant the difference in taxation might have been. The national banks, recognizing they could be taxed as other monied capital, and desiring uniformity of taxation and not one rate for one bank and a different rate for another, surrendered their right or claim to be taxed as the old banks were taxed and entered into this agreement, by which a uniform system of taxation was adopted for all banks, such as the State desired. The claim of the old banks and the national banks as to the mode of taxing them was certainly not without foundation for the reason already given, and the proposition by the legislature to settle
46 these differences and its acceptance was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank cases. In the one case there was no legislation making the discrimination, while in the case before us the State, after placing the banks, State and national, on the same footing as to taxation by the consent and agreement of all the parties to the contract, is now insisting upon a legislative re-cission of the contract and placing the old banks at least in a position where they are to pay only fifty cents on shares of $100 and leaving the national banks subject to a greater rate of taxation. This re-

peal, if sustained, is in effect the creation of three or more new banks, with a rate of taxation much less than that imposed on the national banks and making a discrimination in favor of the old banks and their branches that gives them a monoply of the banking business of the State.

The old banks, with a capital of five millions at the time the Hewitt bill passed, will be relegated to the condition they were in when the contract was made, as was held by the Supreme Court in the case of Clark *v.* Water Co., 143 U. S., and that is an exemption from local burdens with a tax of one-half of one per cent. to the State.

The national banks, with a capital of ten millions when the Hewitt law was enacted and now increased to twenty millions, will also be exempt from local burdens, because the State, in the exercise of a power it now claims, has abandoned the contract under which taxation was equal and uniform and voluntarily made an unjust discrimination when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax and the municipalities or the legislature for them, without power to impose on national banks local burdens. The banks have all practically accepted the provisions of the Hewitt bill, and the legislation repealing or cancelling the contract being in violation of both the State and Federal Constitution leaves the Hewitt bill, as to the banks, in full force and they must be taxed under its provisions until the contract terminates.

These monied institutions are now paying, including tax
47 on surplus and realty, eighty cents, or about that sum, on each share of stock of $100, while the citizen tax-payer is paying only forty-two and one-half cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old constitution, or to the municipalities under the new constitution.

In the absence of this contract it would go to discharge local burdens, but with this contract in full force it must be paid, as to the amount and manner as provided by the Hewitt bill of 1886, into the treasury of the State.

It results, therefore, that the judgments in the case of The Louisville Banking Co. *v.* City of Louisville, Third National Bank *v.* City of Louisville, Northern Bank of Kentucky *v.* Bourbon County, Deposit Bank of Frankfort *v.* Franklin County, Bank of Kentucky *v.* Armstrong, sheriff; Bank of Kentucky *v.* City of Frankfort, Farmers' Bank of Kentucky *v.* City of Frankfort, Same *v.* Franklin County, Same *v.* City of Henderson, are reversed, and the judgments in the cases of The City of Louisville *v.* The Bank of Kentucky, Commonwealth *v.* State National Bank, Same *v.* Frankfort National Bank, Same *v.* Deposit Bank, Same *v.* Bank of Kentucky, City of Covington *v.* German National Bank, Same *v.* First National Bank, and Commonwealth *v.* Farmers' Bank of Kentucky, are each and all affirmed.

Judges Lewis, Paynter, and Guffy dissenting.

At the same time the following dissenting opinion was delivered:

Were this a case simply affecting the rights of two citizens of the State I might content myself with dissenting without expressing my reason therefor, but involving as it does the sovereignty of the people and denying to them, as I conceive it does, their right to have their will to assume the form of law on such a vital question as that of taxation, I feel constrained to give my reasons for dissenting from the views expressed by the court.

The effect of the opinion of the court is to destroy a principle engrafted in the laws of — State nearly forty years ago—one
48 so important that it was declared by the General Assembly to be in effect written in every act of incorporation granted by it. So important was the reservation of the right to amend or repeal such act of incorporation that the General Assembly was unwilling to run the risk of inserting it in each act, but declared by general law that it should be understood to be written in all of them.

The opinion in effect denies the power of the people through their organic law to declare what are just principles of taxation, that the same rate of taxation shall be imposed on the property of corporation as on an individual, and the authority of the General Assembly to execute that constitutional mandate.

I believe that corporate rights should be held as inviolate as those of the citizen; that each citizen should bear his full share of the common burden of taxation; "that all freemen when they form a social compact are equal and no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but on consideration of public services." I do not believe in the State passing laws impairing the obligation of its contracts with corporations or individuals when the contracts are made by virtue of the provisions of the constitution, *b*or do I believe in denying the right to the State to withdraw from a contract when in express terms the right to do so is reserved, as in such case it cannot be said to impair the obligation of the contract.

While I regard there is a vast difference between granting a corporate franchise authorizing the acquisition of property by donation or otherwise for the purpose of educating and spreading the gospel among the Indians and affording an opportunity to the youth of the land in the days of the early settlement of the country to obtain an education, as was the purpose of the charter to Dartmouth College, and granting immunity from taxation to institution- operated solely for private gain; yet *as* the courts of the country, taking the principle enunciated in the Dartmouth College case as authority therefor, have held that immunity from taxation granted in the act of incorporation is a contract with the State and is irrevocable
49 unless the right to do so is reserved in the act of incorporation or in a general act, which must be treated as part of the act of incorporation.

In considering these cases I shall accept that as a rule to govern in the determination of the questions involved. Indeed it is unnecessary to take any other view of the law in order to reach the conclusion which I have done in these cases.

However, I cannot forbear quoting what Justice Miller said in delivering the opinion of the court in New Jersey *v.* Yard, 95 U.S., 114, to wit: "The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

I agree with Justice Miller that in the matter of taxation that one legislature of a State has no power to bargain away the right of a succeeding legislature to levy taxes in as full a manner as the constitution will permit.

Such a power could be exercised to such an extent as to almost destroy the Government or to grievously burden one class of its citizens.

Instead of having the Dartmouth College case under consideration, had Chief Justice Marshall a case coming from Kentucky wherein it was claimed the legislature had sought to impair the obligation of a contract it had made with one of the old banks by passing a statute providing it should pay an amount of tax in addition to that specified in its charter, I cannot believe, in view of the constitutional provision prohibiting the granting of exclusive privileges from the community, except "in consideration of public services," he would have held the bank had an irrevocable contract with the State.

From the Dartmouth College case to the present time (and the right was in that case recognized) the Supreme Court of the
50 United States has uniformly held that whenever the legislature granting the charter reserved the right to amend or repeal it, either by so providing in the charter or by a general law, the right to amend or repeal such charter exists, and to do so is not to impair the obligation of a contract.

The charter being accepted with the full understanding that the right of repeal is part of the contract, and to the exercise of which right the grantee has consented.

Many of the States, after the Dartmouth College case, began to realize the importance of reserving the right to control corporate organizations which from time to time were being created, and, to make sure such power was being reserved, they passed general laws expressly reserving such powers, which statutes became a part of every act of incorporation as fully as if written therein unless a different purpose was therein plainly expressed.

The legislature of this State, being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as the statute of 1856, which is section 8, chapter 68, General Statutes.

It reads as follows: "All charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February 1856 and all other statutes, shall be subject to amendment or repeal at the will of the legislature unless a contrary intent be therein plainly expressed; Provided that whilst privileges and franchises

so granted may be changed or repealed, no amen-ment or repeal shall impair other rights previously vested."

It seems so plain that charters and grants since the 14th February, 1856, are subject to amendment or repeal at the will of the legislature, unless a contrary intent is plainly expressed therein, that it is needless to discuss it.

The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it.

Acts of the charfacter of the act of 1856 have uniformly been held to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amend-
51 ment or modification was made, and that they were as much a part of the charters as if incorporated into them.

Any other interpretation would render the statute inoperative and wholly deprive it of its power to accomplish the purpose of its enactment. In 1841 South Carolina passed a statute substantially the same as the statute of 1856. The Southeastern Railroad Company was incorporated in 1851. In 1855 an act was passed to amend its charter, the amendment exempting the railroad company from taxation. In 1868 the State adopted a new constitution, in which it was declared that the property of the corporations then existing or thereafter created should be taxed.

The legislature of the State passed an act to enforce that provision of the constitution.

The question *was* involved in Tomlinson *vs.* Jessup, 15 Wallace, 454, was as to the enforcement of such legislation.

Justice Field, in delivering the opinion of the court in the case, said: "It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character; and it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company and induced the plaintiff to purchase the shares held by him; but these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed or as subsequently modified or its entire revocation. The original corporators or subsequent stockholders took their interests with knowledge of the existence of this power and of the probability of its exercise at any time, in the discretion of the legislature. The object of the reservation and of similar reservations in other charters is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at
52 any time require such interference. It is a provision intended to preserve to the State control over its contracts with corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. Immunity from taxation,

constituting in these cases a part of the contract with the Government, is, by the reservation of power, such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made.

The reservation affects the entire relation between the State and the corporation and the places under legislative control — all rights, privileges, and immunities derived by its charter directly from the State."

The same doctrine is enunciated in—

Railroad *v.* Maine, 96 U. S., 499.
Railroad Co. *vs.* Georgia, 98 U. S., 359.
Hoge *vs.* Railroad Company, 99 U. S., 348.
Greenwood *vs.* Freight Company, 105 U. S., 13–21.
Spring Valley Water Works Co. *vs.* Schottler, 110 U. S., 347–352.
Clore *vs.* Greenwood Cemetery Company, 107 U. S., 466–476.
Louisville Gas Company *vs.* Citizens' Gas Company, 115 U. S., 683–696.
Gibbs *vs.* Consolidated Gas Company, 130 U. S., 369–408.
Sioux City Street Railway *vs.* Sioux City, 138 U. S., 98–108.

It must be conceded from the authorities cited the Supreme Court of the United States has repeatedly held that the legislatures of the States have the power when reserved in the charter or by general law to change or repeal acts granting corporate privileges or franchises.

The decisions of this court are in accord with these opinions.

The case of Griffen *vs.* Kentucky Insurance Company, 3 Bush, 592, has been quoted with approval in the case of Louisville Water Company *vs.* Clark, 143 U. S., 14, and in that case the court held that in all cases of charters or grants of corporate franchises where the intention of the legislature was not "plainly expressed" not to exercise the power reserved by the statute of 1856 to amend
53 or repeal at the will of the legislature such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them.

Judge Robertson, in delivering the opinion in Griffin *vs.* Kentucky Insurance Co., 3 Bush, 595, said: "There was the general reservation of power, like a special reservation in the charter itself, a part of the contract, or was the contract made subject to it and the obligation defined or modified by it? We think so; and whatever might be thought of the policy of such legislation or of the policy or justice of the repealing statute over which the judiciary has no jurisdiction, our conclusion as to the mere power of repeal is, as we think, sustained by reason and abundant authority. All contracts, except such as are municipal, are made subject to law, and their obligation is defined by the *lex loci contractus.*

Why should the contract in this case be excepted? Such exception would be unreasonable, and the authorities fortify the reason."

In the case of Cumberland and Ohio Railroad Company *vs.* Bar-

ren County Court, 10 Bush, 604, in reference to the act of 1856 the court said: "The act was intended to preserve to the State controover all acts of incorporation thereafter passed. Experience had demonstrated the propriety of, if not the absolute necessity for, such a reservation of power, and it would be a manifest disregard of the clearly expressed will of the legislature for the courts to resort to technical rules of construction or finely drawn legal implications to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal 'unless a contrary intent be plainly expressed.'"

I conclude that the legislature in 1886, when it passed the revenue bill, had the right to amend or repeal at will all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, "unless a contrary intent was plainly expressed."

In view of decisions of the courts, I also conclude that as to the charters of banks granted prior to the 14th of February, 1856,
54 unless the acts extending them reserved the right to amend or repeal their charters, any act of the legislature increasing their tax would be invalid as to such banks unless in the acts extending them the right to amend or repeal was reserved.

The national banks were subject to have the same tax imposed on their shares of stock as are imposed on State banks doing business under charter granted since the 14th of February, 1856. Their real estate is subject to taxation. Their shares of stock may be taxed at their actual value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the State.

In the case of The Covington City National Bank *vs.* City of Covington, &c., 21 Federal Reporter, 491, Justice Matthews, discussing this subject, said: "When, therefore, a statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits. The interest which Congress has left subject to taxation by the States under the limitations prescribed, and which is a distinct independent interest in property held by the shareholder, like any other property that may belong to him, is that interest as defined in Van Allen *vs.* The Assessors, 3 Wall., 573, which 'entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter in proportion to the number of its shares, and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts,' and (page 587) it includes for taxation the whole interest of the shareholder, such as would pass to the purchaser of the share on a transfer of his certificate. So, when a State law taxes shares of national bank stock, it taxes the same interest of the shareholder that he would transfer on a sale. The State may tax them at their actual or at their market value or at any other rate of appraisement which does not violate the act of Congress."

55 To the same effect are the cases of People *vs.* Commissioners of Taxes, 94 U. S., 415.

Mercantile Bank *vs.* New York, 121 U. S., 138.

In the latter case the court said (p. 155): "The main purpose, therefore, of Congress in fixing limits to State taxation on investments in the shares of national banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions and individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for county, school, municipal, and local purposes.

The Supreme Court in Hepburne *vs.* The School Directors, 23 Wallace, 480, held the statute valid.

It has been decided that it is competent for the States to tax the share- of national bank stock, notwithstanding the capital of the bank was invested in bonds of the United States, which were not subject to taxation.

It is no discrimination against them because they are required to pay a greater tax on their shares of stock than is paid by banks enjoying special privileges under their charters. Lionberger *vs.* Rouse, 9 Wallace, 468.

The court should endeavor to ascertain the legislative intent in the act of 1886 with reference to the taxation of banks, as all depends in this controversy upon what was that intent.

To aid in reaching a conclusion as to what the intent was, it is well to recall some official facts within the knowledge of the members of the legislature.

The first of July, 1885, was the date of the last report of the capital stocks of the banks in the State before the enactment of the revenue law of 1886. From that it is learned that the capital stock of the 59 national banks amounted to $9,708,900.00.

56 The capital stock of the 65 State banks doing business under charters granted subsequent to 1856 amounted to $6,224,891.00.

The capital stock of the four State banks—Farmers' Bank of Kentucky, Bank of Kentucky, Northern bank, and the Bank of Louisville—incorporated prior to 1856 was $5,144,500.00.

It will be seen from this statement that the capital stock of the national banks and of the State banks chartered since 1856 amounted in round numbers to $16,000,000.00, while the capital stock of banks whose charters antedate 1856 amounted to about $5,000,000.00, being less than one-third of the other banks named.

It must be presumed that the legislature knew that the banks claiming irrevocable contracts to pay only 50 cents on each share of their capital stock equal to one hundred dollars paid less than one-third of the revenue coming from the banks under the then existing law.

It can hardly be said that the Farmers' Bank of Kentucky was

in a condition to claim an irrevocable contract, because the act extending its charter, which became a law on March 10th, 1876, expressly reserved the right to amend or repeal its charter and amendments thereto.

It reads as follows: "That the charter of the Farmers' Bank of Kentucky as amended be extended for a period of twenty-five years from the termination of its charter as therein fixed: Provided, that said charter and amendments shall be subject to amendment or repeal by the General Assembly either by general or special act, and provided further that whilst the privileges and franchises so granted may be changed or repealed, no amen-ment or repeal shall impair other rights previously vested."

To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract.

This left but three banks in the State which could claim
57 an irrevocable contract and one hundred and twenty-five without any claim whatever to immunity against increased taxation.

The revenue act repealed several acts by particularly naming them and excluding certain other acts from the repealing clause and declared all other acts, general and special, and parts of acts inconsistent or not in conformity therewith were thereby repealed. The revenue law is now chapter 92 of General Statutes The only part of the act relating to the taxation of banks and other institutions of loans or discount is article 2, chapter 92, General Statutes. Sec. 1 of the article relates to the amount of tax which the banks shall pay and designating the method of levying the tax. Sec. 2 imposes certain duties on the cashier of the bank with reference to making a report to the auditor of public accounts. Section 3 exempts banks having a certain money invested in bonds or funds of the United States from taxation named in the section. Section 4, 5, and 6 of article 2 are as follows:

"SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax: and agree to pay the same as herein provided, and waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or a smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatever so long as said tax shall be paid during the corporate existence of such bank.

SECTION 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; Provided, they pay the tax provided in section 1 from the passage of this act.

58 SECTION 6. This act shall be subject to the provisions of section eight (8) chapter sixty-eight (68) of the General Statutes."

Section 7 provides that if the banks fail or refuse to make the consent and agreement as provided in section 4, then they are to be assessed, and the same tax, State, county, and municipal, shall be imposed, levied, and collected, &c., as imposed on the assessed taxable property in the hands of individuals.

Without section four the remaining sections of the article would have been a complete system for levying and collecting taxes on the banks chartered after 1856. The article treats of nothing except the taxation of banks.

It seems there can be no further question of the power of the legislature at that time to impose a tax on *the* such banks for State, county, and municipal purposes.

It was wholly useless for the legislature to ask the consent of the banks chartered since 1856 to make any consent to the imposition of tax on them for that purpose.

The national banks were subject to the payment of taxes for State, county, and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose. It was needless to ask this class of banks to enter into the agreement.

The legislature may have entertained some doubt not as to the right to tax banks for State, county, and municipal purposes, but as to the method prescribed, and desired to remove all doubt by obtaining the consent of such banks to that method. It was greatly to the interest of the national banks and the State banks chartered subsequent to 1856 to enter into the agreement, because they were thus released from the payment of county and municipal taxes. In agreeing to pay the amount provided in the article for State purposes they were released from local burdens, which in some instances were two or three times as great as that which they agreed to pay the State. It was greatly to their interest to accept the proposition of the State. As a matter of fact, these banks were relinquishing no rights. They were apparently yielding a right
59 which the State in its sovereignty already possessed. The right had never been relinquished, but had been expressly reserved. So vigilent had been the State to not only retain the control of corporations and retain its power to tax them, its purpose to do so was declared in the form of a legislative enactment which was understood to be written in every act of incorporation. It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned, as shown by the revenue act, as their charters were declared repealed so far as they were inconsistent therewith. It was the evident purpose of the legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired that all banks should be placed upon the same footing in the matter of taxation with the other banks of the State.

The legislature had been renewing their charters, and if they were again renewed an appeal must be made to the same power.

These banks may have realized that the act of 1856 should have, by a proper interpretation, been made applicable to the acts renewing their charters. However, it is needless to speculate further as to the reason which induced them to enter into the contract with the State by which they released an irrevocable contract which they had under their charter against increased taxation. These banks had the right to give their consent to the increased taxation. The courts had always recognized the right of a corporation to consent to legislation or accept its provisions and be bound thereby, though it may have the effect of depriving such corporation of a vested right. This brings me to the question as to what were the terms and conditions of the contract into which all these banks entered. The banks must be presumed to know the law and the effect of the contract to which they agreed. Those who represent banks are among the brightest and most sagacious business men of the country. The contract is brief, simple, and without ambiguity.

60 In short, the State agreed to accept and the banks agreed to pay seventy-five cents annually on each share of their stock equal to one hundred dollars, and in consideration thereof be exempt from all other taxation whatsoever so long as this tax shall be paid during the corporate existence of such bank. If these were all the terms of the contract, then it might be contended with some reason that it was irrevocable during their corporate existence. Being mindful of the policy which had been pursued for thirty years, it said in effect to the banks, It is desired that the contract be signed in the formal way prescribed, but it must be understood that the right to alter, change, or abandon the contract is reserved to the State. That its purpose might be fully understood, the legislature placed in the article section 6, which in terms makes the statute of 1856 a part of the contract.

It is expressly provided that the article shall be subject to the provisions of section 8, chapter 68, General Statutes. The legislature was determined that the provisions of the act of 1856 should not depend on riles of construction to be read into the contract by implication, but in terms said that it should be part thereof. It is admitted that when the word "act" appears in article 2 it has reference to the article (2). Article 2 was an independent measure offered as a substitute to article 2 of the original bill.

The substitute was adopted and became a part of the revenue bill. It now appears as part of the bill in the exact language as offered. This section 6 has no reference to any part of the revenue bill except the article of which it is a part. It has been suggested that it had reference to new banks that might be organized. This could not be so, because article 2 is dealing with banks in existence and asks them to give their consent, &c., thereto, and says, if at all, they must do so before meeting of the next General Assembly. When it was admitted that the word "act" as used is synonymous with "article," then it must be admitted that the provisions of section 6 of article 2 are applicable alone to the article (2) of which it is a part.

If there could be any doubt from the language used as to the

meaning of the legislature, then that must be removed by
61 an examination of the house and senate journals.

An amendment (page 1241, House Journal 1886) was offered to article 2 of the original revenue bill, and section 7 of that amendment reads as follows: "This act shall not be subject to the provisions of section 8, chapter 68, of the General Statutes." The amendment (page 1243, House Journal 1886) was defeated. While the revenue bill was pending in the senate it was proposed to amend section 6 of article 2 by inserting after the word "shal-" in the first line the words "not for ten years" (page 1315, Senate Journal 1886). This amendment was defeated. Had it been adopted, then the section would have read: "This act shall not for ten years be subject to the provision of section eight (8), chapter sixty-eight (68), of the General Statutes." The proceedings of the house and senate show the legislature fully understood the purpose for which this section was made part of article 2. It was the purpose of the legislature not to be restricted for any period of time in its right to repeal the article and withdraw from the contract.

In view of the plain provision of the statute, about the meaning of which there should be no doubt, and the intent of the legislature being fully explained by its record, it seems to me there should be no hesitation in concluding the act of 1856 should be read as part of the original contract; hence they are not irrevocable contracts. The fact that a written consent was asked and secured does not alter the application of the act of 1856. To this effect is New Jersey *vs.* Yard, 95 U. S., 104. The facts of that case were as follows: The Morris & Essex Railroad Company was created a corporation by an act of the legislature of New Jersey passed January 29th, 1835. The act provided that as soon as the net proceeds of the railroad amounted to seven per cent. on its cost it should pay a State tax of one-half of one per cent. on the cost of the road and no other tax should be levied upon it.

The twentieth section reserved to the legislature the right to amend or repeal the act whenever it should think proper. A supplemental act was passed on March the 2nd, 1836, in which the right to repe-l or amend was reserved. On the 14th of Feb-
62 ruary, 1846, the legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856.

Another supplemental act to the charter of the railroad was approved March 23rd, 1856, authorizing a branch road to be built, and by which the company was vested with all the powers and franchises given by original and supplemental acts, &c. The third section of the last-named act read as follows:

"Be it enacted That the tax of one-half of one per cent. provided by this said original act of incorporation to be paid by the said company to the State whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburg and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation of imposition whatever, by or under the authority

of this State or any law thereof; Provided that this section shall not go into effect or be binding upon the said company until the said company by an instrument duly executed under its corporate seal and filed in the office of the secretary of state shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of the act or this act is void." The instrument required by the section was duly executed by the company. In the act of 1865 there was no reservation of the right to repeal or amend it. Acts of the legislature imposed a more burdensome tax on the railroad company than that provided for in section three, *supra*. The sole question in New Jersey against Yard was whether the act of 1865 and its acceptance by the railroad company constituted a contract which could not be impaired by any subsequent legislature of the State. The court held that it was an irrevocable contract because the legislature had not reserved the right to amend or change it. It is plain, from the opinion, that had the legislature reserved the right to alter or change the contract or act by which it was made the court would have held the act of the legislature doing so did not impair the obligation of the contract. Justice Miller, in delivering the opinion, said: "But, as we have already said, since the legislature which passed
63 the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the o-her, the main question here is, Did they intend to make such a contract?" * * * "In the case now under consideration it is conceded on all hands that the act of 1865 was a contract for a tax on one-half of one per cent. per annum on the cost of the Morris & Essex railroad and no more, but counsel for defendant says the contract was repealable; that the legislature, of its own volition, could impose other and more burdensome taxes at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it and no longer. It is conceded also that the construction of it cannot be sustained, unless we are bound to import into it either the reservation clause of the act of 1836 or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it cannot be done, because it is inconsistent with the legislative intent in passing the act of 1865." * * * "The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair construction and which we do not feel at liberty to import into the contract to defeat its manifest purpose." From the language of this opinion and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, &c. In order to hold that the right to alter, &c., the contract made under article 2 does not exist, it is absolutely necessary to eliminate section 6 from the article. No such rule for the interpretation of statutes can be found, as the meaning of the section is manifest and clear; besides, by the very terms of the act of 1856, a rule of interpretation is given that "all charters and grants" of or to corporations or amendments

thereof and all "other statutes" shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein "plainly expressed." It is proposed now by those representing the banks to disregard this statutory rule of construc-
64 tion. It is now in effect insisted that in order to reserve the right claimed it must be "plainly expressed" in the act that it is reserved; this being done, it is still disregarded. The legislature, doubtless anticipating such contention and versatility, "plainly expressed" in the article that whatever was done thereunder or in pursuance thereof could only continue during its will. If section 6 was not for this purpose, I would like to have had the court to suggest some reason as to why it was placed in the article. The doctrine is that when it is asserted that a State has bargained away her right of taxation in a given case, the contract must be clear and cannot be made out by dubious implication. New Jersey *vs.* Yard, *supra.*

The taxing power of the State is never presumed to be relinquished unless the intention to relinquish is expressed in clear and ambiguous terms. Bradley against McAtee, 7 Bush, 667. It is a familiar rule of construction of statutes that effect must be given to every provision except in cases of absolute and irreconcilable incongruity. Dazey against Kellan, 2 Duval, 407.

If one statute refers to another for the power given by the former the statute referred to is to be considered incorporated in the one making the reference. Nunes *vs.* Wellisch, 12 Bush, 365. Mr. Cooley, in his work on Taxation (page 204), says: "As taxation is the rule and exemption the exception, the intention to make an exception ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain."

For the interpretation of statutes this court in Nicholas *vs.* Wells, Sneed, 259, said: "That the most natural and genuine way of construing a statute is to construe one part by another part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another, and if it can be prevented no clause of sentence or word shall be superfluous, void, or insignificant."

As there is a clear expression of the legislative intent in the statute, no rules are really necessary to aid in its interpretation.
65 If A should rent B his farm for a term of 99 years, consideration of a certain annual rental, but it was written in the contract that it was "subject" to be annul-ed at the will of A, in the interpretation of this contract, would not a court hold that the entire instrument was to be considered in determining the effect? Would not A's right to annul the contract be just as enforcible as B's right was to enter upon the farm under the contract? Whilst it might be said it was an unwise contract upon the part of B, yet, being capable of contracting, he would be bound thereby, and a court would certainly not hold, because it appeared to be an unwise contract for B to have entered into, that therefore A did not reserve the right to annul the contract. This is the character of interpretation

that must be employed to sustain the contention of counsel for the old banks. It can hardly be said it was an unwise contract on the part of one hundred and twenty-five of the one hundred and twenty-eight banks in the State, as by the very terms of the act under which the contract was entered into they were required to pay State, county, and municipal taxes, with the power in the legislature to increase it at will.

It certainly was a very advantageous contract for them to enter into when these banks paid more than two-thirds of the taxes paid by all the banks, with the power in the legislature to increase the amount if they should so desire. What reason can be suggested as to why the legislature would desire to reverse the policy which had been ste-dfastly adhered to for so long and enter into an irrevocable contract with such banks? Why should it want to surrender a power which it had been so jealous to preserve?

The contract was made subject to the right of the legislature to withdraw from it whenever it regarded the public interest demanded it should do so.

Whenever the banks accepted the provisions of the act of 1886 they surrendere- any rights to immunity from increased taxation which their charters gave them.

The acceptance of the act of 1886 was a consent to the re-
66 peal of so much of their charters as were inconsistent therewith; hence they stood in such a relation to the State as to future taxation as the legislature saw proper to impose. If the provisions of their charters relating to taxation were repealed, as it must be admitted they were by the act of 1886, then such provisions were no longer in force. It is unreasonable to say that the provisions of the charter fixing the rate of taxation on the banks at fifty cents on each share of the capital stock of the banks equal to one hundred dollars can be in force if the act of 1886 fixing such tax at seventy-five cents instead of fifty on shares is in force. The court admits the latter is in force. In doing this it must be admitted the charter privileges has been repealed.

If repealed, then, by the act of 1886, surely the only way in which the provisions of their charters could be restored would be by the legislature so providing in same act. There is no pretense this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of their charters. Section 464, Kentucky Statutes, provides: "When a law which may have repealed another shall be repealed the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

It is a most groundless contention to say that if the present law is sustained that the old banks will be restored to the former privileges under their charters.

It has been suggested that the provisions of their charters with reference to taxation were vested rights, and although they consented to the legislation of 1886 and became subject to the provisions of the act of 1856, still, as the charter privilege as to taxation was a vested right, therefore it was saved to them by the provision

which preserves "other rights previously vested." The purpose of the act of 1856 was to reserve in the legislature the power to destroy the privileges and franchises granted in the charters.

If it does not have this effect it would be entirely inoperative, and the effort to retain control of corporations would be abortive.

67 The claim that the privileges granted by article 2 can be repealed, but without the right to terminate the contract with the banks, is not founded in reason.

The only privilege which the banks enjoyed was to pay the seventy-five cents on each share of stock in lieu of all other taxes.

To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted by the court, and still leave the banks in its enjoyment (as is the effect of the opinion of the court) is to employ logic that has never been in common use by this or any other court.

This logic gives the banks the substance and the State the shadow.

The preserved rights, then, are not privileges and franchises granted by the repeal charter, but "other rights" which had vested previous to the act amending or repealing the charter?

Other rights are such as the beneficiaries under the charter may have acquired in property, choses in action, real and personal property, or interests of every character which they could acquire in operating under the charter, and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment, or otherwise in the property belonging to the corporation.

My contention has been recognized as correct in all the decisions of this court in passing upon the act of 1856. The Supreme Court of the United States has so construed the act. It was said in Griffin *vs.* Kentucky Insurance Co., 3 Bush, 594, "The provision was intended to secure the right of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise."

To the same effect is Cumberland & Ohio Railroad Co. *vs.* Barren County Court, 10 Bush, 609. Section 174 of the constitution recognized a just principle when it declared that all property, whether owned by persons or corporations, should be taxed in proportion to its value unless exempted thereby, and that all corporate

68 property should pay the same rate of taxation paid by individual property.

The legislature, in obedience to that provision of the constitution, enacted the law for levying and collecting tax from the banks of the State, the validity of which is in question in these cases.

For the reason already given I conclude that the obligations of no contracts were impaired by the action of the constitutional convention or the succeeding legislature. Some of the best lawyers in the State were members of the convention which framed our constitution, who gave an earnest consideration to the questions involved in these cases, and the conclusions which they reached were

crystal-ized into section 174 of the constitution. I believe that their conclusions are correct.

The opinion of the court denies the power is in the legislature to say what taxes the banks of the State shall pay for State purposes during the existence of their several charters. It denies the right of the legislature to compel them to bear any of the burdens of county and municipal government.

I cannot believe the legislature did or intended by article 2 of the act of 1886 to reverse its policy so earnestly pursued for a generation and surrender to sixty-odd banks of the State its right previously reserved to control them in the matter of taxation, and to give up its power to increase or diminish the taxes imposed on 125 banks, including the national banks.

Exigencies may arise requiring the levying and collecting of vast sums to meet the public demand, yet, however great the emergency may be or imperative the demand for money to meet such wants, the legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporate existence.

The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the State are compelled to incur large expense to support the county governments to pay for bridges and public highways and support their unfortunate citizens. The municipalities must incur great expense in
69 making all necessary improvements for the comfort, safety, and health of their citizens, to supply water and lights, to give police protection to their citizens and to the banks, yet the court concludes that the legislature has no power to compel the banks to contribute their fair share of such expenses.

In this view I cannot concur.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 79 pages (being numbered 1 to 78, inclusive, with an interpolated number, viz., "page 1 continued") contain a true, full, and complete transcript of the record and proceedings had in said court in the case of Third National Bank, appellant, against The City of Louisville, H. R. Thompson, judge of the police court of the city of Louisville, appellees, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of my office. Done at Frankfort, Kentucky, this 10 day of April, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

70 Exhibit "B" with the bill of complaint is as follows:

STATE OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court, Common Pleas Division.

THIRD NATIONAL BANK, Plaintiff,
vs.
R. H. THOMPSON, Judge of the Police Court of the City of Louisville, Defendant. } # 4685. Order.

At a court held on the 13th day of April, 1897—

This day came the plaintiff, The Third National Bank, and filed the opinion and mandate of the court of appeals herein, the mandatory part of which is as follows: "It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion;" and thereupon, in pursuance of said opinion and mandate, the judgment heretofore entered herein is set aside and held for naught.

It is now adjudged by the court that the plaintiff's petition sets forth a good cause of action and the defendant's demurrer to the said petition is overruled, and the defendant declined to plead further herein; and thereupon the plaintiff moved for judgment, and it is considered that the prayer of the plaintiff's petition be granted, and that the defendant, R. H. Thompson, judge of the police court of the city of Louisville, be, and he is hereby, prohibited from proceeding further with the warrant against the plaintiff, Third National Bank, mentioned in the petition in the police court of the city of Louisville or making any further order therein; and it is further considered and adjudged that the plaintiff recover of the defendant its costs therein expended and may have execution therefor, and the parties are hence dismissed.

71 STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing is a full, true, and complete copy of the order entered April 13, 1897, in the case wherein Third National Bank is plaintiff and R. H. Thompson, judge of the police court of the city of Louisville, is defendant, # 4685, as the same appears of record and on file in my said office.

Witness my hand and seal as clerk of said court this 16th day of April, 1897.

JOHN S. CAIN,
[SEAL.] *Clerk Jefferson Circuit Court.*

72 Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to Samuel H. Stone, auditor public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by Third National Bank, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17 day of April, A. D. 1897, and in the 121 year of our Independence.

Attest: THOS. SPEED,
[SEAL.] *C. C. C., K. D.*

MEMORANDUM.—The defendant- are to enter their appearance in the suit in the clerk's office on or before the 7 day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

And the marshal returned said subpœna with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by
73 delivering a copy of the within spa. in cha. to Geo. D. Todd, mayor of the said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Executed May 4th, 1897, on Chas. Finley, sec'y of state; May 14th, on Geo. W. Long, treasurer; May 15th, on Samuel H. Stone, auditor of public accounts, by delivering a copy of the within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By R. D. TUCKER, *D. M.*

And on the 27th day of May, 1897, came parties, by counsel, and filed stipulation herein.

Stipulation above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } No. 6573. Stipulation.

It is stipulated and agreed that the defendant City of Louisville

may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Demurrer above referred to is as follows:

74 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} No. 6573. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of The Third National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY,
Jefferson County,
} *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd,
75 who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by George D. Todd, mayor, this 27 day of May, 1897. My commission expires January 23, 1900

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer above referred to is as follows:

76 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendant-. } No. 6573. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Third National Bank, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

77 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that

this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or

others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $—.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
78 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of

any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

79 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed

rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is

true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

80 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes

of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court, proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt, respectively, to enforce, as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been, or to be illegally, made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes;
81 and this defendant denies that the said auditor has threatened to so certify said assessment, or will, unless restrained, certify

said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened or will be made, or that any such certification thereof has been, or is, threatened, or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore, in substance, decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

82 This defendant denies that the existing laws of the State of Kentucky do not provide for taxing the shares of stock of the complainant, as permitted by act of Congress, or that the franchise law of said State taxes the franchise granted by the Congress of the United States, or taxes its intangible property, surplus, undivided profits, and investments without lawful right to do so or contrary to the act of Congress in such cases made and provided, or that the complainant has never consented to said method of taxation, or that such consent was necessary, or that the complainant has always or at any time protested against the same as illegal or contrary to the act of Congress; and this defendant denies that said statute is repugnant to the act of Congress in such cases made and provided, or because of such alleged repugnancy it is void or of no binding force as against the complainant.

This defendant denies that the capital of the four old banks was about equal to the combined capital of all the other State banks, or that the courts of Kentucky for that reason or on any other ground held that the national banks could not be subjected to a heavier burden of taxation than said old banks, or that, in view of the alleged fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, the complainant is entitled to be put upon a footing as to taxation equally favored with said old banks, or cannot be taxed at a higher rate than said old banks without an unjust discrimination against the

complainant and other national banks, or contrary to the act of Congress.

This defendaut denies that the Commonwealth of Kentucky has deliberately or at all undertaken to violate or that it has violated its alleged contract with the banks of said State, or any of them, or that by the voluntary action of the State the said four old banks, or either of them, have been restored to their original alleged contract right to discharge themselves from all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, or that complainant and the other national banks of the city of Louisville, or either of them, is or would be entitled to be put upon the same footing as to taxation with said old banks.

83 This defendant denies that by reason of the alleged formal contract alleged to have been entered into by all the other banks and trust companies establishing the validity of said alleged contracts they or either of them will escape local taxation, except on the houses owned by them respectively in which they respectively do business, or that the complainant, coming in competition with said institutions, will be driven out of business if subjected to local taxation, or that any unjust or other discrimination between the complainant and said other institutions will result.

84 This defendant, therefore, submits that the complainant was not at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant, City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

85 And on the 28th day of May, 1897, the following order was entered:

This day came complainant in the above-entitled cause and filed herein notice of motion to be entered herein this day; and thereupon came the complainants The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all the other causes, by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants Samuel H. Stone, Geo. W. Long, and Chas. Finley, comprising the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchise of the complainants under the act of November 11th, 1892, until the further order of this court herein, and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time the City of Louisville, appearing herein by H. L. Stone, city attorney, and the County of Franklin, appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort, appearing herein by Ira Julian, objected to the said motion, and the same was argued and submitted, and the court, not being advised, takes time.

And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and, by consent and without waiving the effect of said demurrer, filed answers of the said Board

86 of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bill of complaint; and the said cause, having been argued by counsel upon the said general and special demurrers as well as upon the demurrers of the City of Louisville, was submitted, and the court, not being advised, takes time.

Said demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } No. 6573.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Third National Bank, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, demur to said bill, and for cause of demurrer state:

87 1. That the said bill fails to state facte sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that, in my opinion, the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on May 9th, 1898, came this day the complainant in the above-styled case, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant in this case also filed herein notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions; and also came the City

88 of Louisville and objected to the filing of said supplemental bill of complaint and said motion, and filed herein affidavits to be read in each case; and also came the City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties; and, the court being advised, it is now ordered, adjudged, and decreed that the said

defendants in the above-styled case are enjoined and restrained as follows:

The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898 or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against the complainant on account of assessments heretofore made and certified for the years 1893 or 1894, or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

Amended and supplemental bill above referred to is as follows:

United States Circuit Court, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill.

The Third National Bank, complainant herein, and by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this
89 court of the motion for an injunction the defendants Samuel H. Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now threatening to assess and will, as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt, by distraint and otherwise, to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator or attempting to collect any tax from your orator for the year 1898 or

any other year until the final order and determination of this
90 court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

H. W. Reese says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

H. W. REESE.

Subscribed and sworn to before me by H. W. Reese this May 6th, 1898.

HUSTON QUIN,
N. P., J. C., Ky.

Commission expires with next Kentucky legislature.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

And on the 25th day of June, 1898, came the complainant and offered an amended bill herein, to which the defendant objected, and the court, being advised, allowed said amendment to be filed, except the 3d paragraph thereof, which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding so far as it affected State taxes. Then came the defendant The City of Louisville and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Amended bill above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
S. H. STONE ET AL., Defendants.
} Amended Bill.

1. The Third National Bank be leave of court amends its
91 bill herein, and says that it was originally organized under the authority of an act of Congress approved June 3rd, 1864. That within two years next previous to the date of the expiration of its corporate existence under the act aforesaid it did, with the approval of the Comptroller of the Currency and under and by virtue and authority of an act of Congress entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, 1882, extend its period of succession by amending its articles of association for a term of twenty years from and after August 6th, 1894. Said amended articles of your orator were duly authorized by the consent in writing of your orator's shareholders owning not less than two-thirds of the capital stock of the association, and the board of directors of your orator caused such consent to be certified, under

the seal of the association, by its cashier to the Comptroller of Currency, accompanied by an application made by said cashier for the approval of said amended articles of association by the said comptroller, and thereupon the said comptroller gave to your orator a certificate under his hand and seal that your orator had complied with all the provisions required to be complied with and was authorized to have succession for the extended period named in said articles of association. Said certificate is as follows:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *August* 6, 1894.

"Whereas, by satisfactory evidence presented to the under-
92 signed, it has been made to appear that 'the Third National Bank of Louisville,' in the city of Louisville, in the county of Jefferson and State of Kentucky, has complied with all the provisions of the 'Act of Congress to enable national banking associations to extend their corporate existence, and for other purposes, approved July 12, 1882:'

Now, therefore, I, Oliver P. Tucker, deputy and acting Comptroller of the Currency, do hereby certify that 'the Third National Bank of Louisville,' in the city of Louisville, in the county of Jefferson and State of Kentucky, is authorized to have succession for the period specified in its amended articles of association, namely, until close of business on August 6, 1914.

In testimony whereof witness my hand and seal of office the sixth day of August, 1894.

[SEAL.] O. P. TUCKER,
Deputy and Acting Comptroller of the Currency."

"No. 2111."

2. Your orator shows to the court that on the 5th day of June, 1888, it was adjudged by the court of appeals of Kentucky that the Bank of Kentucky had a charter contract right, irrepealable in nature and running through its extension, which does not expire until October 1st, 1909, to discharge itself of all its tax burdens, State and local, by the payment of fifty cents on each share of its capital stock.

The principal office of said Bank of Kentucky is in Louisville, Kentucky. It has a capital and surplus of $2,716,550, whereas the total capital and surplus of all the national banks, seven in
93 number, doing business in the city of Louisville is only $3,811,343.

Your orator shows that the Bank of Kentucky accepted the terms of the Hewitt law, and thereby consented to an increase of its taxation as follows:

1st. An increase of from fifty cents to seventy-five cents on each share of its capital stock.

2nd. An additional tax for State purposes of the current rate on real estate on all its surplus ocer ten per cent. of the par value of its stock.

3rd. An additional tax for municipal purposes on the real estate owned by the bank for conducting its business.

One of the considerations which induced said bank to accept the provisions of the Hewitt law was to secure uniformity of taxation on capital engaged in banking business, and after that bank and all others in Louisville (except one) accepted the provisions of the Hewitt law there was in said city of Louisville equality in taxation upon all the banks of the city, and this equality remained undisturbed for over six years, when the Commonwealth of Kentucky, having the power to preserve uniformity which had as aforesaid lasted over six years, disturbed and destroyed that uniformity by the passage of the act of November 11, 1892, referred to in the original bill. The passage and attempted enforcement of said act resulted in the litigation and adjudication particularly set out in the original bill, the effect of which is that other banks as well as the Bank of Kentucky, together employed the great bulk of monied capital engaged in the business in the city of Louisville, are taxed only in the
94 method provided for in the Hewitt law hereinbefore and in the original bill set out, whereas, if your orator must pay under the law of November 11, 1892, it will have to pay in the aggregate more that three times as much as it would pay if taxed on the same principle as those banks which have contracts with the State under the Hewitt law aforesaid.

3. Your orator respectfully shows that this discrimination against it in favor of other capital similarly employed, brought about by the voluntary action of the Commonwealth of Kentucky, will result in the greatest injustice and oppression to it and may result in driving it out of business entirely, and your orator respectfully submits that it was and is the purpose of the national banking act and its amendments to protect institutions organized thereunder against such discrimination.

Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capital of the State, at Frankfort, and there equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted governing the State board of equalization, and the said board regularly meets each year and has been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board of equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties
95 whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various county judges of this Commonwealth, as

soon as possible, the action of the board in regard to their respective counties, whereupon, said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their rights to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided, as to the equalization of personal property, as follows:

"SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one."

Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value all assessments are equalized on a basis of
96 seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes and to provide for a State board of equalization."

The result of enforcing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the cash value of their property, while your orator, under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess of its real value, and is denied the privilege accorded to the individual citizens of the State of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution, and is discriminated against your orator in favor of the individual citizens of the State, contrary to the provisions of the national banking act and its amendments.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitor for Complainant.

H. W. Reeso says he is the president of complainant, and that he believes the statements contained in the foregoing amended
97 bill are true.

H. W. REESE.

Subscribed and sworn to before me by H. W. Reese this 20th day of June, 1898. HUSTON QUIN,

Notary Public for Jefferson County, Kentucky.

My commission expires with the next session of the Kentucky legislature.

Demurrer to amended bill is as follows:

98 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
versus
S. H. STONE, &c., Defendants. } #6573. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of Third National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court, whether it shall be compelled to make any further or other answer to the said amended bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,

City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,

City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who

states that he is the mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

99 And on the 25-h day of June, 1898, the following order was entered:

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction and on the defendants' demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be, and the same is, overruled, and that the said demurrers of the defendants be, and the same are, sustained, and that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with costs to the defendants, to be taxed.

And now came the complainant and prayed an appeal in open court and tendered its assignments of errors. Whereupon the court allows the appeal and orders the assignments of errors to be filed and fixes the appeal bond herein at $1,000.

Assignment of errors above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6573.

The complainant assigns the following as the errors of the court in the above-styled case of which complaint is made:

1st. The court erred in sustaining a demurrer to the bill of the complainant.

100 2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

3rd. The court erred in refusing to allow paragraph three of the amendment to be filed.

4th. The court erred in holding that the complainant could be subjected to the tax of the city of Louisville under the general law when the great bulk of moneyed capital engaged in the banking business in the city of Louisville is taxed at a rate so much less onerous, amounting to not more than one-third as much as the tax against complainant, if it may be taxed under the general law.

5th. The court erred in holding that the contract of the complainant with the State of Kentucky expired on the — day of July,

1894, and did not extend through its corporate existence, which does not expire until 1914.

HELM & BRUCE.
For Compl't.

The bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

THIRD NATIONAL BANK OF LOUISVILLE, KY.,
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, The Third National Bank of Louisville, Ky., and E. C. Bohne, are held and firmly bound unto Samuel H. Stone, Charles Finley, & G. W. Long, &
101 the City of Louisville in the sum of one thousand dollars, to be paid to the said Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of July, A. D. 1898.

Whereas the above-named Third National Bank of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Third national bank shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THIRD NAT'L BANK OF LOUISVILLE, KY., [L. S.]
By E. C. BOHNE, *Cashier.* [L. S.]
E. C. BOHNE. [L. S.]

Sealed and delivered in presence of—

HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

102 And on the 25th day of June, 1898, came the parties, by counsel herein, and filed their stipulation herein, which is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6573.

By agreement of the parties hereto, no citation need be issued or served.

HELM & BRUCE,
Sol. for Compl't.
H. L. STONE, *City Att'y.*

103 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 102 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 10th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: Case No. 16,989. Kentucky C. C. U. S. Term No., 404. The Third National Bank of Louisville, appellant, *vs.* Samuel H. Stone, auditor of public accounts; Charles Finley, secretary of state, & George W. Long, treasurer of the State of Kentucky, and The City of Louisville. Filed September 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 405.

THE CITIZENS' NATIONAL BANK OF LOUISVILLE, APPELLANT,

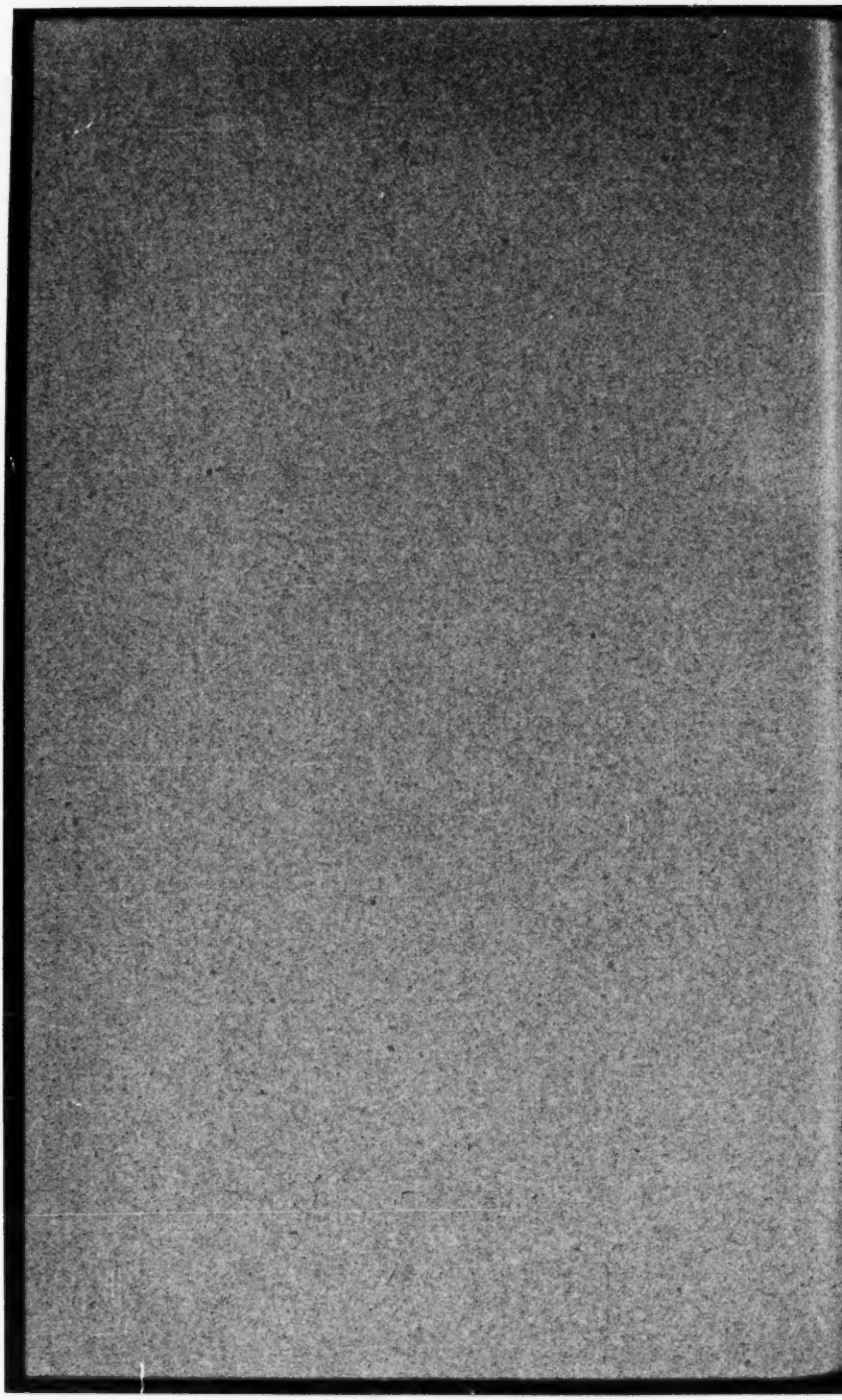
vs.

SAMUEL H. STONE, AUDITOR OF PUBLIC ACCOUNTS, CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE STATE OF KENTUCKY, AND THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 15, 1898.

(16,990.)



(16,990.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 405.

THE CITIZENS' NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

SAMUEL H. STONE, AUDITOR OF PUBLIC ACCOUNTS; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE STATE OF KENTUCKY, AND THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

CITIZENS' NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.

Be it remembered that heretofore, to wit, on the 17th day of April, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendants.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Citizens' National Bank, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and The City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of Congress in reference to national banks, known as the "national banking acts," on the 8th day of August, 1874, and its charter rights lasted under its said organization for 20 years. On April 1, 1894, its charter life was extended and renewed until August 1, 1914, and thereby all the rights and privileges of your orator, including the contract as to taxation, hereinafter referred to, continued in your orator.

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred

to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks
3 and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to

ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned or used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance

or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and
4 from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes

mentioned, during the period above described. Your orator has regularly during the period aforesaid paid to the city its taxes on the property in which it does and has during the period aforesaid done business.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to

the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

6 The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was *was* plainly expressed, brought suit in which it represented itself as the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville

Banking Company had a charter from the State granted subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the

payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies.

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A transcript of the record in the case of Third National Bank *vs.* R. H. Thompson, judge of the police court of the city of Louisville, is filed with the bill of said bank in this court and is now made part of this bill by reference thereto as if filed herewith.

7 Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes imposed on it by law annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state *was* by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and

real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect, and is threatening to collect

from your orator has not been assessed by the said city of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities respectively as auditor, secretary and treasurer of the State.

Your orator says that this board thus constituted, will, unless restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

8

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said illegal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent., and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed and harrassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost, and the taxes claimed by the city of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost.

Your orator respectively shows that the city of Louisville is insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessment, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

Par. 7. Your orator respectfully shows to the court that the existing laws of the State do not provide for taxing the shares of stock of your orator as permitted by the act of Congress, but attempts to tax its franchise granted by the Congress of the United States and

its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress; and your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks, except for the taxation of their tangible property.

Your orator has as aforesaid regularly paid its taxes on all its real estate to the city of Louisville and has also paid to the State of Kentucky in the manner described in the Hewitt bill.

Your orator further shows that in addition to the complication in reference to taxing the old banks in the manner hereinbefore set out, the national banks in the State claimed the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky held that they could not be subjected to a heavier burden of taxation than said old banks. And now your orator respectfully submits to the court that in view of the fact that said four old banks have a capital stock about equal to the combined capital of
9 the other State banks, that your orator is entitled to be put upon a footing as to taxation equally favored with said old banks, and cannot be taxed at a higher rate than said banks without an unjust discrimination against your orator and the other national banks, contrary to the act of Congress; and your orator especially insists that this is true in view of the fact that the Commonwealth of Kentucky had the power to keep all the banks upon the same footing as to taxation as hereinbefore specifically set out, and having such power has deliberately undertaken to violate its contract with said banks, and if as a result of the voluntary action of the State it shall be held that the said four old banks have been restored to their original contract right to discharge themselves of all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, then your orator insists that it and the other national banks of the city of Louisville, being located in the same city with two of the old banks above named, is entitled under the act of Congress to be put upon the same footing as to taxation with said old banks.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H. Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and the city of Louisville to appear and

make full and true answer to this bill (but not under oath, answer under oath being hereby waived) and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long in their respective official capacities to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, auditor aforesaid, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants, including the city of Louisville and each of them be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to *to* which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

W. R. Ray says he is the president of complainant, and that the statements contained in the foregoing bill are true.

W. R. RAY.

Subscribed and sworn to before me by W. R. Ray this 17 day of April, 1897.

ARTHUR PETERS,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 SINKING FUND OFFICE, *Feb.* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leather, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same *same*, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion the president was, on motion of Mr. Tyler, sec-

onded by Mr. Summers, authorized to enter into the following arrangement with the different banks, *true* and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when, and if, it shall be finally adjudged by the 11 court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.
Attest:

J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of

Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part.

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm &
Bruce, that the question of the liability of said banks and
12 trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue laws, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract, which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes
claimed against them under the terms and conditions named
13 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes

claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

14 Upon which bill the following subpœna in chancery issued:

The President of the United States of America to Samuel H. Stone, auditor public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by the Citizens' national bank, which you shall in nowise omit under penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our circuit court affixed, at the clerk's office of the said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:
THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

15 And the marshal returned said subpœna in chancery with the following endorsement thereon:

Executed April 24th, 1897, on the city of Louisville by deliver-

ing a copy of within spa. in ch'y to George D. Todd, mayor of the said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Executed May 4th, 1897, on Chas. Finley, sec'y of state; May 14th, on Geo. W. Long, treasurer; May 15th, on Samuel H. Stone, auditor of public accounts, by delivering a copy of the within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By R. D. TUCKER, *D. M.*

And on the 27th day of May, 1897, came parties by counsel and filed stipulation.

Stipulation above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} No. 6577. Stipulation.

It is stipulated and agreed that the defendant City of Louisville may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

16 & 17 Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} No. 6577. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Citizens' National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain *contain* any matter of

equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

18 STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEORGE D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

My commission expires January 23, 1900.

Answer above referred to is as follows:

19 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky. In Equity.

CITIZENS' NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } No. 6577.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Citizens' National Bank, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering—

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts be-

yond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

20 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2)

of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
21 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and

loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

22 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State

since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

23 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks

and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the

county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt respectively to enforce, as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been, or to be illegally, made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes;
24 and this defendant denies that the said auditor has threatened to so certify said assessment, or will, unless restrained, certify said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened or will be made, or that any such certification thereof has been, or is, threatened, or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore, in substance, decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State,

were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 1., 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the

State board of valuation and assessment, as required by the revenue law of November 11, 1892.

25 This defendant denies that the existing laws of the State of Kentucky do not provide for taxing the shares of stock of the complainant as permitted by act of Congress, or that the franchise law of said State taxes the franchises granted by the Congress of the United States or taxes its intangible property, surplus, undivided profits, and investments without lawful right to do so or contrary to the act of Congress in such cases made and provided, or that the complainant has never consented to said method of taxation, or that such consent was necessary, or that the complainant has always or at any time protested against the same as illegal or contrary to the act of Congress; and this defendant denies that said statute is repugnant to the act of Congress in such cases made and provided or because of such alleged repugnancy it is void or of no binding force as against the complainant.

This defendant denies that the capital of the four old banks was about equal to the combined capital of all the other State banks, or that the courts of Kentucky for that reason or on any other ground held that the national banks could not be subjected to a heavier burden of taxation than said old banks, or that in view of the alleged fact that said four old banks have a capital stock about equal to the combined capital of the other State banks the complainant is entitled to be put upon a footing as to taxation equally favored with said old banks, or cannot be taxed at a higher rate than said old banks without an unjust discrimination against the complainant and other national banks or contrary to the act of Congress.

This defendant denies that the Commonwealth of Kentucky has deliberately or at all undertaken to violate or that it has violated its alleged contract with the banks of said State or any of them, or that by the voluntary action of the State the said four old banks or either of them have been restored to their original alleged contract right to discharge themselves from all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, or that complainant and the other national banks of the city of Louisville or either of them is or would be entitled to be put upon the same footing as to taxation with said old banks.

26 This defendant denies that by reason of the alleged formal contract alleged to have been entered into by all the other banks and trust companies establishing the validity of said alleged contracts they or either of them will escape local taxation, except on the houses owned by them respectively, in which they respectively do business, or that the complainant, coming in competition with said institutions, will be driven out of business if subjected to local taxation, or that any unjust or other discrimination between the complainant and said other institutions will result.

27 This defendant, therefore submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction,

pendente lite be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

28 And on the 28th day of May, 1897, the following order was entered:

This day came complainant in the above-entitled cause and filed herein notice of motion to be entered herein this day; and thereupon came the complainants The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all of the other causes by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants Samuel H. Stone, Geo W. Long, and Chas. Finley, comprising the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchise of the complainants under the act of November 11th, 1892, until the further order of this court herein, and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time the City of Louisville, appearing herein by H. L. Stone, city attorney, and the County of Franklin, appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort, appearing herein by Ira Julian, objected to the

said motion, and the same was argued and submitted, and the court, not being advised, takes time.

And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court,
29 and also a general demurrer, and by consent and without waiving the effect of said demurrer, filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bill of complaint; and the said cause having been argued by counsel upon the said general and special demurrers, as well as upon the demurrers of the City of Louisville, was submitted, and the court, not being advised, takes time.

Said demurrer is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } No. 6577.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Citizens' National Bank, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set
30 forth and alleged, demur to said bill, and for cause of *of* demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants Samuel H. Stone, auditor, Charles Finley, secretary of state, and George W. Long, treas-

urer of the State of Kentucky, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on May 9th, 1898, the following order was entered:

Came this day the complainant in the above-styled case, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant in said case also filed herein notice duly served of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions; and also came the City of Louisville
31 and objected to the filing of said supplemental bill of complaint and said motions, and filed herein affidavits to be read in each case; and also came the City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties; and the court being advised, it is ordered, adjudged, and decreed that the said defendants in the above-styled case are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898, or any of them; and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against any of the complainants on account of assessments heretofore made and certified for the years 1893 or 1894, or from attempting by distraining or otherwise from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

Said amended and supplemental bill above referred to is as follows:

United States Circuit Court, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill.

The Citizens' National Bank, complainant herein, and by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this cou-ty of the motion for an injunction, the defendants Samuel H.
32 Stone, Charles Finley, and G. W. Long, being, respectively, the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now threatening to assess, and will, as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year

1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein, and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt by distraint and otherwise to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator, or attempting to collect any tax from your orator for the year 1898, or any other year, until the final order and determination of this court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

33 William R. Ray says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

W. R. RAY.

Subscribed and sworn to before me by William R. Ray this May 7, 1898.

HUSTON QUIN,
N. P., J. C., Ky.

Commission expires with the next Kentucky legislature.

And on June the 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This day came the complainant and offered an amended bill herein, to which the defendant objected, and the court, being advised, allowed said amendment to be filed, except the 4 paragraph thereof, which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding so far as it affected State taxes. Then came the defendant The City of Louisville and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Said amended bill above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
S. H. STONE ET AL., Defendants.
} Amended Bill.

34 1. The Citizens' national bank, by leave of court, amends its bill herein, and says that it was originally organized under the authority of an act of Congress approved June 3rd, 1864. That within two years next previous to the date of the expiration of its corporate existence under the act aforesaid it did, with the approval of the Comptroller of the Currency and under and by virtue and authority of an act of Congress entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, 1882, extend its period of succession by amending its articles of association for a term of twenty years from and after August 1st, 1894. Said amended articles of your orator were duly authorized by the consent in writing of your orator's shareholders owning not less than two-thirds of the capital stock of the association, and the board of directors of your orator caused such consent to be certified under the seal of the association by its cashier to the Comptroller of the Currency, accompanied by an application made by said cashier for the approval of said amended articles of association by the said comptroller; and thereupon the said comptroller gave to your orator a certificate under his hand and seal that your orator had complied with all the provisions required to be complied with and was authorized to have succession for the extended period named in said articles of association.

Said certificate is as follows:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *August 1st*, 1894.

Whereas, by satisfactory evidence presented to the under-
35 signed, it has been made to appear that "the Citizens' National Bank of Louisville," in the city of Louisville, in the county of Jefferson and State of Kentucky, has complied with all the provisions of the "act of Congress to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12th, 1882:

Now, therefore, I, James H. Eckels, Comptroller of the Currency, do hereby certify that "the Citizens' National Bank of Louisville," in the city of Louisville, in the county of Jefferson and State of Kentucky, is authorized to have succession for the period specified in its amended articles of association, namely, until close of business on August 1st, 1914.

In testimony whereof witness my hand and seal of office this 1st day of August, 1894.

JAMES ECKELS,
Comptroller of the Currency.

[SEAL.]

No. 2164.

2. Your orator respectfully shows that it has in all respects complied with the provisions of said act of July 12th, 1882.

Your orator shows that it is provided by the fourth section of the aforesaid act of July 12th, 1882, as follows: "That any association so extending the period of its succession shall continue to enjoy all the rights and privileged and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it
36 shall continue to be in all respects the identical association it was before the extension of its period of succession."

And your orator respectfully shows to the court that under the law of the land at the date of the passage of the Hewitt law, mentioned in the original bill, it had the right to continue its corporate existence in the manner provided by the act of Congress of July 12th, 1882, *do* as to preserve the identical corporate existence and entity which made and entered into the contract with the Commonwealth of Kentucky under and by virtue of the aforesaid Hewitt law, and notwithstanding that fact, but in view of it, the contract with the Commonwealth of Kentucky formally made, as heretofore stated in the original bill, provided that your orator and its shares of stock "should be exempt from all other taxation whatever so long as said tax should be paid during the corporate existence of such bank."

And your orator further shows that the question which was submitted to and decided by the court of appeals of Kentucky was not only whether it had a contract with the Commonwealth of Kentucky, which was irrepealable, but the extension and duration of said contract, and it was determined by the court of appeals of Kentucky that said contract, made in the manner aforesaid, extended and continued so long as your orator should pay the tax thereunder throughout the corporate existence of your orator, and your orator respectfully shows that its corporate existence has not terminated since the making of said contract, but the same identical corporate existence is preserved and will continue under the terms of said extension until the first day of August, 1914.

3. Your orator shows to the court that on the 5th day of
37 June, 1888, it was adjudged by the court of appeals of Kentucky that the Bank of Kentucky had a charter right irrepealable in nature and running through its extension, which does not expire until October 1st, 1909, to discharge itself of all its tax burdens, State and local, by the payment of fifty cents on each share of its capital stock.

The principal office of said Bank of Kentucky is in Louisville, Kentucky. It has a capital and surplus of $2,716,550, whereas the total capital and surplus of all the national banks, seven in number, doing business in the city of Louisville is only $3,811,343.

Your orator shows that the Bank of Kentucky accepted the terms of the Hewitt law, and thereby consented to an increase of its taxation as follows:

1st. An increase of from fifty cents to seventy-five cents on each share of its capital stock.

2nd. An additional tax for State purposes of the current rate on real estate on all its surplus over ten per cent. of the par value of its stock.

3rd. An additional tax for municipal purposes on the real estate owned by the bank for conducting its business.

One of the considerations which induced said bank to accept the provisions of the Hewitt law was to secure uniformity of taxation on capital engaged in banking business, and after that bank and all others in Louisville (except one) accepted the provisions of the Hewitt law there was in said city of Louisville equality in taxation upon all the banks of the city, and this equality remained undisturbed for over six years, when the Commonwealth
38 of Kentucky, having the power to preserve uniformity, which had as aforesaid lasted over six years, disturbed and destroyed that uniformity by the passage of the act of November 11, 1892, referred to in the original bill. The passage and attempted enforcement of said act resulted in the litigation and adjudication particularly set out in the original bill, the effect of which is that other banks, as well as the Bank of Kentucky, together employed the great bulk of monied capital engaged in the business of banking in the city of Louisville are taxed only in the method provided for in the Hewitt law, hereinbefore and in the original bill set out; whereas, if your orator must pay under the law of November 11, 1892, it will have to pay in the aggregate more than three times as much as it would pay if taxed on the same principal as those banks which have contracts with the State under the Hewitt law aforesaid.

Your orator respectfully shows that this discrimination against it in favor of other capital similarly employed, brought about by the voluntary action of the Commonwealth of Kentucky, will result in the greatest injustice and oppression to it and may result in driving it out of business entirely, and your orator respectfully submits that it was and is the purpose of the national banking act and its amendments to protect institutions organized thereunder against such discrimination.

4. Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capital of the State, at Frankfort, and there equalizes the assessments of all real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated.

39 Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted governing the State board of equalization, and the said board has been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board of equaliza-

tion shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average list of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their rights to be heard.

The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided, as to the equalization of personal property, as follows:

"SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the
40 case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one half shall be rejected and fractions of one-half and over shall be counted as one."

Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted Mat 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes, and to provide for a State board of equalization."

The result of enforceing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the cash value of their property, while your orator under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess of its real value, and is denied the privilege accorded to the individual citizens of the State, of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution, and is discriminated against your orator in favor
41 of the individual citizens of the State, contrary to the provisions of the national banking act and its amendments.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and right under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitors for Complainant.

H. C. Rodes says he is the president of the complainant, and that the statements contained in the foregoing amended bill are true.

H. C. RODES.

Subscribed and sworn to before me by H. C. Rodes this 21st day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with next session of the Kentucky legislature.

Demurrer above referred to is as follows:

42 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
versus
S. H. STONE, &c., Defendants. } #6577. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of Citizens' National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

43 And on the 25th day of June, 1898, the following decree was entered:

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendant's demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be and the same is overruled, and that the said demurrers of the defendants be and the same are sustained, and that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with costs to the defendants, to be taxed.

And now came the complainant and prayed an appeal in open court and tendered their assignments of errors. Whereupon the court allows the appeal and orders the assignments of errors to be filed and fixes the appeal bond herein at $1,000.

Said assignment of errors is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant, }
vs. } 6577.
SAMUEL H. STONE, &c., Defendants. }

The complainant assigns the following as the errors of the court in the above-styled case of which complaint is made:

1st. The court erred in sustaining a demurrer to the bill of the complainant.

44 2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

3rd. The court erred in refusing to allow paragraph four of the amendment to be filed.

4th. The court erred in holding that the complainant could be subjected to the tax of the city of Louisville under the general law when the great bulk of moneyed capital engaged in the banking business in the city of Louisville is taxed at a rate so much less

onerous, amounting to not more than one-third as much as the tax against complainant, if it may be taxed under the general law.

5th. The court erred in holding that the contract of the complainant with the State of Kentucky expired on the 1st day of July, 1894, and did not extend through its corporate existence, which does not expire until 1914.

HELM & BRUCE,
Sol. for Complainant.

45 The bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

CITIZENS' NATIONAL BANK OF LOUISVILLE
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, Citizens' National Bank, are held and firmly bound unto Samuel H. Stone, Charles Finley, G. W. Long, and The City of Louisville in the sum of one thousand dollars, to be paid to the said Samuel H. Stone, Charles Finley, G. W. Long, and The City of Louisville, — executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 21st day of July, A. D. 1898.

Whereas the above-named Citizens' national bank hath prosecuted an appeal to the United States Supreme Court to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Citizens' national bank shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITIZENS' NATIONAL BANK, [L. S.]
By H. C. RODES, *President.* [L. S.]
H. C. RODES. [L. S.]

Sealed and delivered in presence of—

THOS. SPEED,
Clerk U. S. Cir. Court.

46 And on the 25th day of June, 1898, came the parties, by counsel herein, and filed their stipulation herein, which is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

CITIZENS' NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6577.

By agreement of the parties hereto, no citation need be issued or served.

HELM & BRUCE,
Sol's for Compl't.
H. L. STONE, *City Att'y.*

47 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 46 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 10th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

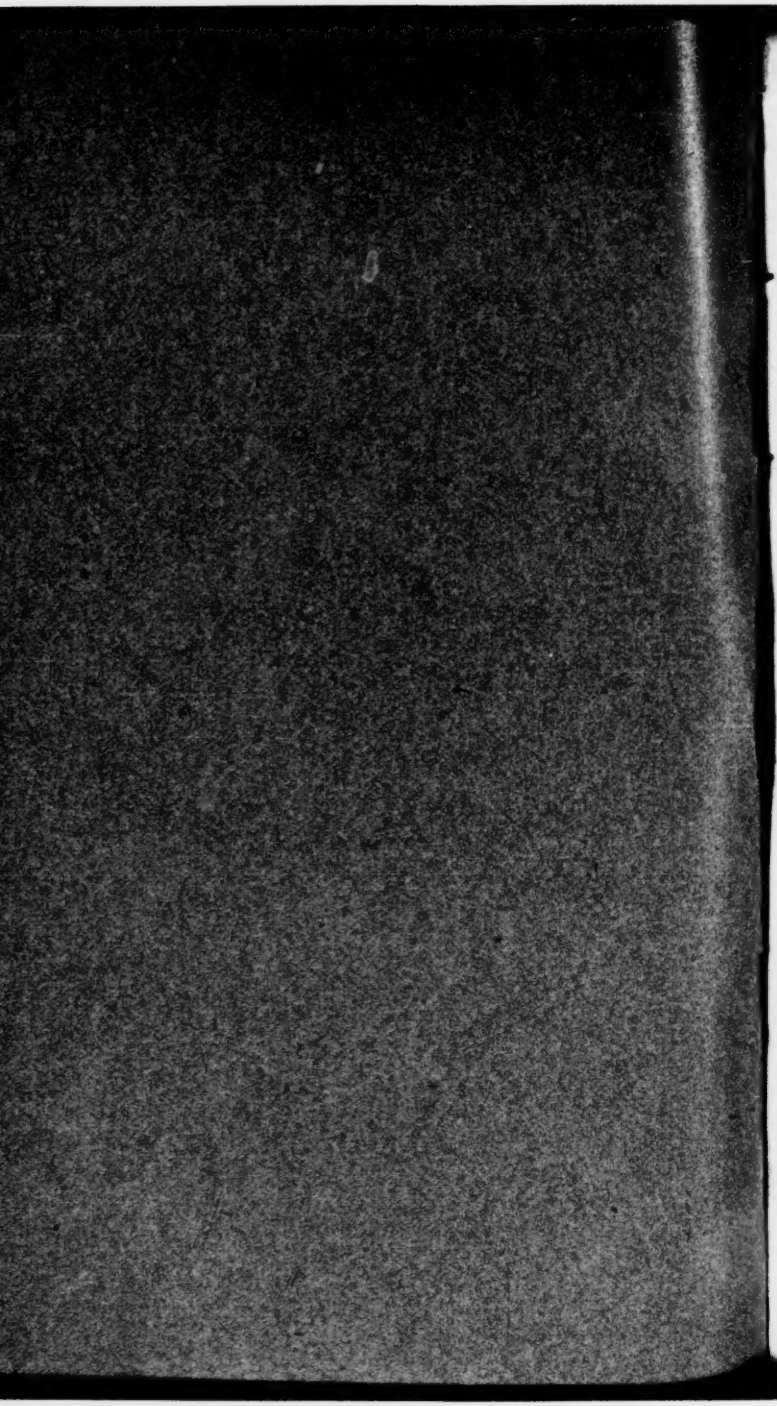
THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: Case No. 16,990. Kentucky C. C. U. S. Term No., 405. The Citizens' National Bank of Louisville, appellant, *vs.* Samuel H. Stone, auditor of public accounts; Charles Finley, secretary of State, & George W. Long, treasurer of the State of Kentucky, & The City of Louisville. Filed September 15th, 1898.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 16, 1898.

(16,991.)



(16,991.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 406.

THE FIDELITY TRUST AND SAFETY VAULT COMPANY
APPELLANT,

vs.

THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21, A. D. 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6582.

Be it remembered that heretofore, to wit, on the 17th day of April, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendant.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Fidelity Trust & Safety Vault Company, a citizen and resident of the State of Kentucky, brings this bill against The City of Louisville, a municipal corporation of the State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled, "An act to incorporate the Fidelity Trust Company, approved on the 22 day of April, 1882, and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract and to be contracted with, to sue and be sued, and generally to do such banking business as is usually granted to such corporations. The amendments to the charter of your orator were adopted April 12th, 1888, — May 5, 1890. An amendment was also adopted March 4, 1884, by which the corporate name was changed from Fidelity Trust Company to the Fidelity Trust & Safety Vault Company.

Your orator says it is and has been since its organization engaged in the banking business in the city of Louisville, Ky.

Your orator respectfully shows that one Samuel H. Stone is now the auditor of public accounts for the Commonwealth of Kentucky, having been duly elected and qualified according to law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the

treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty
3 cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to

amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever,

so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

4 Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that for each of the years, including 1887, down to the present time it has regularly paid its taxes to the city of Louisville on the house in which it does and has done business.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11,

1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the

city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust compa ies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the

records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

6 This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was *was* plainly expressed, brought suit in which it represented itself as the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the

State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

7 2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies,

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A certified copy of the transcript in the case of Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of Louisville, is filed with the bill of said bank in this court against Samuel H. Stone, &c., and by reference is made part hereof.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank

and trust company shall in addition to other taxes imposed on it by law annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state *was* by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per
8 annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined

$50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect and is threatening to collect from your orator has not been assessed by the city of Louisville, but the assessment has been made by the auditor, secretary of state and treasurer of the State under the pretended authority of the act of November 11, 1872, heretofore referred to.

Your orator respectfully shows to the court that the taxes which the defendant The City of Louisville is threatening to collect is upon the assessments for the years 1893 and 1894. The amount of the pretended assessment made by the said State board of valuation and assessment against your orator upon its franchise for the year 1893 is $1,495,865.56, and for the year 1894 is $1,533,094.53. Your orator further shows that for the year 1893 the tax rate of the city of Louisville was $2.17, and for the year 1894 it was $1.88, so that the total amount involved in this controversy is $61,282, which exceeds the amount of taxes which your orator would have to pay under the "Hewitt bill" in the sum of $46,000.

Your orator further shows that the auditor of the State, acting under the authority of said void law, certified the assessment against your orator's franchise for the years aforesaid to the clerk of the county court of Jefferson county; and the said clerk has certified said assessment to the tax collector of the city of Louisville, and your orator further respectfully shows that the said city of Louisville will by its officers, unless restrained by this honorable court, proceed by distraint and otherwise to collect said illegal tax upon said illegal assessment when it has no lawful right to do so, and the claim of the defendant, The City of Louisville, that it has the right to collect said taxes against your orator casts a cloud upon your orator's right to pay taxes under and in accordance with its contract, and your orator will furthermore be subjected to much harassment and litigation and unnecessary costs; and your orator and its stockholders will be greatly and irreparably injured by the false claims of the defendant, The City of Louisville, and its attempts by distraint and by a suit to collect said taxes.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city of Louisville, and that it may be spared the irreparable injury which it

will suffer by attempts to collect said taxes by distraint, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendant, The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived) and that an injunction *pendente lite* be granted commanding the said city of Louisville, its officers and agents, to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

9 John D. Taggart says he is the president of complainant, and that the statements contained in the foregoing bill are true.

JOHN D. TAGGART.

Subscribed and sworn to before me by John D. Taggart this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 Exhibit "A" with the bill of complaint is as follows:

SINKING FUND OFFICE, *Feb.* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leather, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same *same*, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, *true* and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when, and if, it shall be finally adjudged by the
11 court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.
Attest:

J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of

Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and
12 trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue laws, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract, which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named
13 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes

claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

14 Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to the City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by the Fidelity Trust & Safety Vault Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest: THOS. SPEED,
C. C. C., K. D.,
[SEAL.] By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant- is to enter its appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

And the marshal returned said spa. in chancery with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in chancery to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
U. S. Marshal,
By R. E. HAWES, *D. M.*

15 And on the 27th day of May, 1897, came parties, by counsel, and filed stipulation herein.

Said stipulation above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST AND SAFETY VAULT COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6582. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6582. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of The Fidelity Trust and Safety Vault Company, Complainant.

16 This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth — alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

17 Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.
My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer above referred to is as follows:

18 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky. In Equity.

FIDELITY TRUST & SAFETY VAULT CO., Complainant, }
versus } No. 6582.
CITY OF LOUISVILLE, Defendant. }

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Fidelity Trust & Safety Vault Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, denies that the complainant by its charter and the amendments thereto has power to do such banking business as is usually granted to such corporations, or to do a regular or general banking business at all, or that it has since its organization or at any time been engaged in the banking business in the city of Louisville. On the contrary, the complainant's charter expressly provides (section eight), "That nothing herein shall be construed to permit said company to discount paper or to engage in the business of banking."

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said

State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted

may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12) of said act of May 17, 1886.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," ap-

proved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged

agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision

should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said

judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's

bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so, or that the alleged claim of this defendant, that it has the right to collect said taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making, any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and
23 said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to

the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction, *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of

the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant, City of Louisville.

24 STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant, City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on the 28th day of May, 1897, the following order was entered:

This day came the complainant in the above-entitled cause and filed herein notice — duly served on the defendant, and moved the court to grant it an injunction until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in said bill of complaint.

And came the said City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same coming on to be heard was submitted, and the court, not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the said City of Louisville, and the same were argued by counsel and submitted to the court, and the court, not being advised, takes time.

And on the 4th day of June, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

And on the 25th day of June the following order was entered:

This day came the complainant and offered an amended bill herein, to which the defendant objected, and the court, being advised, allowed said amendment to be filed, except the 3d paragraph thereof,

which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding so far as it affected State taxes.

26 Then came the defendant The City of Louisville and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Said amended bill above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST AND SAFETY VAULT COMPANY, Complainant, *versus* CITY OF LOUISVILLE ET AL., Defendants. } Amended Bill.

The complainant, Fidelity Trust and Safety Vault Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks and other institutions of loans or discount and to all corporations required by law to be taxed on their capital stock. And your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed and has always been taxed on its capital stock.

Your orator further shows that the proposition of the Commonwealth of Kentucky conveyed in the fourth section of the Hewitt law was not to banks alone, but to banks and other institutions before mentioned. And your orator, in the regular and formal manner provided in said fourth section of the Hewitt law and as fully set out in the original bill, entered into the contract with the Commonwealth of Kentucky, and your orator submits that the

27 Commonwealth did not as a mere matter of grace extend an immunity or exemption from taxation to your orator, but entered into a contract based upon a valuable consideration; and your orator further respectfully shows to the court that it is not necessary to support such a contract that your orator should be engaged in the performance of a public service, but your orator further submits to the court that it is engaged in the performance of a public service as much so as banks and sufficient to support an exemption from taxation.

Your orator says that at the time it entered into the contract with the city of Louisville to abide the result of the decision in the case of The Louisville Banking Company *vs.* R. H. Thompson and The City of Louisville, it and the city and the counsel for said city, all in good faith, believed that the decision of that case would settle every question which could be raised either by it or the city of Louisville, and your orator shows that at that time the case of the Louisville Trust Company *vs.* City of Louisville had not been decided.

Your orator further shows that the question of whether it was entitled to the rights accorded under the Hewitt law was not involved or discussed by counsel for either side, but was conceded by the

city of Louisville in the aforesaid case of Louisville Trust Company *vs.* City of Louisville.

2. Your orator further shows that by an amendment to its charter adopted by the General Assembly of the Commonwealth of Kentucky and approved April 12, 1888, it was provided as follows:

"SECTION 1. That the charter of the Fidelity Trust and Safety Vault Company, of Louisville, Kentucky, be and the same is
28 so amended that promissory notes payable to any person or persons, or to a corporation, and payable and negotiable at the office of said company, in Louisville, Kentucky, which shall be endorsed to and discounted by any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, shall be and they are hereby placed on the same footing as foreign bills of exchange."

And by an amendment adopted the 15th day of May, 1890, it was provided as follows:

"SECTION 2. That said company may receive money on deposit subject to check or payable at an agreed time.

"SECTION 3. That all promissory notes, secured by lien on real estate or collateral, made negotiable and payable at a chartered bank or at the office of said company, shall, when endorsed to, and purchased by said company, be placed on the footing of foreign bills of exchange."

Your orator further shows that since the adoption of said amendment it has regularly done a savings-bank business, and has received deposits and paid interest on the same, in every respect doing the same character of business as done by the Louisville Trust Company under its power to do a savings-bank business; and your orator submits that for the purposes of taxation, and so far as the performance of a public service is concerned, it should be deemed and treated as a bank.

3. Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capital of the State, at Frankfort, and there
29 equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted governing the State board of equalization, and the said board has been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board of equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various judges of this Commonwealth, as soon as possible, the action of the

board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided, as to the equalization of personal property, as follows:

"SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the
30 personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one."

Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes, and to provide for a State board of equalization."

The result of enforcing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the cash value of their property, while your orator under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess of its real value, and is denied the privilege accorded to the individual citizens of the State, of having the assess-
31 ment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitors for Complainant.

John Stites says he is the president of the complainant, and that the statements contained in the foregoing amended bill are true.

JOHN STITES.

Subscribed and sworn to before me by John Stites this 20th day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with the next session of the Kentucky legislature.

Demurrer filed June 25th, 1898, is as follows:

32 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant, *versus* CITY OF LOUISVILLE, Defendants. } #6582. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of Fidelity Trust & Safety Vault Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant, City

of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23d day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

33 And on the 25th day of June, 1898, the following decree was entered:

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendant's demur-er to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be and the same is overruled, and that the said demurrer of the defendants be and the same is sustained, and that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with costs to the defendant, to be taxed.

And now came the complainant and prayed an appeal in open court and tendered its assignment of errors. Whereupon the court allows the appeal and orders the assignments of errors to be filed and fixes the appeal bond herein at $1,000.

Assignment of errors above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant,
vs.
CITY OF LOUISVILLE. } 6582.

Comes the complainant and assigns the following as the errors of the court committed of which complaint is made:

1. The court erred in sustaining the demurrer to the bill of complaint.

2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

34 3rd. The court erred in refusing to allow the 3rd paragraph of the amendment to be filed.

4th. The court erred in holding that the complainant was not entitled to the benefit of the contract made between the city of Louisville and the sinking fund commissioners on the one hand and the banks and trust companies upon the other, the complainant having formally accepted the provisions of the Hewitt bill within the time allowed and having paid its taxes thereunder ever since, including the year 1887.

5th. The court erred in holding that the city attorney exceeded his authority in treating the complainant as one of the corporations

whose rights and claimed rights could be tested by the suit of The Louisville Banking Company *vs.* R. H. Thompson, police judge, &c.

6th. The court erred in holding that the complainant is not a bank and does not perform any public service.

HELM & BRUCE.
Sol. for Comptainant.

Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, The Fidelity Trust & Safety Vault Company, are held and firmly bound unto The City of Louisville in the sum of one thousand dollars, to be paid to the said City of Louisville, — executors or administrators; to which
35 payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of July, A. D. 1898.

Whereas the above-named Fidelity Trust and Safety Vault Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Fidelity Trust and Safety Vault Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FIDELITY TRUST & SAFETY VAULT CO., [L. S.]
By JOHN STITES, *President.* [L. S.]
JOHN STITES. [L. S.]

Sealed and delivered in presence of—

HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

36 And on the 25th day of June, 1898, came the parties herein, by counsel, and filed their stipulation herein, which is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendants. } No. 6582.

By agreement of the parties hereto, no citation need be issued or served.

HELM & BRUCE,
Sol. for Compl't.
H. L. STONE, *City Att'y.*

37 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 36 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 10th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: Case No. 16,991. Kentucky C. C. U. S. Term No., 406. The Fidelity Trust & Safety Vault Company, appellant, *vs.* The City of Louisville. Filed September 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 407.

THE FIDELITY TRUST AND SAFETY VAULT COMPANY, APPELLANT,

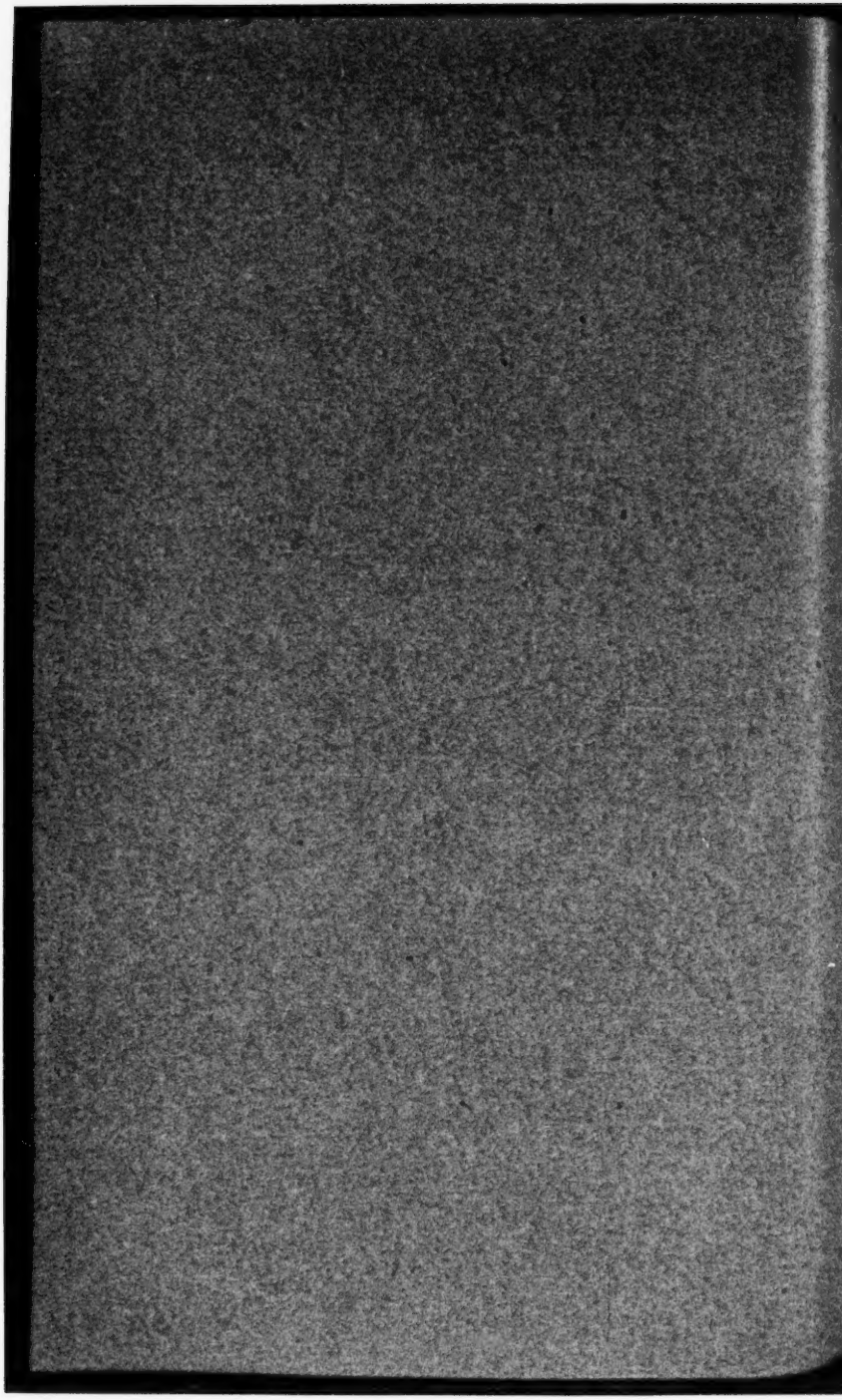
vs.

SAMUEL H. STONE, AUDITOR OF PUBLIC ACCOUNTS, CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE STATE OF KENTUCKY, AND THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 15, 1898.

(16,992.)



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(16,992.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

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THE FIDELITY TRUST AND SAFETY VAULT COMPANY, APPELLANT,

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, A. D. 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

FIDELITY TRUST & SAFETY VAULT CO., Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6581.

Be it remembered that heretofore, to wit, on the 17th day of April, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendants.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Fidelity Trust & Safety Vault Company, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and The City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled, "An act to incorporate the Fidelity Trust Co., approved on the 22 day of April, 1882, and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract, and to sue and be sued. Said amendments were adopted April 12, 1888, & May 5, 1890. An amendment was also adopted March 4, 1884, by which the corporate name was changed from Fidelity Trust Company to the "Fidelity Trust and Safety Vault Company."

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatis-

factory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks
3 and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions,

and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and
4 from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on 1st day of June, 1895, the court of appeals of Kentucky decide n favor of the banks the litigation hereinafter mentioned, and ereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up

to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described. Your orator shows that for each of the years from and including 1887 down to the present time it has regularly paid its taxes to the city of Louisville on the house in which it does and has done business.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville includ-

ing your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.
C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

6 The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was *was* plainly expressed,

brought suit in which it represented itself as the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies,

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge police court of the city of Louisville, is filed in this court with the bill of said bank against Sam'l H. Stone and others, and is now referred to and made a part of this bill.

7 Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes imposed on it by law annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state *was* by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may

prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision, of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal

corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect, and is threatening to collect from your orator has not been assessed by the said city of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities respectively as auditor, secretary and treasurer of the State.

Your orator says that this board thus constituted, will, unless restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud
8 upon your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said illegal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent., and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed and harrassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost, and the taxes claimed by the city of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000 00 exclusive of interest and cost.

Your orator respectively shows that the city of Louisville is insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessment, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

Par. 7. Your orator respectfully shows to the court that the existing laws of the State do not provide for taxing the shares of stock of your orator as permitted by the act of Congress, but attempts to tax its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress; and your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks, except for the taxation of their tangible property.

Your orator has —.

Your orator further shows that in addition to the complication in reference to taxing the old banks in the manner hereinbefore set out, the national banks in the State claimed the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky held that they could not be subjected to a heavier burden of taxation than said old banks. And now your orator respectfully submits to the court that in view of the fact that said four old banks have a capital stock about equal to the combined capital of
9 the other State banks, that your orator is entitled to be put upon a footing as to taxation equally favored with said old banks, and cannot be taxed at a higher rate than said banks without an unjust discrimination against your orator and the other national banks, contrary to the act of Congress; and your orator especially insists that this is true in view of the fact that the Commonwealth of Kentucky had the power to keep all the banks upon the same footing as to taxation as hereinbefore specifically set out, and having such power has deliberately undertaken to violate its contract with said banks, and if as a result of the voluntary action of the State it shall be held that the said four old banks have been restored to their original contract right to discharge themselves of all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, then your orator insists that it and the other national banks of the city of Louisville, being located in the same city with two of the old banks above named, is entitled under the act of Congress to be put upon the same footing as to taxation with said old banks.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H.

Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and the city of Louisville to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived) and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long in their respective official capacities to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, auditor aforesaid, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants, including the city of Louisville and each of them be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to *to* which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

John D. Taggart says he is the president of complainant, and that the statements contained in the foregoing bill are true.

JOHN D. TAGGART.

Subscribed and sworn to before me by John D. Taggart this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 Exhibit "A" of bill of complaint is as follows:

SINKING FUND OFFICE, *Feb.* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leather, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same *same*, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund

the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, *trust* and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when, and if, it shall be finally adjudged by the
11 court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.
Attest:

J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meet-

ing of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm &
Bruce, that the question of the liability of said banks and
12 trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue laws, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract, which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes
claimed against them under the terms and conditions named
13 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually

involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

14 Upon which bill of complaint the following subpœna in chancery issued:

The President of the United States of America to Samuel H. Stone, auditor public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by Fidelity Trust & Safety Vault Co., which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Louisville, this 17 day of April, A. D. 1897, and in the 121 year of our Independence.

Attest:
[SEAL.] THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendant- are to enter their appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk.*

And the marshal returned said subpœna with the following endorsement thereon:

15 Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in ch'y to George D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Executed May 4th, 1897, on Chas. Finley, sec'y of state; May 14th, on Geo. W. Long, treasurer; May 15th, on Samuel H. Stone, auditor of public accounts, by delivering a copy of within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By R. D. TUCKER, *D. M.*

And on the 27th day of May, 1897, the following stipulation was filed:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT CO., Complainant, *versus* SAMUEL H. STONE, &c., Defendants. } No. 6581. Stipulation.

It is stipulated and agreed that the defendant City of Louisville may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Demurrer above referred to is as follows:

16 In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIDELITY TRUST AND SAFETY VAULT CO., Complainant, *versus* SAMUEL H. STONE, &c., Defendants. } # 6581. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Fidelity Trust & Safety Vault Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demur to said bill, and for cause of demurrer states:

1. That the bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in this said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled

to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

17 STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer above referred to is as follows:

18 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky. In Equity.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant, *versus* SAMUEL H. STONE, &c., Defendant-. } No. 6581.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Fidelity Trust & Safety Vault Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, denies that the complainant by its charter and the amendments thereto has power to do such banking business as is usually granted to such corporations, or to do a regular or general banking business at all, or that it has since its organization or at any time been engaged in the banking business in the city of Louisville. On the contrary, the complainant's charter expressly provides (section eight), "But nothing herein shall be construed to permit said company to discount paper or to engage in the business of banking."

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory

or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted

may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12) of said act of May 17, 1886.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," ap-

proved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged

agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision

should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said

judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's

bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt respectively to enforce, as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been, or to be illegally, made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes;
23 and this defendant denies that the said auditor has threatened to so certify said assessment, or will, unless restrained, certify said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened or will be made, or that any such certification thereof has been, or is, threatened, or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were

involved and issues were made, as in three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on

its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

24 This defendant, therefore submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction, *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on the 28th day of May, 1897, the following order was entered:

This day came complainant in the above-entitled cause and filed

herein notice of motion to be entered herein this day; and thereupon came the complainants The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all the other causes by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants Samuel H. Stone, Geo W. Long, and Chas. Finley, comprising the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchise of the complainants under the act of November 11th, 1892, until the further order of this court herein, and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time the City of Louisville, appearing herein by H. L. Stone, city attorney, and the County of Franklin, appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort, appearing herein by Ira Julian, objected to the said motion, and the same was argued and submitted, and the court, not being advised, takes time.

And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without
26 waiving the effect of said demurrer, filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bill of complaint; and the said cause having been argued by counsel upon the said general and special demurrers, as well as upon the demurrers of the City of Louisville, was submitted, and the court, not being advised, takes time.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT CO., Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } No. 6581.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Fidelity Trust & Safety Vault Co., complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set

forth and alleged, demur to said bill, and for cause of demurrer state:

27 1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants Samuel H. Stone, auditor; Charles Finley, secretary of the State, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper tobe filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on May 9th, 1898:

Came this day the complainant in the above-styled case, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant in said case also — herein notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and George W. Long, by Richard Ernst, their attorney, and entered appearance to such motions; and also came the City of Louisville and objected to the filing of said supplemental bills of complaint and said motion, and filed herein affidavits to be read in each

28 case; and also came the City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties; and, the court being advised, it is now ordered, adjudged, and decreed that the said defendants in the above-styled cases are enjoined and restrained as follows: The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898, or any of them; and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against the complainant on account of the assessments heretofore made and certified for the years 1893 and 1894, or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

Said amended and supplemental bill above referred to is as follows:

United States Circuit Court, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant, *vs.* SAMUEL H. STONE, &c., Defendants.	Amended and Supplemental Bill.

The Fidelity Trust & Safety Vault Company, complainant herein, and by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this court of the motion for an injunction, the defendants Samuel H.
29 Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now threatening to assess, and will, as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt by distraint and otherwise to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator, or attempting to collect any tax from your orator for the year 1898, or any other year, until the final order and determination of this court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

30 John D. Taggart says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

JOHN D. TAGGART.

Subscribed and sworn to before me by John D. Taggart this May 6th, 1898.

HUSTON QUIN,
N. P., J. C., Ky.

Commission expires with next Kentucky legislature.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This day came the complainant and offered an amended bill herein, to which the defendant objected, and the court, being advised, allowed said amendment to be filed, except the 3d paragraph thereof, which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding so far as it affected State taxes. Then came the defendant The City of Louisville and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Amended bill above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

31 FIDELITY TRUST AND SAFETY VAULT COMPANY, Complainant,
versus
S. H. STONE ET AL., Defendants.
6581.
Amended Bill.

The complainant, The Fidelity Trust and Safety Vault Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks and other institutions of loans or discount and to all corporations required by law to be taxed on their capital stock. And your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed and has always been taxed on its capital stock.

Your orator further shows that the proposition of the Commonwealth of Kentucky conveyed in the fourth section of the Hewitt law as not to banks alone, but to bank- and other institutions before mentioned. And your orator, in the regular and formal manner provided in said fourth section of the Hewitt law and as fully set out in the original bill, entered into the contract with the Commonwealth of Kentucky, and your orator submits that the Commonwealth did not as a mere matter of grace extend an immunity or exemption from taxation to your orator, but entered into a contract based upon a valuable consideration; and your orator further respectfully shows to the court that it is not necessary to support such a contract that your orator should be engaged in the performance of a public service as much so as banks and sufficient
32 to support an exemption from taxation.

Your orator further says that at the time it entered into the contract with the city of Louisville to abide the result of the decision in the case of the Louisville Banking Company *vs.* R. H. Thompson and The City of Louisville, it and the city and the coun

se- for said city, all in good faith, believed that the decision of that case would settle every question which could be raised either by it or the city of Louisville — had not been decided.

Your orator further shows that the question of whether it was entitled to the rights accorded under the Hewitt law was not involved or discussed by counsel for either side, but was conceded by the city of Louisville in the aforesaid case of Louisville Trust Company *vs.* City of Louisville.

Your orator further shows that by an amendment to its charter adopted by the General Assembly of the Commonwealth of Kentucky and approved April 12, 1888, it was provided as follows:

"SECTION 1. That the charter of the Fidelity Trust and Safety Vault Company, of Louisville, Kentucky, be and the same is so amended that promissory notes payable to any person or persons, or to a corporation, and payable and negotiable at the office of said company, in Louisville, Kentucky, which shall be endorsed to and discounted by any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, shall be and they are hereby placed on the same footing as foreign bills of exchange."

And by an amendment adopted the 15th day of May, 1890, it was provided as follows:

33 "SECTION 2. That said company may receive money on deposit subject to check or payable at an agreed time."

"SECTION 3. That all promissory notes, secured by lien on real estate or collateral, made negotiable and payable at a chartered bank or at the office of said company, shall, when endorsed to, and purchased by said company, be placed on the footing of foreign bills of exchange."

Your orator further shows that since the adoption of said amendment it has regularly done a savings-bank business, and has received deposits and paid interest on the same, in every respect doing the same character of business as done by the Louisville Trust Company under its power to do a savings-bank business; and your orator submits that for the purpose of taxation, and so far as the performance of a public service is concerned, it should be deemed and treated as a bank.

Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capital of the State, at Frankfort, and there equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted governing the State board of equalization, and the said board regularly meets each year and has been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

34 "SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board of equalization shall fix the percentage of assessed value of real prop-

erty at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided, as to the equalization of personal property, as follows:

"SECTION 4375. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one."

35 Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes, and to provide for a State board of equalization."

The result of enforceing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the cash value of their property, while your orator under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess of its real value, and is denied the privilege accorded to the individual citizens of the State, of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

Wherefore your orator prays as in the original bill, and for all

such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitors for Complainant.

36 John Stites says he is the president of the complainant, and that the statements contained in the foregoing amended bill are true.

JOHN STITES.

Subscribed and sworn to before me by John Stites this 20th day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with next session of the Kentucky legislature.

Said demurrer of City of Louisville above referred to is as follows:

37 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant,
versus
S. H. STONE, &c., Defendants. } #6581. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of Fidelity Trust & Safety Vault Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

38 And on the 25th day of June, 1898, the following decree was entered:

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendant's demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be and the same is overruled, and that the said demurrers of the defendants be and the same are sustained, and that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with costs to the defendants, to be taxed.

And now came the complainant and prayed and appeal in open court and tendered *their* assignment of errors. Whereupon the court allows the appeal and orders the assignment of errors to be filed and fixes the appeal bond herein at $1,000.

Assignment of errors above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIDELITY TRUST AND SAFETY VAULT COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6581.

Comes the complainant and assigns the following as the errors of the court committed of which complaint is made:

1st. The court erred in sustaining the demurrer to the bill of complaint.

2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

39 3rd. The court erred in refusing to allow the 3rd paragraph of the amendment to be filed.

4th. The court er-ed in holding that the complainant was not entitled to the benefit of the contract made between the city of Louisville and the sinking fund commissioners on the one hand and the banks and trust companies upon the other, the complainant having formally accepted the provisions of the Hewitt bill within the time allowed and having paid its taxes thereunder ever since, including the year 1887.

5th. The court erred in holding that the city attorney exceeded his authority in treating the complainant as one of the corporations whose rights and claimed rights could be tested by the suit of The Louisville Banking Company *vs.* R. H. Thompson, police judge, &c.

6th. The court erred in holding that the complainant is not a bank and does not perform any public service.

HELM & BRUCE.
Sol. for Complainant.

40 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, The Fidelity Trust & Safety Vault Company, are held and firmly bound unto Samuel H. Stone, Charles Finley, G. W. Long, & The City of Louisville in the sum of one thousand dollars, to be paid to the said Samuel H. Stone, Charles Finley, G. W. Long, & The City of Louisville, — executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of July, A. D. 1898.

Whereas the above-named Fidelity Trust & Safety Vault Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Fidelity Trust & Safety Vault Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FIDELITY TRUST AND SAFETY VAULT CO., [L. S.]
By JOHN STITES, *Pres't.* [L. S.]
JOHN STITES. [L. S.]

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

41 And on the 25th day of June, 1898, came the parties herein, by counsel, and filed herein their stipulation, which is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIDELITY TRUST & SAFETY VAULT COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6581.

By agreement of the parties hereto, no citation need be issued or served.

HELM & BRUCE,
Sol. for Compl't.
H. L. STONE, *City Att'y.*

42 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 41 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 10th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: Case No. 16,992. Kentucky C. C. U. S. Term No., 407. The Fidelity Trust & Safety Vault Company, appellant, *vs.* Samuel H. Stone, auditor of public accounts; Charles Finley, secretary of state, & George W. Long, treasurer of the State of Kentucky, and The City of Louisville. Filed September 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 415.

THE LOUISVILLE TRUST COMPANY, APPELLANT,

vs.

THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 15, 1905.

(16,993.)

(16,993.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 408.

THE LOUISVILLE TRUST COMPANY, APPELLANT,

vs.

THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

LOUISVILLE TRUST COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendants.

Be it remembered that heretofore, to wit, on the 17th day of April, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendant.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Louisville Trust Company, a citizen and resident of the State of Kentucky, brings this bill against The City of Louisville, a municipal corporation of the State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled, "An act to incorporate the Louisville Safety Vault & Trust Company," approved on the 22d day of April, 1884, and your orator has has all the powers granted by said charter and the several amendments thereof, among which is the power to contract and to be contracted with, to sue and be sued, and generally to do such banking business as is usually granted to such corporations. The amendments to the charter of your orator were adopted May 15th, 1886, and Jan'y 17th, 1890. By this last amendment the corporate name is changed from Louisville Safety Vault & Trust Company to the Louisville Trust Company.

Your orator says it is, and has been since its organization, engaged in the banking business in the city of Louisville, Ky.

Your orator respectfully shows that one Samuel H. Stone is now the auditor of public accounts for the Commonwealth of Kentucky, having been duly elected and qualified according to law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant, The City of Louisville, is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty
3 cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," ap-

proved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

4 Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that until July, 1891, it did not own the building in which it does business, and since that date it has paid its city taxes on said house in which it does business.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of

Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $——. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said

banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

As further *evidence* of the contract at that time made between the

City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

6 This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

The amount paid by the banks and trust companies to the city

under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was *was* plainly expressed, brought suit in which it represented itself as the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856 but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State bank from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief

opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

7 2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies.

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of Louisville Banking Co. *vs.* R. H. Thompson, judge police court of the city of Louisville, is filed in this court with the bill of said Bank *vs.* Sam'l H. Stone & others & is now referred to & made part of this bill.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes imposed on it by law annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district

where its franchise may be exercised. The auditor, treasurer and secretary of state *was* by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president cashier. secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per
8 annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect and is threatening to collect from your orator has not been assessed by the city of Louisville, but the assessment has been made by the auditor, secretary of state and treasurer of the State under the pretended authority of the act of November 11, 1872, heretofore referred to.

Your orator respectfully shows to the court that the taxes which the defendant, The City of Louisville, is threatening to collect is upon the assessments for the years 1893 and 1894. The amount of the pretended assessment made by the said State board of valuation and assessment against your orator upon its franchise for the year 1893 is $566,697.06, and for the year 1894 is $1,226,100.00. Your orator further shows that for the year 1893 the tax rate of the city of Louisville was $2.17, and for the year 1894 it was $1.88, so that the total amount involved in this controversy is $35,348, which exceeds the amount of taxes which your orator would have to pay under the "Hewitt bill" in the sum of $19,500.

Your orator further shows that the auditor of the State acting under the authority of said void law certified the assessment against your orator's franchise for the years aforesaid to the clerk of the county court of Jefferson county; and the said clerk has certified said assessment to the tax collector of the city of Louisville, and your orator further respectfully shows that the said city of Louisville will by its officers, unless restrained by this honorable court, proceed by distraint and otherwise to collect said illegal tax upon said illegal assessment when it has no lawful right to do so, and the claim of the defendant, The City of Louisville, that it has the right to collect said taxes against your orator casts a cloud upon your orator's right to pay taxes under and in accordance with its contract, and your orator will furthermore be subjected to much harassment and litigation and unnecessary costs; and your orator and its stockholders will be greatly and irreparably injured by the false claims of the defendant, The City of Louisville, and its attempts by distraint and by a suit to collect said taxes.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city of Louisville, and that it may be spared the irreparable injury which it will suffer by attempts to collect said taxes by distraint and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of

subpœna against the defendant, The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said city of Louisville, its officers and agents to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

9 H. V. Loving says he is the president of complainant, and that the statements contained in the foregoing bill are true.

H V. LOVING.

Subscribed and sworn to before me by H. V. Loving this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

10 Exhibit "A" with the bill of complaint is as follows:

SINKING FUND OFFICE, *Feb.* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leather, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same *same*, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following ar-

rangement with the different banks, *trust* and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when, and if, it shall be finally adjudged by the
11 court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.
Attest:

J. M. TERRY,
Secretary & Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of

Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and
12 trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue laws, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract, which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named
13 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes

claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

14 Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to the City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by the Louisville Trust Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of the said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:
THOS. SPEED,
C. C. C., K. D.,
[SEAL.] By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

And the marshal returned said subpœna in chancery with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in chancery to Geo. D. Todd,
15 mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

And on the 27th day of May came parties, by counsel, and filed stipulation.

Said stipulation above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST CO., Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6584. Stipulation.

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

Said demurrer is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6584. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill
16 *of Complaint of Louisville Trust Company, Complainant.*

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd,
17 who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GOE. D. TODD.

Subscribed and sworn to before me by George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer above referred to is as follows:

18 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant, *versus* CITY OF LOUISVILLE, Defendant. } No. 6584. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Trust Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, denies that the complainant by its charter and the amendments thereto has power to do such banking business as is usually granted to such corporations, or to do a general or regular banking business at all, or that it has since its organization or at any time been employed in the banking business in the city of Louisville. On the contrary, the complainant's charter expressly provides (section nine), "But nothing herein shall be construed to permit such company to discount paper or to engage in the business of banking."

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty

cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said

act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12) of said act of May 17, 1886.

This defendant denies that the complainant has, since July, 1891, paid its taxes to this defendant or the taxes on the house or building in which it does business or has done business since said date.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said

license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was be-

yond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for

carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11,

1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so, or that the alleged claim of this defendant, that it has the right to collect said taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making, any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and
23 said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was

only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant, City of Louisville.

24 STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant, City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on the 28th day of May, 1897, the following order was entered:

This day came the complainant in the above-entitled cause and filed herein notice — duly served on the defendant, and moved the court to grant it an injunction until the further order of the court, enjoining and restraining the defendant, The City of Louisville, from taking any steps for the enforcement of the taxes set forth in said bill of complaint.

And came the said City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and the same coming on to be heard was submitted, and the court, not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the said City of Louisville, and the same were argued by counsel and submitted to the court, and the court, not being advised, takes time.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

And on June 25th, 1898, the following order was entered:

This day came the complainant and offered an amended bill herein, to which the defendant objected, and the court, being advised, allowed said amendment to be filed, except the 3d paragraph thereof, which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding so far as it affected State taxes.

Then came the defendant The City of Louisville and filed
26 a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Said amended bill above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
versus
CITY OF LOUISVILLE ET AL., Defendants. } Amended Bill.

1. The complainant, The Louisville Trust Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks and other institutions of loan or discount and to all corporations required by law to be taxed on their capital stock; and your orator respectfully shows that it is and always has been an institution of loan, and always since its organization had been required by law to be taxed and has always been taxed on its capital stock.

Your orator further shows that the proposition of the Commonwealth of Kentucky conveyed in the fourth section of the Hewitt law was not to banks alone, but to banks and the other institutions before mentioned; and your orator, in the regular and formal manner provided in said fourth section of the Hewitt law and as fully set out in the original bill, entered into the contract with the Commonwealth of Kentucky, and your orator submits that the Commonwealth did not as a mere matter of grace extend an immunity or exemption from taxation to your orator, but entered into a contract based upon a valuable consideration; and your orator further respectfully shows to the court that it is not necessary to
27 support such a contract that your orator should be engaged in the performance of a public service, but your orator further submits to the court that it is engaged in the performance of a public service as much so as banks and sufficient to support an exemption from taxation.

Your orator further says that at the time it entered into the contract with the city of Louisville to abide the result of the decision in the case of The Louisville Banking Company *vs* R. H. Thompson and The City of Louisville, it and the city and the counsel for said city, all in good faith, believed that the decision of that case would settle every question which should be raised either by it or the city of Louisville, and your orator shows that at that time the case of The Louisville Trust Company *vs.* City of Louisville had not been decided.

Your orator further shows that the question of whether it was entitled to the rights accorded under the Hewitt law was not involved or discussed by counsel for either side, but was conceded by the city of Louisville in the aforesaid case of Louisville Trust Company *vs.* City of Louisville.

2. Your orator further shows that by an amendment to its charter adopted by the General Assembly of the Commonwealth of Ken-

tucky and approved May 15, 1886, it was expressly provided by section- five, six, and seven as follows:

"SECTION 5. For purposes of taxation, this company shall be classed and treated as one of the banks of this State, and shall be subject to and pay the same rate of taxes, to same parties, at
28 same time, in same manner and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this State.

"SECTION 6. The said company, in the prosecution of its business as provided in its charter shall have power to buy and sell notes secured by lien on real estate, also to loan money and take such notes in pledge as security for such loan; and all such notes bought by or pledged to said company as would be placed on same footing as foreign bills of exchange, if discounted by any of the banks of this State, shall be, and they are hereby, placed on same footing as foreign bills of exchange, provided said notes are given in fulfillment of contracts that have been fully executed at the time of such purchase or pledge.

"SECTION 7. Said company is hereby authorized to establish 'savings department' in connection with its business, and carry on business in such departments as a saving- bank, and shall receive on deposit during business hours any sum not less than one dollar, and shall allow interest on same at such rate as may be fixed by the by-laws, not exceeding four per cent. per annum. The business of this department shall be kept distinct and separate from the other business of the company, and in a separate set of books. All sums deposited in the savings department by a workingman, married woman or infant, shall be, and they are hereby, exempted from taxation of any kind whatever; but the sum so exempted from taxation shall not exceed the sum of five hundred dollars. Married women and infants may make deposits in this department in their own names, and withdraw same as if of full age or unmarried."

And your orator shows that from and after the adoption of said amendment to its charter, which was just two days before the adoption of the Hewitt law, it did and still does a saving- bank
29 business, and is for all purposes of taxation and so far as the performance of a public service is concerned a bank, and it is respectfully submitted that it should be so deemed and treated.

3. Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capital of the State, at Frankfort, and there equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted governing the State board of equalization, and the said board had been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real prop

erty—Report to county judges—Witnesses.—The said board of equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided, as to the equalization of personal property, as follows:

"SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one."

Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes, and to provide for a State board of equalization."

31 The result of enforcing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the fair cash value of their property, while your orator under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess of its real value, and is denied the privilege accorded to the individual citizens of the State, of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitor- for Complainant.

H. V. Loving says he is president of the complainant, and that the statements contained in the foregoing amended bill are true.

H. V. LOVING.

Subscribed and sworn to before me by H. V. Loving this 21st day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with the next session of the Kentucky legislature.

Demurrer above referred to is as follows:

32 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
versus
CITY OF LOUISVILLE, Defendants. } # 6584. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of Louisville Trust Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

33 And on the 25th day of June, 1898, the following decree was entered:

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendant's demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be and the same is overruled, and that the said demurrer of the defendant be and the same is sustained, and that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with costs to the defendant, to be taxed.

And now came the complainant and prayed an appeal in open court and tendered *their* assignment of errors. Whereupon the court allows the appeal and orders the assignment of errors to be filed and fixes the appeal bond herein at $1,000.

Said assignment of errors is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant, }
vs. } 6584.
CITY OF LOUISVILLE, &c., Defendants. }

Comes the complainant and assigns the following as the errors of the court committed of which complaint is made:

1st. The court erred in sustaining the demurrer to the bill of complaint.

34 2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

3rd. The court erred in refusing to allow the 3rd paragraph of the amendment to be filed.

4th. The court er-ed in holding that the complainant was not entitled to the benefit of the contract made between the city of Louisville and the sinking fund commissioners on the one hand and the banks and trust companies upon the other, the complainant having formally accepted the provisions of the Hewitt bill within the time

allowed and having paid its taxes thereunder ever since, including the year 1887.

5th. The court erred in holding that the city attorney exceeded his authority in treating the complainant as one of the corporations whose rights and claimed rights could be tested by the suit of The Louisville Banking Company *vs.* R. H. Thompson, police judge, &c.

6th. The court erred in holding that the complainant is not a bank and does not perform any public service.

HELM & BRUCE.
Sol. for Complainant.

35 The bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE TRUST COMPANY
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, The Louisville Trust Company, are held and firmly bound unto the City of Louisville in the sum of one thousand dollars, to be paid to the said City of Louisville, — executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 19th day of July, A. D. 1898.

Whereas the above-named Louisville Trust Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Louisville Trust Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE LOUISVILLE TRUST CO., [L. S.]
By H. V. LOVING, *Pres.* [L. S.]
H. V. LOVING. [L. S.]

Sealed and delivered in presence of—

HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

36 And on the 25th day of June, 1898, came the parties herein, by counsel, and filed their stipulation herein, which is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6584.

By agreement of the parties hereto, no citation need be issued or served.

HELM & BRUCE,
Sol. for Compl't.
H. L. STONE, *City Att'y.*

37 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 36 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 10th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: Case No. 16,993. Kentucky C. C. U. S. Term No., 408. The Louisville Trust Company, appellant, *vs.* The City of Louisville. Filed September 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 409.

THE LOUISVILLE TRUST COMPANY, APPELLANT,

vs.

SAMUEL H. STONE, AUDITOR OF PUBLIC ACCOUNTS; CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE STATE OF KENTUCKY, AND THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 15, 1898.

(16,994.)

(16,994.)

SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

LOUISVILLE TRUST COMPANY, Complainant,
versus
S. H. STONE, ETC., Defendants. } 6583.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, Louisville Trust Company, by its counsel, Helm & Bruce, and filed in the clerk's office of our said court their bill of complaint and exhibits against the above-named defendants, S. H. Stone, etc., which bill of complaint is in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Louisville Trust Company, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and The City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled, "An act to incorporate the Louisville Safety Vault and Trust Company," approved on the 22d day April, 1884, and your orator has all the powers granted by said charter and the several amendments thereof,
2 among which is the power to contract, and to sue and be sued. Said amendments were adopted May 15, 1886, and January 17, 1890. By this last amendment the corporate name is changed from Louisville Safety Vault and Trust Company to the "Louisville Trust Company."

Your orator says it is and has been since its organization engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatis-

factory in this, to wit: that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national
3 banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by — to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by

individuals, corporations, or societies, and said banks, institutions and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier
4 and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real

estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time allowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth and from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator, through its cashier, made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in

accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time, reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described. Your orator shows that until July, 1891, it did not own the building in which it does business, and since that date it has paid its city taxes on said house in which it does business.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

6 Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill," approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant The City of Louisville claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embar-assing the sinking fund of the city as little as possible, the banks through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of

Louisville and its sinking fund commissioners upon the one part, and the banks and trust companies of the city of Louisville including your orator upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

7 Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute, such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted

the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class
8 from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof, marked A.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the con-

tract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself and the Bank of Louisville, which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856, but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

9 In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank, and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits though really against the city of Louisville were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall

be subject to the provisions of section 8, chapter 68 of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

10 2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract is irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of the Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville, is filed in this court with the bill of said bank against Samuel H. Stone and others and is now referred to and made a part of this bill.

Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state is by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of

March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal
11 place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in

violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not
12 impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect and is threatening to collect from your orator has not been assessed by the city of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities, respectively, as auditor, secretary, and treasurer of the State.

Your orator says that this board thus constituted will, unless restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt by distraint and otherwise to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said legal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent, and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed by distraint upon its personal property and harassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and cost, and the taxes claimed by the city of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and cost.

Your orator respectfully shows that the city of Louisville is insisting that the auditor of the State, the defendant Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against
13 your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has

threatened to so certify said assessment, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H. Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants, including the City of Louisville, and each of them, be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

H. V. Loving says he is the president of complainant, and that the statements contained in the foregoing bill are true.

H. V. LOVING.

Subscribed and sworn to before me by H. V. Loving this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

14 Here follows "Exhibit A," referred to in foregoing bill:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-

house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.
Attest:

J. M. TERRY,
Secretary and Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interests of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

16 It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved:
C. H. GIBSON,
President Com'rs Sinking Fund, City of Louisville.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLAUGHLIN.

The President of the United States of America to Samuel H. Stone, auditor public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court, by Louisville Trust Company, which you shall in no-wise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal
17 of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest: THOS. SPEED,
[SEAL.] *C. C. C., K. D.*

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk.*

Endorsed on the back of said subpœna is the following return:

Executed April 24th, 1897, on the City of Louisville by deliver-

ing a copy of within spa. in ch'y to George D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Fees, $2.00.

Executed May 4th, 1897, on Chas. Finley, secretary of state; May 14th, on Geo. W. Long, treasurer; May 15th, on Samuel H. Stone, auditor of public accounts, by delivering a copy of within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By P. D. TUCKER, *D. M.*

Fees, $6.00.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendant-. } No. 6583. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Trust Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer
18 appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be com[illegible]led to make any further or other answer to the said bill, and pr[illegible]o be hence dismissed with its costs and charges in this behalf [illegible]ost wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JOHN F. GROENE,
Notary Public, Jefferson County, Kentucky.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant, }
vs. } No. 6583. Stipulation.
SAMUEL H. STONE, &C., Defendant-. }

It is stipulated and agreed that the defendant, City of Louisville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

19 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant, }
vs. } No. 6583. In Equity.
SAMUEL H. STONE, &C., Defendants. }

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Louisville Trust Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, denies that the complainant by its charter and the amendments thereto has power to do such banking business as is usually granted to such corporations, or to do a regular or general banking business at all; or that it has since its organization, or at any time, been engaged in the banking business in the city of Louisville. On the contrary, the

complainant's charter expressly provides (section 9), "But nothing herein shall be construed to permit such company to discount paper, or to engage in the business of banking."

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each
20 share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of sec-

tion eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the
21 complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12), of said act of May 17, 1886.

This defendant denies that the complainant has, since July, 1891, paid its taxes to this defendant or the taxes on the house or building in which it does business or has done business since said date.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner dif-

ferent from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing
22 for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all

banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate
23 to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from com-

ing into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

24 This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

The defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided

on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks
25 had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has

further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

26 This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court, proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made, the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt, respectively, to enforce as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been or to be illegally made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes; and this defendant denies that the said auditor has threatened to so certify said assessment, or will, unless restrained, certify said assessment for the years 1895, 1896, and 1897, or either of them,

to the said clerk, or that said clerk will certify the same to the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened or will be made, or that
27 any such certification thereof has been, or is, threatened or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 14, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the

rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of
28 its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant, therefore, submits that the complainant was not at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defend-
29 ant, City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true,

and so far as stated from information he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE.

Circuit Court of the United States for the Sixth Circuit, District of Kentucky, Louisville, Ky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF LOUISVILLE, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

WESTERN BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

LOUISVILLE BANKING COMPANY, Complainant,
vs.
SAM'L H. STONE, Defendant.

UNION NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, Defendant.

LOUISVILLE CITY NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

BANK OF COMMERCE, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

AMERICAN NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

FARMERS' AND DROVERS' BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

30 THIRD NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

FIRST NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

CITIZENS' NATIONAL BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

GERMAN SECURITY BANK, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

FIDELITY TRUST AND SAFETY COMPANY, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
SAM'L H. STONE, ETC., Defendant-.

This day came the complainants in each of the above-entitled causes and filed herein notice of motion to be entered herein this day. And thereupon came the complainants, The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all of the other causes, by Helm & Bruce counsel, and moved the court to enter an order herein enjoining and restraining the defendants Samuel H. Stone, Geo. W. Long and Chas. Finley, composing the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchises of the complainants under the act of November 11, 1892, until the further order of the court herein; and enjoining and restraining the other defendants herein, to wit: The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time, The City of Louisville appearing herein by H. L. Stone, city attorney, and The County of Franklin appearing herein by Ira Julian and J. H. Polsgrove, and The Board of Councilmen of Frankfort appearing herein by Ira Julian, objected to the said motion, and the same was argued and submitted, and the court not being advised takes time.

And at the same time came The Board of Councilmen of the City of Frankfort and The County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of The Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without waiv-
31 ing the effect of the said demurrers, filed answers of the said Board of Councilmen of the City of Frankfort and The County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bills of complaint. And the said cause having been argued by counsel upon the said general and

special demurrers as well as upon the demurrers of The City of Louisville, was submitted, and the court not being advised takes time.

May 28, 1897.

WM. H. TAFT,
Circuit Judge.

Notary Public of Jefferson County, Kentucky.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST CO., Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } 6583.

The demurrer of the defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Louisville Trust Company, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained, to be true in such manner and form as the same is therein set forth and alleged, demur to said bill, and for cause of demurrer state:

First. That the said bill fails to state facts sufficient to show jurisdiction in this court.

Second. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that, in my opinion, the same is well founded in point of law, and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

32 And on 9th day of May, 1898, the following order was entered.

Came this day complainant in the above-styled case, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant

in said case also filed herein notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions; and also came the City of Louisville and objected to the filing of said supplemental bill of complaint and said motions, and filed herein affidavits to be read in each case; and also came City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties; and, the court being advised, it is now ordered, adjudged, and decreed that the said defendants in the above-styled cases are enjoined and restrained as follows:

The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainant for the years 1895, 1896, 1897, and 1898, or any of them; and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against any of the complainants on account of assessments heretofore made and certified for the years 1893 or 1894, or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

33 Said amended and supplemental bill above referred to is as follows:

United States Circuit Court, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } Amended and Supplemental Bill.

The Louisville Trust Company, complainant herein, and by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this court of the motion for an injunction the defendants, Samuel H. Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are *not* threatening to assess, and will, as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the

tax collector of the city of Louisville, and said city will at-
34 tempt by distraint and otherwise to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator, or attempting to collect any tax from your orator for the year 1898, or any other year, until the final order and determination of this court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

H. V. Loving says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

H. V. LOVING.

Subscribed and sworn to before me by H. V. Loving this May 6th, 1898.

HUSTON QUIN,
N. P., J. C., Ky.

Commission expires with next Kentucky legislature.

And on June 4th, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until 25th day of June, 1898.

And on 25th day of June, 1898, the following order was entered:

This day came the complainant and offered an amended bill herein, to which the defendant objected, and the court, being advised, allowed said amendment to be filed, except the 3 paragraph thereof,
which the court disallowed without prejudice to the right
35 of the complainant to raise that question in another proceeding so far as it affected State taxes. Then came the defendant The City of Louisville and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Amended bill above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
versus
S. H. STONE ET AL., Defendants.
} Amended Bill.

The complainant, The Louisville Trust Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks and other institutions of loan or discount and to all corporations

required by law to be taxed on their capital stock; and your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed and has always been taxed on its capital stock.

Your orator shows that the proposition of the Commonwealth of Kentucky conveyed in the fourth section of the Hewitt law was not to banks alone, but to banks and the other institutions before mentioned; and your orator, in the regular and formal manner provided in said fourth section of the Hewitt law and as fully set out in the original bill, entered into the contract with the Commonwealth of Kentucky, and your orator submits that the Commonwealth did not as a mere matter of grace extend an immunity or exemption from taxation to your orator, but entered into
36 a contract based upon a valuable consideration; and your orator further respectfully shows to the court that it is not necessary to support such a contract that your orator should be engaged in the performance of a public service, but your orator further submits to the court that it is engaged in the performance of a public service as much so as banks and sufficient to support an exemption from taxation.

Your orator further says that at the time it entered into the contract with the city of Louisville to abide the result of the decision in the case of The Louisville Banking Company *vs* R. H. Thompson and The City of Louisville, it and the city and the counsel for said city, all in good faith, believed that the decision of that case would settle every question which could be raised either by it or the city of Louisville, and your orator shows that at that time the case of The Louisville Trust Company *vs.* City of Louisville had not been decided.

Your orator further shows that the question of whether it was entitled to the rights accorded under the Hewitt law was not involved or discussed by counsel for either side, but was conceded by the city of Louisville in the aforesaid case of Louisville Trust Company *vs.* City of Louisville.

2. Your orator further shows that by an amendment to its charter adopted by the General Assembly of the Commonwealth of Kentucky and approved May 15, 1886, it was expressly provided by sections five, six, and seven as follows:

"SECTION 5. For purposes of taxation, this company shall be *cal*ssed and treated as one of the banks of this State, and shall be subject to and pay the same rate of taxes, to same parties, at
37 same time, in same manner and for the same purposes only, as may be provided by law from time to time as the banks doing business in this State."

"SECTION 6. The said company, in the prosecution of its business as provided in its charter, shall have power to buy and sell notes secured by lien on real estate, also to loan money and take such notes in pledge as security for such loan; and all such notes bought by or pledged to said company as would be placed on same footing as foreign bills of exchange, if discounted by any of the banks of this State, shall be, and they are hereby, placed on same footing as

foreign bills of exchange, provided said notes are given in fulfillment of contracts that have been fully executed at the time of such purchase or pledge."

"SECTION 7. Said company is hereby authorized to establish a 'savings department' in connection with its business, and carry on business in such departments as a savings bank, and shall receive on deposit during business hours any sum not less than one dollar, and shall allow interest on same at such rate as may be fixed by the by-laws, not exceeding four per cent. per annum. The business of this department shall be kept distinct and separate from the other business of the company, and in a separate set of books. All sums deposited in the savings department by a workingman, married woman or infant, shall be, and they are hereby, exempted from taxation of any kind whatever, but the sum so exempted from taxation shall not exceed the sum of five hundred dollars. Married women and infants may make deposits in this department in their own names, and withdraw same as if of full age or unmarried."

38 And your orator shows that from and after the adoption of said amendment to its charter, which was just two days before the adoption of the Hewitt law, it did and still does a savings bank business, and is for all purposes of taxation and so far as the performance of a public service is concerned a bank, and it is respectfully submitted that it should be so deemed and *tearted*.

3. Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capital of the State, at Frankfort, and there equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted governing the State board of equalization, and the said board has been in the habit of meeting each year for a great many years in the past. By saud act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board of equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard.

The secretary of the State board of equalization shall report to the various county jusges of this Commonwealth, as soon as possible, the action of the board in regard to their respective

39 counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and ex-

penses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided, as to the equalization of personal property, as follows:

"SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one."

Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes and to provide for a State board of equalization."

The result of enforcing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the fair cash value of their property, while your orator under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess of its real value, and is denied the privilege accorded to the individual citizens of the State of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitors for Complainant.

H. V. Loving says he is president of the complainant, and that the statements contained in the foregoing amended bill are true.

H. V. LOVING.

Subscribed and sworn to before me by H. V. Loving this 21st day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with the next session of the Kentucky legislature.

Demurrer above referred to is as follows:

41 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
versus
S. H. STONE, &c., Defendants. } # 6583. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of Louisville Trust Company, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law, and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

42 And on the 25-h day of June, 1898, the following decree was entered:

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendants' demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be and the same is overruled, and that the said demurrers of the defendants be and the same are sustained, and that the complainant's bill of complaint as amended by, and the same is hereby, dismissed with costs to the defendants, to be taxed.

And now came complainant and prayed an appeal in open court and tendered *their* assignment of errors. Whereupon the court allows the appeal and orders the assignment of errors to be filed and fixes the appeal bond herein at $1,000.

Said assignment of errors above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6583.

Comes the complainant and assigns the following as the errors of the court committed of which complaint is made:

1st. The court er-ed in sustaining the demurrer to the bill of complaint.

43 2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

3rd. The court erred in refusing to allow the third paragr*p*ah of the amendment to be filed.

4th. The court erred in holding that the complainant was not entitled to the benefit of the contract made between the city of Louisville and the sinking fund commissioners on the one hand and the banks and trust companies upon the other, the complainant having formally accepted the provisions of the Hewitt bill within the time allowed and having paid its taxes thereunder ever since, including the year 1887.

5th. The court erred in holding that the city attorney exceeded his authority in treating the complainant as one of the corporations whose rights and claimed rights could be tested by the suit of The Louisville Banking Company *vs.* R. H. Thompson, police judge, &c.

6th. The court erred in holding that the complainant is not a bank and does not perform any public service.

HELM & BRUCE.
Sol. for Complainant.

44 The bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

LOUISVILLE TRUST COMPANY
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, The Louisville Trust Company, are held and firmly bound unto Samuel H. Stone, Charles Finley, G. W. Long, and the City of Louisville in the sum of one thousand dollars, to be paid to the said Samuel H. Stone, Charles Finley, G. W. Long, and the City of Louisville, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our *presents* and dated this 19th day of July, A. D. 1898.

Whereas the above-named Louisville Trust Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that is the above-named Louisville Trust Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LOUISVILLE TRUST CO., [L. S.]
By H. V. LOVING, *Pres.* [L. S.]
H. V. LOVING. [L. S.]

Sealed a*b*d delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

45 And on the 25th day of June, 1898, came the parties herein, by counsel, and filed their stipulation herein, which is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

LOUISVILLE TRUST COMPANY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } No. 6583.

By agreement of the parties hereto, no citation need be issued or served.

HELM & BRUCE,
Sol. for Compl't.
H. L. STONE, *City Att'y.*

46 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 45 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 10th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: Case No. 16,994. Kentucky C. C. U. S. Term No., 409. The Louisville Trust Company, appellant, *vs.* Samuel H. Stone, auditor of public accounts; Charles Finley, secretary of state, & George W. Long, treasurer of the State of Kentucky, & The City of Louisville. Filed September 15th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 634.

THE FIRST NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

SAMUEL H. STONE, CHARLES FINLEY, AND GEORGE W. LONG ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED DECEMBER 12, 1896.

(17,219.)

(17,219.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 634.

THE FIRST NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

SAMUEL H. STONE, CHARLES FINLEY, AND GEORGE W. LONG ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term, begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

FIRST NATIONAL BANK, Complainant,
versus
S. H. STONE, ETC., Defendants. } 6575.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, First National Bank, by its counsel, Helm & Bruce, and filed in the clerk's office of our said court their bill of complaint and exhibits against the above-named defendants, S. H. Stone, etc., which bill of complaint is in the words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

First National Bank, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley, and George W. Long, citizens and residents of the State of Kentucky, and the city of Louisville, a corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the acts of Congress of the United States, and especially under the acts in relation to national banks, commonly known as the national banking acts, on the 22d day of October, 1863, and its charter rights under its said organization lasted for twenty years, and its charter life was extended and renewed for twenty years, from September 6, 1882, in the manner provided by said national banking acts.

2 Your orator shows that it has all the powers, privileges, and immunities granted by said national banking acts to the banks incorporated and organized thereunder, and is and has been, since its organization, engaged in the banking business in the city of Louisville, Kentucky.

The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky approved May 17, 1886, known as the "Hewitt bill," and hereafter more particularly set out and for brevity called the "Hewitt bill,"

the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit, that there were four banks chartered by said State prior to the year 1856 which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the "old banks." These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of — legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city, and district tax—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan and discount were taxed at the same rate as the old banks and national banks. The
3 State being dissatisfied with the existing tax rate against the banks and similar corporations, desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be

taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it was provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it was further provided that any officer having in charge the affairs of such bank, institution or corporation who should refuse, when duly called upon for the purpose, to allow his books to be investigated, should be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, should be fined not less than five hundred dollars and not more than one thousand dollars.

It was further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, should, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations are invested, and pay into the treasury the amount of tax due.

4 It was further provided that if such tax be not paid, the cashier and his sureties should be liable for the same and twenty per cent. upon the amount, and any State bank, institution or corporation should thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of such bank, and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

Your orator shows that from the first day of July, 1887, although it was not by the United States banking acts bound to submit to taxation under the "Hewitt bill," it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of

said "Hewitt bill," and the said State, through its proper officers, received and appropriated said taxes paid by your orator as aforesaid.

Your orator has no real estate, and never had.

In the way above stated, your orator accepted the provisions of the "Hewitt bill."

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also, in accordance with said act, tendered to said auditor the taxes, at the current rate then assessed upon real estate, upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards, on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded
5 from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill," and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time, reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Par. 3. Your orator respectfully shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking

fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum
6 of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A.

As further evidence of the contract at that time made between the city of Louisville and its sinking fund, and the various banks and trust companies of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as

to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund and by the attorney for the city under the authority
7 and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigations.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks of the city of Louisville, including your orator, paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those actually involved in the test cases, paid the whole amount of the taxes claimed as against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision could be rendered.

A copy of the contract aforesaid, with the minute aforesaid, is filed herewith as part hereof, marked A.

Your orator, though not bound to do so under the national banking acts, yet in common with the other national banks, and in reliance upon its contract with the State, paid said tax upon its gross receipts.

The amount paid by the banks and trust companies to the city

under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 4. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes, imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised. The auditor, treasurer, and secretary of state is by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise, the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports, it is provided, shall be verified by the president, cashier, secretary, treasurer, or manager, or other chief officer, in such form as the auditor may prescribe, showing the fol-
8 lowing facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the number and real value thereof; the highest price at which such stock was sold at the *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed, or liable to assessment in the State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values, shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, shall by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust com-

panies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction. Your orator further shows to the court that the tax for State and municipal purposes attempted to be imposed upon all trust companies and banks, including your orator, under the present revenue law, approved November 11, 1892, is very much more onerous than the tax imposed under the "Hewitt bill" of May 17, 1886.

And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General
9 Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville claims the right to collect, and is threatening to collect from your orator has not been assessed by the said city of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities, respectively, as auditor, secretary and treasurer of the State.

Your orator says that this board thus constituted, will, unless restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt by distraint and otherwise to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the illegal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent., and that the taxes thereafter shall carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed and harassed by distraint on its personal property and with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt, respectively, to enforce as against

your orator the taxes attempted to be imposed and the penalties denounced by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and costs, and the taxes claimed by the city of Louisville, based on the assessment of your orator's franchise, exceeds the sum of $2,000.00, exclusive of interest and costs.

Your orator respectfully shows that the city of Louisville is insisting that the auditor of the State, the defendant Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessments, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

Par. 5. Your orator respectfully shows to the court that the existing laws of the State of Kentucky do not provide for taxing the shares of your orator as permitted by the act of Congress, but attempts to subject to taxation its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress. And your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks except for the taxation of their tangible property.

Your orator further shows and submits to the court that by reason of the formal contract entered into by all the other banks and trust companies in the city of Louisville, and by reason of the former adjudication in favor of said banks and trust companies establishing the validity of said contracts, they will escape local taxation, except on the houses owned by them, respectively, in which they respectively do business, and your orator coming as it does into direct competition with said institutions will be driven out of business if subjected to local taxation, wherefore it respectfully insists that it is protected by the acts of Congress against such unjust discrimination.

To the end, therefore, that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ

of subpœna against the defendants, Samuel H. Stone, auditor; Charles Finley, secretary; George W. Long, treasurer of the State of Kentucky, and the City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, and that the said Samuel H. Stone be restrained from certifying any assessment which has been or may be made of
11 the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants, including the City of Louisville, and each of them, be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

G. W. Lewman says he is president of complainant, and that the statements contained in the foregoing bill are true.

G. W. LEWMAN.

Subscribed and sworn to before me by G. W. Lewman, this 17th day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

12 Exhibit "A" with bill is as follows:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same; but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum

per annum if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies
13 paying, or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid; but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary & Treasurer.

14 Stipulation between the City of Louisville, the Commissioners of the Sinking Fund of the City of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the City of Louisville, the Commissioners of the Sinking Fund of the City of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of said board, and the Mayor of the City of Louisville, on

the one part, and the various banks, trust, and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part—

First. That in February, 1894, it was agreed between the City of Louisville and the Board of Sinking Fund Commissioners, acting together in the interest of the said city, and the various banks, trust, and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm and Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all the said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

15 B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named

16 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof; but at a later date and in further reliance upon said agreement all said banks and companies, except those actually in.

volved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust and Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

And thereupon the following subpœna in chancery issued:

The President of the United States of America to Samuel H. Stone, auditor public accounts, Commonwealth of Kentucky; Charles Finley, secretary of state, Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by First National Bank, which you shall in nowise omit, under the penalty of the law.

17 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121 year of our Independence.

Attest:
[SEAL.]

THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendant- are to enter their appearance in the suit in the clerk's office on or before the 7 day of June next, the day at which the writ is returnable; otherwise the bill may be taken as *pro confesso*.

THOS. SPEED, *Clerk.*

And thereupon the marshal made the following return:

Executed April 24th, 1897, on the city of Louisville by delivering a copy of within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Executed May 4th, 1897, on Chas. Finley, sec't'y of state; May 14th on Geo. W. Long, treasurer; May 15th on Samuel H. Stone, auditor of public accounts, by delivering a copy of within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal,
By P. D. TUCKER, *D. M.*

18 And on the 27th day of May, 1897, the following stipulation was filed:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} No. 6575. Stipulation.

It is stipulated and agreed that the defendant City of Louisville may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} No. 6575. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of First National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

19 1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to

be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by George D. Todd, mayor this 27 day of May, 1897. My commission expires January
19½ 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer above referred to is as follows:

20 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant, }
versus } No. 6575. In Equity.
SAMUEL H. STONE, &c., Defendant. }

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of First National Bank, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts be-

yond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

21 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of

the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $—.

This defendant denies that the ordinance of 1894, provided for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
22 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be

made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

23 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alledged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the mangement of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and incorporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust

companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show that questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

23½ This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this

defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises, or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

24 This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court, proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract

or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will in turn certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restricted or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant is or would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that unless restrained the complainant will be improperly annoyed or harassed with litigation or the value of its stock greatly or at all impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt respectively to enforce as against the complainant the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was at or before the institution of this action or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court
25 clerk of Jefferson county the assessment alleged to have been or to be illigally made by said State board, so that its tax collector may endeavor to enforce as against the complainant and the other banks and trust companies in the city the taxes for city purposes; and this defendant denies that the said auditor has threatened to so certify said assessment or will unless restrained certify said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to the tax collector of the city of Louisville, or that any further assessment by said State board or for the years 1895, 1896, and 1897, or either of them, has been or is threatened or will be made, or that any such certification thereof has been or is threatened or will be made by said auditor so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensborough *v.* Daviess County, and other bank-tax cases, wherein the same legal questions were involved and issues were made as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court in said three cases delivered June 1, 1895, and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky and other bank-taxes cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or
26 national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar insti-

tutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the

State board of valuation and assessment, as required by the revenue law of November 11, 1892.

27 This defendant denies that the existing laws of the State of Kentucky do not provide for taxing the shares of stock of the complainant as permitted by act of Congress, or that the franchise law of said State taxes the franchise granted by the Congress of the United States, or taxes its intangible property, surplus, undivided profits, and investments without lawful right to do so or contrary to the act of Congress in such cases made and provided, or that the complainant has never consented to said method of taxation, or that such consent was necessary, or that the complainant has always or at any time protested against the same as illegal or contrary to the act of Congress; and this defendant denies that said statute is repugnant to the act of Congress in such cases made and provided or because of such alleged repugnancy it is void or of no binding force as against the complainant.

This defendant denies that the capital of the four old banks was about equal to the combined capital of all the other State banks, or that the courts of Kentucky, for that reason or on any other ground held that the national banks could not be subjected to a heavier burden of taxation than said *led* banks, or that in view of the alleged fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, the complainant is entitled to be put upon a footing as to taxation equally favored with said old banks or cannot be taxed at a higher rate than said old banks without an unjust discrimination against the complainant and other national banks, or contrary to the act of Congress.

This defendant denies that the Commonwealth of Kentucky has deliberately or at all undertaken to violate or that it has

28 violated its alleged contract with the banks of said State or any of them, or that by the voluntary action of the State the said four old banks or either of them have been restored to their original alleged contract right to discharge themselves from all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, or that complainant and the other national banks of the city of Louisville or either of them is or would be entitled to be put upon the same footing as to taxation with said old banks.

This defendant denies that by reason of the alleged formal contract alleged to have been entered into by all of the other banks and trust companies establishing the validity of said alleged contracts, they or either of them will escape local taxation, except on the houses owned by them respectively, in which they respectively do business, or that the complainant, coming in competition with said institutions, will be driven out *od* business if subjected to local taxation, or that any unjust or other discrimination between the complainant and said other institutions will result.

This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer

irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

29 STATE OF KENTUCKY, } *sct:*
Jefferson County, }

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant, City of Louisville, and the facts stated in the foregoing answer, so far as stated from his personal knowledge, are true, and so far as stated from information he believed the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

And on the 28th day of May, 1897, the following order was entered:

This day came the complainant in the above-styled cause and filed herein notice of motion to be entered herein today. And thereupon came the complainants, The Bank of Kentucky and The Bank of Louisville, by Humphrey and Davie, counsel, and the complainants in all of the other causes, by Helm and Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendant-, Sam'l H. Stone, Geo. W. Long, and Chas. Finley, composing the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchise of the complainants under the act of November 11th, 1892, until the further order of the court herein, and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The
30 County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And, at the same time, The City of Louisville, appearing herein by H. L. Stone, city attorney, and The County of Franklin, appearing herein by Ira Julian and J. H. Polsgrove, and The Board of

Councilmen of Frankfort, appearing herein by Ira Julian, objected to said motion, and the same was argued and submitted, and the court, not being advised, takes time.

And at the same time came The Board of Councilmen of the City of Frankfort and The County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of The Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without waiving the effect of said demurrers, filed answers of the said Board of Councilmen of the City of Frankfort and The County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. *H.* Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bills of complaint.

And the said causes, having been argued by counsel upon the said general and special demurrers, as well as upon the demurrers of The City of Louisville, *was* submitted, and the court, not being advised, takes time.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

31 FIRST NATIONAL BANK, Complainant, *vs.* SAMUEL H. STONE, ETC., Defendants. } No. 6575.

The demurrer of the defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of The First National Bank, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify, as counsel for the defendants, Samuel H.
32 Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on the 9th day of May, 1898, the following order was entered:

Came this day the complainant in the above-styled case, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant in this case also filed notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions; and also came the City of Louisville and objected to the filing of said supplemental bills of complaint and said motions and filed herein affidavits to be read in each case; and also came the City of Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties; and, the court being advised, it is now ordered, adjudged, and decreed that the said defendants in the above-styled cases are enjoined and restrained as follows:

The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainants or any of them for the years 1895, 1896, 1897, and 1898 or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action
33 against any of the complainants on account of assessments heretofore made and certified for the years 1893 or 1894 or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

Amended & supplemental bill above referred to is as follows:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK, Complainant, *vs.* SAMUEL H. STONE, &c., Defendants.	Amended and Supplemental Bill.

The First National Bank, complainant herein, *and* by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this court of the motion for an injunction the defendants, Samuel H. Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now

threatening to assess and will as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original
34 bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessments to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt, by distraint and otherwise, to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator or attempting to collect any tax from your orator for the year 1898 or any other year until the final order and determination of this court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

G. W. Lewman says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

G. W. LEWMAN.

Subscribed and sworn to before me by G. W. Lewman this May 6th, 1898.

HUSTON QUIN,
N. P., J. C., Ky.

Commission expires with next Kentucky legislature.

35 And on the 4th day of June, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This day came the complainant and offered an amended bill herein; to which the defendant objected; and the court, being advised, allowed said amendment to be filed except the 2d paragraph thereof, which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding so far as it affected State taxes.

Then came the defendant The City of Louisville and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

Amended bill is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
S. H. STONE ET AL., Defendants. } Amended Bill.

The complainant, The First National Bank, amends its bill of complaint herein, and respectfully shows to the court that on the 5th day of June, 1888, it was adjudged by the court of appeals of Kentucky that the Bank of Kentucky had a charter contract right, irrepealable in nature, and running through its extension, which does not expire until October 1st, 1909, to discharge itself of all its tax burdens, State and local, by the payment of fifty cents on each share of its capital stock.

36 The principal office of said Bank of Kentucky is in Louisville, Kentucky. It has a capital and surplus of $2,716,550, whereas the total capital and surplus of all the national banks, seven in number, doing business in the city of Louisville is only $3,811,343.

Your orator shows that the Bank of Kentucky accepted the terms of the Hewitt law, and thereby consented to an increase of its taxation as follows:

1. An increase of from fifty cents to seventy-five cents on each share of its capital stock.

2. An additional tax for State purposes of the cur-ent rate on real estate on all its surplus over ten per cent. of the par value of its stock.

3. An additional tax for municipal purposes on the real estate owned by the bank for conducting its business.

One of the considerations which induced said bank to accept the provisions of the Hewitt law was to secure uniformity of taxation on capital engaged in banking business, and after that bank and all others in Louisville (except your orator, and its failure was not by design, but oversight) accepted the provisions of the Hewitt law there was in said city of Louisville equality in taxation upon all the banks of the city, and this equality remained undisturbed for over six years, when the Commonwealth of Kentucky, having the power to preserve uniformity, which had, as aforesaid, lasted over six years, disturbed and destroyed that uniformity by the passage of the act of November 11, 1892, referred to in the original bill. The passage and attempted enforcement of said act resulted in the litigation and adjudication particularly set out in the original bill, the effect of which is that other banks as well as the Bank of

37 Kentucky, together employing the great bulk of banking capital engaged in the business of banking in the city of

Louisville, is taxed only in the method provided for in the Hewitt law, hereinbefore and in the original bill set out, whereas, if your orator must pay under the *lat* of November 11, 1892, it will have to pay in the aggregate more than three times as much as it would pay is taxed on the same principle as those banks which have contracts with the State under the Hewitt law aforesaid.

Your orator respectfully shows that this discrimination against it in favor of other capital similarly employed, brought about by the voluntary action of the Commonwealth of Kentucky, will result in the greatest injustice and oppression to it and may result in driving it out of business entirely, and your orator respectfully submits that it was and is the purpose of the national banking act and its amendments to protect institutions organized thereunder against such discrimination.

Your orator further shows that under the laws of Kentucky provisions is made for a State board of equalization, which annually meets at the capitol of the State, at Frankfort, and there equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted, governing the State board of equalization, and the said board has been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board
38 of equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revose their action, or not, as they think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard.

The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided as to the equalization of personal property, as follows:

SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average

per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall ve counted as one."

39 Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value, all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never *be* been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes and to provide for a State board of equalization."

The result of enforcing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the cash value of their property, while your orator, under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full value of all its assets, and is denied the privilege accorded to the individual citizens of the State of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of Federal Constitution, and is discriminated against your orator in favor of the individual citizens of the State, contrary to the provisions of the national banking act and its amendments.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

40 HELM & BRUCE,
Solicitors for Complainant.

George W. Lewman says he is the president of the complainant, and that the statements contained in the foregoing amended bill are true.

G. W. LEWMAN.

Subscribed and sworn to before me by George W. Lewman this 20th day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with next session of the Kentucky legislature.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
S. H. STONE, &c., Defendants. } #6575. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of First National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

41 2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

42 And on the 25-h day of June, 1898, the following decree was entered :

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendants' demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be, and the same is, overruled, and that the said demurrers of the defendants be, and the same are, sustained, and that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with costs to the defendants, to be taxed.

And now come the complainant and prayed an appeal in open court and tendered *their* assignments of errors; whereupon the court allows the appeal and orders the assignment of errors to be filed, and fixes the appeal bond herein at $1,000.

Assignment of errors above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIRST NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6575.

The complainant assigns the following as the errors of the court in the above-styled case of which complaint is made:

1st. The court erred in sustaining a demurrer to the bill of the complainant.

2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

43 3rd. The court erred in refusing to allow 2nd paragraph of the amendment to be filed.

4th. The court erred in holding that the complainant could be subjected to the tax of the city of Louisville under the general law when the great bulk of moneyed capital engaged in the banking business in the city of Louisville is taxed at a rate so much less onerous, amounting to not more than one-third as much as the tax against complainant, if it may be taxed under the general law.

HELM & BRUCE,
Sol. for Comp't.

And on the 25th day of June, 1898, the following agreement was filed:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIRST NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6575.

By agreement of the parties hereto no citation need be issued or served.

HELM & BRUCE,
Sol. for Comp't.
H. L. STONE, *City Att'y.*

Bond above referred to is as follows:

44 Circuit Court of the United States, District of Kentucky.

FIRST NATIONAL BANK OF LOUISVILLE
vs.
SAMUEL H. STONE ET AL. } No. 6575.

Know all men by these presents that we, First National Bank of Louisville, G. W. Lewman, & Charles J. Doherty, are held and firmly bound unto Samuel H. Stone, Charles Finley, & George W. Long in the sum of one thousand dollars, to be paid to the said Samuel H. Stone, Charles Finley, and George W. Long, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 21st day of November, A. D. 1898.

Whereas the above-named First National Bank of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named First National Bank of Louisville shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FIRST NAT'L BANK,
By G. W. LEWMAN, *Pres't.* [L. S.]
G. W. LEWMAN. [L. S.]
CHARLES J. DOHERTY. [L. S.]

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk, U. S. Court.

Approved:
THOS. SPEED, *Clerk.*

45 DISTRICT OF KENTUCKY, ss:

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 44 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and seal this 1st day of December, 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: File No. 17,219. Kentucky C. C. U. S. Term No., 634. The First National Bank of Louisville, appellant, *vs.* Samuel H. Stone, Charles Finley, and George W. Long *et al.* Filed December 12th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 635.

THE FIRST NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED DECEMBER 12, 1896.

(17,220.)

(17,220.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 635.

THE FIRST NATIONAL BANK OF LOUISVILLE, APPELLANT,

vs.

THE CITY OF LOUISVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1898.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at its regular term, begun and held at the Federal court hall, in the city of Louisville, on 21st day of February, 1898.

Present: Hon. John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6576.

Be it remembered that heretofore, to wit, on April 17, 1897, came the complainant, First National Bank, by its counsel, Helm and Bruce, and filed in the clerk's office of our said court their bill of complaint and exhibits against the above-named defendants, City of Louisville; which bill of complaint is in the words and figures as follows, to wit:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

First National Bank, a citizen and resident of the State of Kentucky, brings this bill against the City of Louisville, a corporation of the State of Kentucky deriving its rights and powers from the statute law of Kentucky duly enacted for the government of cities of the first class; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the acts of Congress of the United States, and especially under the acts in relation to national banks, commonly known as the national banking act, on the 22 day of October, 1863, and its charter rights under its said organization lasted for twenty years, and its charter life was extended and renewed for twenty years, from Sept. 6, 1882, in the manner provided by said national banking acts.

Your orator shows that it has all the powers, privileges, and immunities granted by said national banking acts to banks incorporated and organized thereunder, and is and has been, since its organization, engaged in the banking business in the city of Louisville, Kentucky.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky approved May 17, 1886, known as the "Hewitt bill," and hereafter more particularly set out and for brevity called the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this, to wit, that there were four banks chartered by said State prior to the year 1856 which held charter contracts beyond the power of the State to repeal. Said banks are hereafter referred to as the "old banks." These banks had a large

capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city, and district tax—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respective charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations, desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the
3 State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred dollars of so much heir surplus, undivided surplus, undivided

profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it was provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it was further provided that any officer having in charge the affairs of such bank, institution or corporation who should refuse, when duly called upon for the purpose, to allow his books to be investigated, should be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, should be fined not less than five hundred dollars and not more than one thousand dollars.

It was further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, should, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due.

It was further provided that if such tax be not paid, the cashier and his sureties should be liable for the same and twenty per cent. upon the amount, and any State bank, institution or corporation should thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing, under the seal of such bank, and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

Your orator shows that from the 1st day of July, 1887, although it was not by the United States banking acts bound to submit to taxation under the "Hewitt bill," it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said "Hewitt bill," and the said State, through its proper officers, received and appropriated said taxes paid by your orator as aforesaid.

Your orator has not, and never had, any real estate.

4 In the way above stated, your orator accepted the provisions of the "Hewitt bill."

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes, at the current rate then assessed upon real estate upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards, on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill," and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time, reported to the auditor in the manner provided by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described.

Par. 3. Your orator respectfully shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust

companies of the city of Louisville, including your orator, upon the other, that pending the litigation which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such actions as might be necessary to settle and adjudge the right- and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof marked A.

5 As further evidence of the contract at that time made between the city of Louisville and its sinking fund, and the various banks and trust companies of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.
B. Banks whose charters had been granted subsequent to 1856.
C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigations.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks of the city of Louisville including your orator paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those actually involved in the test cases, paid the whole amount of the taxes claimed as against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision could be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof marked A.

Your orator though not bound to do so under the national banking acts, yet in common with the other national banks, and in reliance upon its contract with the State, paid said tax upon its gross receipts.

The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 4. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th

of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer, and secretary of state is by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise, the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the number and real value thereof; the highest price at which such stock was sold at the *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require.

6 Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values, shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, shall by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties

and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction. Your orator further shows to the court that the tax for State and municipal purposes attempted to be imposed upon all trust companies and banks, including your orator, under the present revenue law, approved November 11, 1892, is very much more onerous than the tax imposed under the "Hewitt bill" of May 17, 1886.

And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the city of Louisville is claiming the right and is threatening to collect from your orator has not been assessed by the said city of Louisville, but said pretended assessment has been made or attempted to be made by the State board of valuation and assessment, consisting of the auditor, secretary of state and treasurer of the State.

Your orator further shows that the auditor of the State acting under said pretended authority has heretofore certified said assessments to the county clerk of Jefferson county for the years 1893 and 1894, who in turn has certified the same to the proper tax collecting officer of the defendant, The City of Louisville.

Your orator respectfully shows that the pretended assessment against your orator's franchise by the State board of valuation and assessment for the year 1893 amounts to $898,731.23 and for the year 1894 amounts to $884,726.00. Your orator further shows that the tax rate for the city of Louisville for the year 1893 was $2.17, and for the year 1894 was $1.88, and that said illegal taxes claimed by the defendant, The City of Louisville, upon said pretended assessment for the year 1893 *is* $19,502, and for the year 1894 *is* $16,632, and exceeds the amount which your orator would have to pay under the "Hewitt bill" by over $28,500.

Your orator further shows that the claim of the defendant, The City of Louisville, that it has the right to collect said taxes from your orator by distraint as well as by suit casts a cloud upon your orator's right to pay taxes under and in accordance with its contract contained in the "Hewitt bill," and the claim of the said city of Louisville of its right to collect said taxes by distraint or suit injures your orator's stock and stockholders irreparably.

Par. 5. Your orator respectfully shows to the court that the existing laws of the State of Kentucky do not provide for taxing the shares of your orator as permitted by the act of Congress, but attempts to subject to taxation its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to do so, and contrary to the act of Congress in such cases made and

provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress. And your orator respectfully submits that said statute of the State of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

Your orator further shows that there is no other law of the State of Kentucky providing for the taxation of banks except for the taxation of their tangible property.

7 Your orator further shows and submits to the court that by reason of the formal contract entered into by all the other banks and trust companies in the city of Louisville, and by reason of the former adjudication in favor of said banks and trust companies establishing the validity of said contracts, they will escape local taxation, except on the houses owned by them, respectively, in which they respectively do business, and your orator coming as it does into direct competition with said institutions will be driven out of business if subjected to local taxation, wherefore it respectfully insists that it is protected by the acts of Congress against such unjust discrimination.

To the end, therefore, that your orator may not be subjected to the false claims and suits which will be instituted by the city of Louisville, and that it may be spared the irreparable injury which it will suffer by attempts to collect said taxes by distraint and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendant, The City of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said city of Louisville, its officers and agents to refrain from endeavoring by distraint or by suit or otherwise from collecting or attempting to collect any of the taxes heretofore certified to it as aforesaid, or any part thereof, based upon the illegal assessment against the franchise of your orator until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendant, The City of Louisville, from collecting or attempting to collect by distraint, suit, or otherwise, the illegal taxes aforesaid improperly assessed against your orator's franchise and properties aforesaid, and from collecting any of said taxes or claimed penalties in behalf of said city, and for all general, equitable and proper relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

G. W. Lewman says he is president of complainant, and that the statements contained in the foregoing bill are true.

G. W. LEWMAN.

Subscribed and sworn to before me by G. W. Lewman, this 17 day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

8 Exhibit "A" with the foregoing bill is as follows:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same; but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in

9 any manner or to any extent prejudice the banks or companies paying it, or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks ans companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid; but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions in-

volved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary & Treasurer.

Stipulation between the City of Louisville, the Commissioners of the Sinking Fund of the City of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the City of Louisville, the Commissioners of the Sinking Fund of the City of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of the said board, and the Mayor of the City of Louisville, on the one part, and the various banks, trust, and title companies of the city of Louisville, acting by Humphrey & Davie and Helm and Bruce, attorneys, of the other part—

First. That in February, 1894, it was agreed between the City of Louisville and the Board of Sinking Fund Commissioners, acting together in the interest of the said city, and the various banks, trust, and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, rep-

resenting class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of the city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill that that should exempt all banks and companies falling within that class from the payment of taxes except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them under the terms and conditions named
12 in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof; but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

And thereupon the following process issued:

The President of the United States of America to the City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you in our said court by First National Bank, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States of America, and the seal
13 of our said circuit court, hereto affixed at the clerk's office of said court, in Louisville, this 17th day of April, A. D. 1897, and in the 121st year of our Independence.

Attest:

[SEAL.]

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 7th day of June next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

And the marshal returned same with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in chancery to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

And on the 27th day of May, 1897, the following stipulation was filed:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant.
} No. 6576. Stipulation.

It is stipulated and agreed that the defendant, City of Louis-
14 ville, may file a demurrer to the complainant's bill and an answer at the same time without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant, City of Louisville.

Said demurrer is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6576. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Bill of Complaint of First National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and
15 humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant, City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27th day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

Answer filed on 27th day of May, 1897, is as follows:

16 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendant. } No. 6576. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of First National Bank, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering:

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

17 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this

could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State, repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2) of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, or had no right to retire therefrom or amend or repeal the same, as provided for in section six (6), article two (2) of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or

others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to subject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $28,500.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
18 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the

validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

19 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be

deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all

statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

20 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not

impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States, that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises, or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that it is now, or was at the institution of this action, threatening to collect any taxes from the complainant, upon the assessment for the years 1893 and 1894, or either of them.

This defendant denies that it will by its officers, or either of them, unless restrained by this honorable court, proceed by distraint, or otherwise, to collect said alleged illegal tax upon said alleged illegal assessments, or when it has no lawful right to do so, or that the alleged claim of this defendant, that it has the right to collect said taxes against the complainant, casts a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the complainant will be subjected to much or any harassment or litigation, or unnecessary or any costs, or that complainant, or its stockholders, will be greatly or irreparably or at all injured by the alleged false claims of this defendant, or its alleged attempts by distraint or suit to collect said taxes, or that it has made or is making any false claim for taxes against the complainant, or that it has made, or is now making any attempt by distraint, suit, or otherwise, to collect any taxes from the complainant, held to be unlawful under said decision of June 1, 1895.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensborough *v.* Daviess County, and other bank-tax cases, wherein the same legal questions were involved and issues were made as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court in said three cases delivered June 1, 1895, and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky and other bank-tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or

21 national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or

by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations: that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the expiration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896, and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

This defendant denies that the existing laws of the State of Kentucky do not provide for taxing the shares of stock of the complainant as permitted by act of Congress, or that the franchise law of said State taxes the franchise granted by the Congress of the United States, or taxes its intangible property, surplus, undivided profits, and investments without lawful right to do so or contrary to the act of Congress in such cases made and provided, or that the complainant has never consented to said method of taxation, or that such consent was necessary, or that the complainant has always or at any time protested against the same as illegal or contrary to the act of Congress; and this defendant denies that said statute is repugnant to the act of Congress in such cases made and provided or because of such alleged repugnancy it is void or of no binding force as against the complainant.

This defendant denies that the capital of the four old banks was about equal to the combined capital of all the other State banks, or that the courts of Kentucky, for that reason or on any other ground held that the national banks could not be subjected to a heavier burden of taxation than said old banks, or that in view of the alleged fact that said four old banks have a capital stock about equal to the combined capital of the other State banks, the complainant is entitled to be put upon a footing as to taxation equally favored with said old banks, or cannot be taxed at a higher
22 rate than said old banks without an unjust discrimination against the complainant and other national banks, or contrary to the act of Congress.

This defendant denies that the Commonwealth of Kentucky has deliberately or at all undertaken to violate, or that it has violated, its alleged contract with the banks of said State, or any of them, or that by the voluntary action of the State the said four old banks, or either of them, have been restored to their original alleged contract right to discharge themselves from all taxation by the payment of fifty cents on each share of their stock in lieu of all other taxation, or that complainant and the other national banks of the city of Louisville, or either of them, is or would be entitled to be put upon the same footing as to taxation with said old banks.

This defendant denies that by reason of the alleged formal contract alleged to have been entered into by all the other banks and trust companies establishing the validity of said alleged contracts, they or either of them will escape local taxation, except on the houses owned by them respectively, in which they respectively do business, or that the complainant, coming in competition with said institutions, will be driven out of business if subjected to local taxation, or that any unjust or other discrimination between the complainant and said other institutions will result.

This defendant, therefore, submits that the complainant was not,

at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant, City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

23 And on the 28th day of May, 1897, the following order was entered:

This day came the complainant in the above-entitled cause and filed herein notice duly served on the defendant, and moved the court to grant it an injunction until the further order of the court enjoining and restraining the defendant, The City of Louisville, from taking any steps [illegible] the enforcement of the taxes set forth in the said bill of comp[illegible].

And came the said City of Louisville, by H. L. Stone, its city attorney, and objected to the said motion, and, the same coming on to be heard, was submitted, and the court, not being advised, takes time.

And at the same time this cause came on to be heard upon the demurrers, general and special, heretofore filed herein by the said City of Louisville, and the same were argued by counsel and submitted to the court, and the court, not being advised, takes time.

And on the 4th day of June, 1898, the following order was entered:

It is ordered by the court that the preliminary injunction heretofore granted in this case be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This day came the complainant and offered an amended bill herein; to which the defendant objected; and the court, being advised, allowed said amendment to be filed, except the 2 paragraph thereof, which the court disallowed without prejudice to the right of the complainant to raise that question in another proceeding, so far as it affected State taxes. Then came the defendant, The City of Louisville, and filed a demurrer to the amended bill, which is sustained; to which the complainant excepts.

24 Said amended bill is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE ET AL., Defendants. } Amended Bill.

The complainant, The First National Bank, amends its bill of complaint herein, and respectfully shows to the court that on the 5th day of June, 1888, it was adjudged by the court of appeals of Kentucky that the Bank of Kentucky had a charter contract right, irrepealable in nature, and running through its extension, which does not expire until October 1st, 1909, to discharged itself of all its tax burdens, State and local, by the payment of fifty cents on each share of its capital stock.

The principal office of said Bank of Kentucky is in Louisville Kentucky. It has a capital and surplus of $2,716,550, whereas the total capital and surplus of all the national banks, seven in number, doing business in the city of Louisville is only $3,811,343.

Your orator shows that the Bank of Kentucky accepted the terms of the Hewitt law, and thereby consented to an increase of its taxation as follows:

1. An increase of from fifty cents to seventy-five cents on each share of its capital stock.

2. An additional tax for State purposes of the current rate on real estate on all its surplus over ten per cent. of the par value of its stock.

3. An additional tax for municipal purposes on the real estate owned by the bank for conducting its business.

25 One of the considerations which induced said bank to accept the provisions of the Hewitt law was to secure uniformity of taxation on capital engaged in banking business, and after that bank and all others in Louisville (except your orator, and its failure was not by design, but oversight) accepted the provisions of the Hewitt law there was in said city of Louisville equality in taxation upon all the banks of the city, and this equality remained undisturbed for

over six years, when the Commonwealth of Kentucky, having the power to preserve uniformity, which had, as aforesaid, lasted over six years, disturbed and destroyed that uniformity by the passage of the act of November 11, 1893, referred to in the original bill. The passage and attempted enforcement of said act resulted in the *the* litigation and adjudication particularly set out in the original bill, the effect of which is that other banks as well as the Bank of Kentucky, together employing the great bulk of monied capital engaged in the business of banking in the city of Louisville, is taxed only in the method provided for in the Hewitt law, hereinbefore and in the original bill set out, whereas, if your orator must pay under the law of November 11, 1893, it will have to pay in the aggregate more than three times as much as it would pay if taxed on the same principle as those banks which have contracts with the State under the Hewitt law aforesaid.

Your orator respectfully shows that this discrimination against it in favor of other capital similarly employed, brought about by the voluntary action of the Commonwealth of Kentucky, will result in the greatest injustice and oppression to it and may result in driving it out of business entirely, and your orator respectfully sub-
26 mits that it was and is the purpose of the national banking act and its amendments to protect institutions organized thereunder against such discrimination.

Your orator further shows that under the laws of Kentucky provision is made for a State board of equalization, which annually meets at the capitol of the State, at Frankfort, and there equalizes the assessments of all the real and personal property of the individual citizens of the State in the manner and on the basis hereinafter stated. Said board regularly meets each year and undertakes to carry out the provisions of said act, and especially the sections hereinafter quoted, governing the State board of equalization, and the said board has been in the habit of meeting each year for a great many years in the past. By said act it is provided as follows:

"SECTION 4274. Percentage of value to be fixed on real property—Report to county judges—Witnesses.—The said board of equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State board of equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard.

27 The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts."

And by said act it is further provided as to the equalization of personal property, as follows:

"SECTION 4275. Percentage of value to be fixed on personal property.—The said board of equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands, shall be used, and in determining such per centum, fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one."

Said act provides the method of ascertaining the cash value of said real and personal property, and after thus ascertaining said cash value, all assessments are equalized on a basis of seventy per cent. of that cash value.

Said act was first adopted May 10, 1884, and has never been repealed, but has been amended from time to time, and has been each year from that time to the present enforced and carried out, especially the sections above quoted, by the said State board of equalization. Said act is entitled "An act to equalize assessments for revenue purposes and to provide for a State board of equalization."

28 The result of enforcing this statute is that the individual citizens of the State are taxed on a basis not exceeding seventy per cent. of the fair cash value of their property, while your orator, under the terms of the act of November 11, 1892, fully set out in the original bill, is taxed on the full book or apparent value of all its assets, which is much in excess or its real value, and is denied the privilege accorded to the individual citizens of the State of having the assessment of its property equalized on the basis of seventy per cent. of its cash value.

Your orator shows that it is thus denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

Wherefore your orator prays as in the original bill, and for all such general and equitable relief as to the court may seem proper and just under the circumstances; and your orator will ever pray.

HELM & BRUCE,
Solicitors for Complainant.

George W. Lewman says he is the president of the complainant, and that the statements contained in the foregoing amended bill are true.

G. W. LEWMAN.

Subscribed and sworn to before me by George W. Lewman this 20th day of June, 1898.

HUSTON QUIN,
Notary Public for Jefferson County, Kentucky.

My commission expires with the next session of the Kentucky legislature.

29 Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
versus
CITY OF LOUISVILLE, Defendants. } #6576. In Equity.

The Demurrer of The City of Louisville, Defendant, to the Amended Bill of Complaint of First National Bank, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's amended bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to the said amended bill, and for cause of demurrer states:

1. That the said amended bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said amended bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, this defendant does demur thereto, and humbly demands the judgment of the court whether it shall be compelled to make any further or other answer to the said amended bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

30 I hereby certify, as counsel for the defendant, City of Louisville, in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant, City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, Charles P. Weaver, who states that he is the mayor and chief officer of the defendant, City of

Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

CHAS. P. WEAVER.

Subscribed and sworn to before me by said Charles P. Weaver, mayor, this 23 day of June, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

And on the 25th day of June, 1898, the following decree was entered :

This cause having been submitted and brought on to be heard on the complainant's motion for a temporary injunction, and on the defendant's demurrers to the bill of complaint and the amended bill of complaint, and due deliberation having been had, it is ordered, adjudged, and decreed that the complainant's said motion be, and the same is, overruled, and that the said demurrer of the defendant be, and the same *is*, sustained, and that the complainant's bill
31 of complaint as amended be, and the same is hereby, dismissed with costs to the defendant, to be taxed.

And now came the complainant and prayed an appeal in open court and tendered *their* assignment of errors; whereupon the court allows the appeal and orders the assignments of errors to be filed, and fixes the appeal bond herein as $1,000.

Assignment of errors above referred to is as follows :

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIRST NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } 6576.

The complainant assigns the following as the errors of the court in the above-styled case of which complaint is made :

1. The court erred in sustaining the demurrer to the bill of the complainant.

2nd. The court erred in sustaining the demurrer to the bill of complaint as amended.

3rd. The court erred in refusing to allow paragraph two of the amendment to be filed.

4th. The court erred in holding that the complainant could be subjected to the tax of the city of Louisville under the general law when the great bulk of moneyed capital engaged in the banking business in the city of Louisville is taxed as a rate so much less onerous, amounting to not more than one-third as much as
32 the tax against complainant, if it may be taxed under the general law.

HELM & BRUCE, *For Compl't.*

And on the 25th day of June, 1898, the following agreement was filed:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

FIRST NATIONAL BANK, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } 6576.

By agreement of the parties hereto no citation need be issued or served.

HELM & BRUCE,
Sol. for Comp't.
H. L. STONE, *City Att'y.*

Bond above referred to is as follows:

33 Circuit Court of the United States, District of Kentucky.

FIRST NATIONAL BANK OF LOUISVILLE
vs.
CITY OF LOUISVILLE.

Know all men by these presents that we, The First National Bank of Louisville, G. W. Lewman, & Charles J. Doherty, are held and firmly bound unto the City of Louisville in the sum of one thousand dollars, to be paid to the said City of Louisville, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 21st day of November, A. D. 1898.

Whereas the above-named First National Bank of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named First national bank shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FIRST NAT'L BANK, [L. S.]
By G. W. LEWMAN, *Pr's't.*
G. W. LEWMAN. [L. S.]
CHARLES J. DOHERTY. [L. S.]

Sealed and delivered in presence of—
THOS. SPEED.

Approved:
THOS. SPEED, *Clerk.*

34 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 33 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, as the same appears from the files and records in my said office.

Witness my hand and seal this 1st day of December, 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Endorsed on cover: File No. 17,220. Kentucky C. C. U. S. Term No., 635. The First National Bank of Louisville, appellant, *vs.* The City of Louisville. Filed December 12th, 1898.

Supreme Court of the United States.

SAMUEL H. STONE, AUDITOR, &c ..... *Appellants*,

vs. No. 356.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF KENTUCKY..... *Appellees*,

SAMUEL H. STONE, AUDITOR, &c. ..... *Appellants*,

vs. No. 385.

THE FARMERS BANK OF KENTUCKY..... *Appellee.*

FARMERS BANK OF KENTUCKY..... *Appellant*,

vs. No. 386.

SAMUEL H. STONE, AUDITOR, &c..... *Appellees.*

SAMUEL H. STONE, AUDITOR, &c..... *Appellants*,

vs. No. 387.

THE DEPOSIT BANK OF FRANKFORT..... *Appellee.*

BRIEF FOR STONE, AUDITOR, &c.

Statement of Case.

On the 17th day of May, 1886, the Legislature passed "An act to amend the revenue laws of the Commonwealth of Kentucky," known as the Hewitt law (article 2, chapter 92, General Statutes of Kentucky), under which the various banks of the State that had accepted the provisions thereof claimed they had an irrevocable contract of exemption from all local

taxation. This claim was never recognized by the State and local authorities, because the Hewitt law was, by its express terms, repealable at pleasure of the Legislature.

In 1891 the new Constitution of Kentucky provided that—

> "All property whether owned by natural persons or corporations shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property." (Section 174.)

In 1892 the new revenue law of the State required the banks and other corporations to pay local taxes as provided by section 174 of the State Constitution.

The banks claimed said provisions of the State Constitution and act of 1892 were null and void as to them, because repugnant to the contract clause of the Federal Constitution; and having instituted suits in the State court for injunctions against collection of local taxes from them, the Court of Appeals of Kentucky, through Judge Pryor, in 1895, decided the banks had irrevocable contracts of exemption under the Hewitt law; and, under the mandate in said suits, a broad order of injunction was entered in the Franklin Circuit Court on 21st of January, 1896, restraining the county and city from collecting, or attempting to collect, any local taxes from these banks (see copy of said order on page 10 of record in Bank of Kentucky Case), from which order appeals were prayed, which are now pending in Kentucky Court of Appeals.

But in March, 1897, the Kentucky Court of Appeals (through Judge Paynter) on appeals by the banks against the city of Owensboro, decided that the Hewitt law was repealable and the contracts of the banks thereunder had been abrogated by the Kentucky Constitution and act of 1892, and overruled the opinion of Judge Pryor on that subject.

Then on 17th day of April, 1897 (notwithstanding the former sweeping order of injunction in State Court), the present suits

for a second injunction were instituted by the banks in the United States Circuit Court, claiming contracts under their charters and under the Hewitt Bill, and also averring that it had been finally adjudicated they had an irrevocable contract of exemption; but the petitions, as will be observed, do not plead the former judgment as an estoppel. The circuit judge (Taft) decided the banks did not have an irrevocable contract under the Hewitt law, but granted the second injunction on the ground that the former judgment was an estoppel as to parties and privies; and from that judgment this appeal is prosecuted.

Specification of Errors.

Sam'l H. Stone, Auditor, &c., defendants below, say that the decree entered herein, by the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, on the 25th day of June, 1898, is erroneous for the following reasons:

1st. Because the court erred in overruling the demurrers of each of said defendants to the plaintiff's petition herein.

2d. Because the court erred in overruling the several pleas to the jurisdiction herein.

3d. Because the court erred in refusing to permit defendant board of councilmen of the city of Frankfort to file the amended answer offered to be filed herein on the 25th day of June, 1898.

4th. Because the court erred in adjudging that by reason of the several pleas of res judicata relied on by complainants, the complainants have established an irrevocable contract with the Commonwealth of Kentucky, under the provisions of the Act of May 17, 1886, known as the Hewitt Bill.

5th. Because the court erred in enjoining and restraining Sam'l H. Stone, Auditor, Charles Finley and Geo. W. Long from proceeding to value the franchises of complainants, under the Act of November 11th, 1892, for the years 1895, 1896, 1897

and 1898, and for all subsequent years until expiration of complainants charters, and also erred in enjoining and restraining the several counties and cities, defendants herein, from endeavoring to collect any tax upon any valuation, from complainants, and also erred in adjudging that complainants, by making payment of taxes to the State in accordance with said Hewitt law, is discharged in full from all taxes, and also erred in adjudging that the provisions of the present Constitution of Kentucky and the Act of November 11th, 1892, in so far as they are intended to provide, or do provide, for any assessment or taxation of complainants' property, rights of property, or franchises, except under said Hewitt Bill, are repugnant to the Federal Constitution, and void.

Brief of Argument.

The banks contend that Article two (2) of the Hewitt Bill constituted an irrevocable contract between them and the State. That proposition, the Auditor and "Board of Valuation and Assessment," together with the counties and cities, deny. Upon the determination of the question thus presented the merits of these cases depends.

In 1886, when the Hewitt Bill was adopted, the banks' charters were repealable at the legislative will, by virtue of the general Act of February the 14th, 1856, which expressly reserved to the Legislature the power to repeal all charters and grants thereafter adopted. The partial immunity from taxation granted the banks by the Hewitt Bill was, therefore, a mere gratuity, and subject to revocation at any time by the Legislature, independently of any express reservation of the repealing power. The right of repeal, however, was expressly reserved, both by the said Act of 1856 and also by section six (6) Article two (2) of the Hewitt Bill itself. It would seem, therefore, that there is no reasonable ground whatever on which to question the power of the constitutional convention

of 1891 to abrogate the said Hewitt law and subject all banks of the State to an equal and uniform system of taxation.

The circuit court of the United States for the District of Kentucky, in these cases, and also the Kentucky Court of Appeals, in the Owensboro cases now pending in this court, decided said question (as to irrevocable contract rights) adversely to the banks. The judgments of those two courts on that subject are so well fortified by the opinions filed in support thereof, one written by Judge Taft and the other by Judge Paynter, that further argument on our part, as to that question, would be superfluous. See opinion by Judge Taft herein as to the Northern Bank of Kentucky, and said opinion by Judge Paynter—Appendix to this brief.

The banks, however, claim that, by reason of certain judgments (set forth in their bills), the Auditor, &c., and the court are estopped from all inquiry into the said original question of contract.

But the claim of estoppel is not available in these cases, because:

1st. The judgments against the city of Frankfort, relied upon by the banks, were duly appealed from by said city, and same are now pending, subject to reversal or modification, in the Kentucky Court of Appeals.

2d. Neither the Auditor nor the Board of Valuation and Assessment, nor any member thereof, was a party or privy to the former suits.

3d. The adjudication relied on was as to a matter of law (not of fact), and is not conclusive in these cases.

4th. The question of contract decided in the former suits was not the same as the question of contract presented in these cases; nor did the question arise under the same circumstances in the former as in these cases.

5th. The banks, in their bills of complaint, have opened said judgments and the original question of contract, and

thereby waived and defeated the erroneous presumption upon which they rely.

6th. The chancellor will not interpose to aid in giving effect to an erroneous and unjust adjudication.

There are other reasons against said estoppel—as the absence of jurisdiction, comity between the State and Federal Courts, and the pendency of suits in the Franklin Circuit Court between the parties hereto involving the same questions presented in these cases—which will be considered in general suggestions at the close of this brief.

I.

Appeals Pending in Kentucky Court of Appeals.

> "When an appeal is taken from a judgment, it is evident the appellant can not have the full benefit of his appeal if during the time necessary to procure a decision in the appellate court the judgment may be used against him to the same extent as if no appeal had been taken. * * * In perhaps a majority of the States the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties."
>
> Freeman on Judgments, 4th Edition, Vol. 1, § 328, and authorities there cited.

And that is the effect of appeal in Kentucky.

Yocum v. Moore, 4 Bibb., 221.

Talbott v. Morton, 5 Littell, 326.

Cox v. Griffith, 12 Ky. Law Rep., 842.

Civil Code of Practice, Ky., § 747 (last edition).

Appeal without supersedeas does not generally prevent execution of the judgment, and the lis pendens is a bar to a second suit upon the same cause of action. But an issue that is "sub judice" in a "lis pendens" is not "res judicata" for the purpose of estoppel in another case, on a different cause of action.

We deem it unnecessary to cite further authority in support of the foregoing proposition.

In the Deposit Bank case, the said appeal now pending in Kentucky Court of Appeals, is the first appeal to that court in that case.

The allegation that the decision in that case was, by agreement, to be controlled by the decision in other cases is unfounded in fact, and is expressly controverted by the answer to the bill of that bank herein.

The judgment in said Deposit Bank case is not only erroneous, but void, same being a judgment for injunction in a suit by the city for taxes, in which suit no ground whatever for injunction is set forth or relied upon. The entry of same was a clerical misprision, and permitted by oversight on part of the court. All the foregoing in regard to the Deposit Bank judgment is apparent from the record in the case of that bank.

Said appeals in the Bank of Kentucky and Farmers Bank cases are second appeals in the same cases, for error generally, and especially because the judgments below (in Franklin Circuit Court) do not conform to the mandates of the Court of Appeals.

Said appeals, therefore, involve, not only the original question of contract, but also the question as to the force and effect of the judgments below (in Franklin Circuit Court) now relied on by the banks herein.

That said appeals were duly prosecuted and are now pending may be seen by reference to § 734 of the Civil Code of Practice of Kentucky and the printed records herein.

Deposit Bank, pages 116 to 120.

Bank of Kentucky, pages 144 to 147.

Farmers Bank, pages 235 to 239.

The question of what effect should be given the judgments relied on by the banks as a technical estoppel herein is the principal question involved in each of said pending appeals. That is a question peculiarly appropriate to the jurisdiction of

the Kentucky Court of Appeals, as that court should be allowed to determine the meaning and effect of its own mandate.

As recently declared by this court in Phœnix Insurance Co. v. Tennessee, 161 U. S., pages 183 to 186—

> "There is no contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a State court should operate as an estoppel."

Said judgments can not have, in this or any other court, any greater or other effect than that which is given them by the said Court of Appeals.

Revised Statutes, U. S., § 905.

Hence, whatever effect that court may give the said judgments on the trial of the said pending appeals, will determine their effect in all other courts, and will be sustained by this court on writ of error to that court.

It is manifest, therefore, that said judgments should not, in these cases, be awarded any conclusive effect during the pendency of said appeals. The banks will have a plain remedy by writ of error from this court, should their alleged contract rights be impaired by the opinion of the Kentucky Court of Appeals as to the proper effect of said judgments.

II.

Parties and Privies.

The records show that neither the Auditor nor the "Board of Valuation and Assessment," nor any member thereof, was a party to either of the former suits.

Were they or either of them privy to the former suits?

> "In the law of estoppel one person becomes privy of another (1) by succeeding to the position of that other as regards the subject of the estoppel; (2) by holding in subordination to that other."
>
> Bigelow on Estoppel, 5th Edition, page 142, and authorities there cited.

In what sense the Auditor and said board may succeed to the position of any county or city as regards the subject of estoppel herein, or hold in subordination to any county or city, is difficult to understand.

It is suggested that the counties and cities are the real parties in interest, and that the Auditor and said Board are nothing but their agents in the matter of assessment, etc., of franchises.

That view ignores the interest of the State and State officers, and assumes a relationship of principal and agent which does not exist.

The State of Kentucky is one of the real parties in interest herein. Article two (2) of the Hewitt Bill, if irrepealable, is a limitation upon the taxing power of the State, not only as to local but also as to State taxation. It prescribes not only the rate of taxation for State purposes, but also the mode of taxation both for State and local purposes. It ties the hands of the State in the matter of taxation and compels the State to conform its revenue system to said Article two (2) of the Hewitt Bill. Confusion, inequality and want of uniformity in the most important branch of the State government is the result.

The State is certainly interested in a litigation which may contract the boundary of the exercise of its sovereignty and nullify important porvisions of its organic and statutory laws, independently of the interest of any county or city.

The State has the right to dictate its own internal policy, and to protect each taxpayer from inequalities in the matter of taxation. That right the proposed estoppel would take from the State without allowing it a day in court.

Besides, the State is directly interested in local taxation generally, and in the taxation imposed by each county and city. Certain important functions of the State government are performed through local officers—as the collection of State revenues, service of process, keeping and preservation of public records. Hence local taxation is, to a large extent, only an indirect mode of taxation for State purposes.

The proposition, that the State is estopped by a litigation to which it was not a party, and to which no person authorized to act for the State was a party, and when the State does not succeed to the position of nor hold in subordination to any person who was a party, needs no refutation. Indeed the State can not have been party or privy to the former suits, because the State can not be sued without its consent. The State, therefore, is not estopped by said judgments.

The State not being estopped, are the officers of the State, acting only for and on behalf of the State, estopped? The State can not act except through her representatives. Every act of an authorized representative of the State is an act of the State. And wherever an authorized representative of the State, in discharge of a duty prescribed by the State, is estopped, the State is thereby estopped.

Persons authorized to act as State officers are subject to estoppel, and to injunction, and to mandamus, independently of the State's liability thereto.

But that is upon the hypothesis that said persons threaten to transcend their official authority. The State officers made parties to these suits do not threaten to transcend their official authority. The Auditor and "Board of Valuation and Assessment," in making the assessment of franchises and certifying same to the county clerk, act only as prescribed and directed by the State Constitution of 1891 and the revenue Act of 1892, and in doing so they are the direct representatives of the State. The proposed estoppel, therefore, against the Auditor and said Board would be in effect and in fact an estoppel against the State, in the matter of the assessment, &c., of franchises.

Having shown that the State is not estopped by said judgments, it follows necessarily that the Auditor and "Board of Valuation and Assessment" are not estopped thereby. Said Auditor and Board constitute the only medium through which the assessment and certification in controversy can be made. Then of what value, effect or consequence, would the State's

exemption from estoppel by said judgments be, if the Auditor and Board of Valuation and Assessment be estopped by said judgments from making the assessment, etc.?

In Re Ayer, 123 U. S., 443, and authorities therein cited.

See also opinion of Judge Taft herein as to Northern Bank of Kentucky, found in printed record of Deposit Bank of Frankfort case, on pages 99 to 102, which shows that the State was not privy to the former suits, and is not estopped by said judgments.

Of course said judgments do not affect the State's interest in this litigation, nor its authority in the matter of said assessment and certification.

Said erroneous judgments, rendered in 1896, do not invalidate the State Constitution of 1891 nor the revenue Act of 1892, the State not having been party or privy to the former suits, and the legislation complained of having been enacted prior to the erroneous judgments relied upon by the banks.

The official authority of said State officers is, of course, coextensive with the authority of the State, in respect to the assessment and certification in controversy.

The question, therefore, of whether or not said State officers would be acting ultra vires in making the assessment and certification in controversy must be considered and determined independently of said erroneous judgments.

As to the suggested relationship of principal and agent between the counties and cities and the Auditor and Board of Valuation and Assessment, Mechem on Agency (1889 Ed.), page 1, declares:

> "Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party, the agent, is employed to represent and act for the other, the principal, in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority."

In what respect does the Auditor and the Board of Valuation and Assessment represent any county or city? and how is any part of the Auditor's or said Board's authority derived from any county or city? Whom do the Auditor and said Board represent in making the assessment and certification of franchises? and from what source do they derive their authority? The Auditor and said Board, in making the assessment, etc., as provided in the revenue act of 1892, represent the State, and they derive their authority to act in that matter directly and entirely from the State. There is no contract, express or implied, between any county or city and the Auditor or said Board of Valuation and Assessment. Hence there is no such relation as that of principal and agent between them.

The agency which renders a judgment against the principal an estoppel against the agent, or vice versa, must be a well defined agency. The character and scope of the agent's authority must appear, within which scope the agent may act for the principal and the principal may control the action of the agent.

But why should we discuss the relation between a municipality and the Auditor and said Board, when it must be conceded that said judgments do not estop the State; from which it follows necessarily that the Auditor and Board of Valuation and Assessment, representing the State in making the assessment, etc., are not estopped by the said judgments.

We would suggest also that the State officers made parties hereto have an interest in this litigation, apart from that of the State or any municipality. Each of them having been elected by the people of the entire State, having assumed the responsibilities of office, and having executed bond for the faithful performance of their official services as prescribed by the Constitution and laws of Kentucky, they are not only officially, but also personally, interested in the subject of this litigation. Is an officer not materially interested in the responsibilities and duties of his office? Do not the bills of complaint herein charge them with a violation of law and such

unauthorized action as would render each of them personally responsible in damages to the banks? And are they estopped from denying the charge of misfeasance in office, and from asserting their official responsibilities and duties, by a former litigation to which neither of them was a party and in which their interest was not represented? (Saying nothing of several thousand dollars' costs, for which Sam'l H. Stone, Chas. Finley and Geo. W. Long will be individually liable, if the injunction prayed for herein be granted.)

If the exercise of the State's sovereignty may be limited and prescribed, and the duties and responsibilities of State officers determined by a litigation to which neither the State nor any officer of the State is a party, because an interested county or city of the State is a party thereto, the Commonwealth and all State officials should not be indifferent to any litigation to which a county or city of the State may be a party.

The State of Kentucky and the Auditor and Board of Valuation and Assessment, through their authorized representative, the Attorney General, are now in this court protesting against such estoppel, asking a trial of these causes upon their merits, and declaring that this is the first day they have ever had in court to try their rights now in controversy.

The fact that the bills of complaint do not name the State nor the Auditor nor the Board of Valuation and Assessment as a party defendant herein, does not affect the real character of the cases. It is perfectly obvious upon the face of said bills that the object of the suits is to enjoin Sam'l H. Stone, Chas. Finley and Geo. W. Long, and through them enjoin the Auditor and Board of Valuation and Assessment, and through them enjoin the State of Kentucky from giving effect to the State Constitution of 1891 and revenue Act of 1892 in so far as the same require the assessment, etc., of complainants' franchises for the purposes of taxation.

In Re Ayer, 123 U. S., 443, and the authorities therein cited.

Neither the State of Kentucky, therefore, nor the Auditor

nor the Board of Valuation and Assessment, nor either Sam'l H. Stone, Chas. Finley or Geo. W. Long is estopped herein by the said judgments, neither of them having been a party or privy to the former suits.

The State not being estopped, no municipality is estopped; because there is such a community of interest between the State and each municipality, with respect to the subject of estoppel, that neither can be estopped without affecting the interest of the other. Indeed the right of the State extends, not only to assessment of the franchises and certification of same to the county clerk, but also to collection of the taxes thereon. If collection of the taxes be inhibited, the assessment and certification would be futile.

The authorities on the subject of "Privity" are well collated and commented upon in the "American and English Encyclopedia of Law," vol. 21, pages 184 to 234. But the case of In Re Ayer, 123 U. S., 443, which is a clear, exhaustive and correct exposition of the law on this subject, and which has been repeatedly approved by this court, with the authorities therein cited, will be found conclusive as to the proposition of estoppel herein.

The fact that these are really suits against the State, in violation of the 11th Amendment to the Constitution of the United States, will be further considered in this brief, in what we shall suggest on the subject of jurisdiction.

III.

Adjudication as to Matter of Law.

> "It must not be supposed that the parties would be estopped by a judgment in one cause of action from disputing in another cause of action the doctrines of law applied in the first. * * * What is law for one must be law for all; and there could be no advantage in extending the doctrine of res judicata to such cases."
> Bigelow on Estoppel, 5th Edition, pages 100 to 101, and authorities there cited.

Mr. Justice Bradley, in the case of South Ottawa v. Perkins, 94 U. S., page 267, expressed the view of this court on that subject as follows:

> "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be the law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place and not a law in another in the same State."
>
> "And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges.
>
> "The doctrine of estoppel is totally inadmissible in the case."

The banks herein propose that, by reason of estoppel against the truth, and in contradiction of the truth, in a court of equity, the law as to about a dozen banks of Kentucky is not the law as to the remainder of the 254 banks of Kentucky; that the law as to the Deposit Bank of Frankfort, is not the law as to the State National Bank of Frankfort; that the law as to the Bank of Kentucky is not the law as to the Farmers Bank of Kentucky; that the law as to the Farmers Bank of Kentucky at Frankfort is not the law as to the same bank at Georgetown, nor in Scott county, etc.

In the case of Richardson v. The City of Boston, 19 Howard, U. S., page 268, this court (as to the principal issue in the case) said: "A party is not concluded by an erroneous opinion of the court pronounced in a former case" (between same parties).

The court of Appeals of New York, in Goodale v. Tuttle, 29 N. Y. Reports (2 Tiffany,) 467, declared: "A recovery upon no title alleged, which recovery was based wholly upon a mis-

understanding of the law, though it would be binding in the particular case, would not estop any right which could be availed of in a subsequent litigation."

To the same effect is Bernard v. City of Hoboken, 3 Dutcher's (2 7 N. J. Law) Reports, 412.

In the case of Packet Co. v. Sickles, 5 Wallace, 585, Messrs. Carlisle & Davidge, for the plaintiff in error, in stating their side of the case, said:

> "We are estopped only from denying the particular points of facts found, to-wit, a parole promise. The fact, if true, that we did not at the former trial make objection on this ground was, at most, but an admission for the purposes of that case. It was an admission of law, which does not estop in any subsequent case."

This last proposition was not controverted by the other side, and appears to have been concurred in by this court in that case.

The recognized accuracy and ability of said counsel, entitle their deliberate statement as to a proposition of law to some consideration. Especially when the same seems to have been approved by the opposite party and the court in the said case. In support of the said proposition said counsel referred to the case of Richardson v. City of Boston, 19 Howard, 268, in which this court expressly so held.

In the case of Sawyer v. Woodbury, 7 Gray (Mass.), 502, the court, in speaking of this character of estoppel, said:

> "This estoppel is attended with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly by excluding the truth. It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affimatively or negatively, and not by way of inference."

In Last Chance Min. Co. v. Tyler Min. Co., 157 U. S., 691, this court said:

> "The essence of estoppel by judgment is that there has

> been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means it was reached."

The foregoing and other authorities establish beyond reasonable controversy that an adjudication as to a matter of law in one case between the parties thereto is not conclusive in any subsequent litigation between the same parties concerning a cause of action different from that formerly adjudicated.

'Tis only findings as to distinct issues of fact in the trial of one cause of action that are, under any circumstances, available as estoppel in the trial of another cause of action.

The causes of action now under consideration are different from those in which said judgments were rendered, both as to the taxes demanded and the alleged breach of contract.

The banks must concede that the suits now being tried are different causes of action from the said former suits; otherwise, the present suits by the banks would be barred by the former suits.

Hence the erroneous decision by the State court as to a question of law, in said former cases, does not estop this court from deciding the same question according to law and the rights of the parties in these cases. (The difference between the question of contract tried in the former cases, and the question of contract presented in these cases, will be hereafter considered.)

The matter now proposed herein as having been adjudicated in said former cases is a matter of law (not of fact).

There was no issue nor finding of fact in said former cases. Article two (2) of the Hewitt Bill was cited and conceded. The acceptance thereof by the banks was alleged and conceded, and the only issue (as to Hewitt Bill contract) presented by the pleadings, and the only matter determined by the court, was as to the proper construction of said Article two (2) of the Hewitt Bill.

Whether or not there was an irrevocable contract between

the banks and the State, and whether or not the State had impaired the obligation of a contract, depended, in those cases, entirely upon the construction of that article.

Whether or not the banks declared, in those cases, that said article and their acceptance thereof constituted an irrevocable contract, is immaterial. Such declaration, if made, was only a conclusion of law. It having been conceded by the pleadings that the banks had accepted the Hewitt Bill, and that the same (accepted) constituted a contract between the banks and the State, the issue arose only as to the construction of the contract—as to the terms and conditions, the meaning and import of the contract—whether the same was, by its terms and meaning, revocable or irrevocable?

That was a question which could only be determined by examination and construction of said article. The issue of law having been thus definitely presented, the State court, in said former cases, adjudged: not that there was a contract (there was no issue as to that), but that, according to the proper construction of said article two (2) the same was irrevocable; and, consequently, that the State Constitution of 1891 and the revenue law of 1892 impaired the obligation of a contract between the banks and the State, and were, to the extent of said impairment, in conflict with the Federal Constitution, and void.

It is this erroneous construction, by the State court, of said article two (2), which is now proposed as res judicata and conclusive of the proper construction of said article in these cases.

The Hewitt Bill was a general statute of Kentucky; and any question as to the proper construction thereof is a question of law. Hence said erroneous adjudication of the State court as to the meaning, import and effect of said general statute (article two (2) of the Hewitt Bill) is not conclusive in these cases.

No better exposition of this subject can be found anywhere

than in Bigelow on Estoppel, 5th Edition, in the chapter on "Judgments in Personam," beginning on page 80 of said edition.

Section 2 of said chapter, after reviewing Duchess of Kingston's case, Cromwell v. Sac, and the other leading cases which extended the doctrine of estoppel by judgment to its utmost limit, concludes (on page 103), as follows:

> "We have now ascertained the nature of the pleas of former judgment and of former verdict, and the distinction between them, the former operating as a bar to subsequent actions founded on the same demand; the latter operating as a bar to the further litigation of the special findings of the jury irrespective of the nature of the cause of action."

'Tis, therefore, only as a "former verdict" that said judgments could be made available in these cases. Estoppel by "former judgment" bars the relitigation of the same cause of action, and applies both to matters of law and matters of fact.

Estoppel by "former verdict" is not confined to the same cause of action. It extends to other causes of action; but is only available to prevent the relitigation of distinct questions of fact formerly determined between the same parties.

It will be found on examination that, in each of the leading cases on which the doctrine of estoppel by "Former Verdict" is founded, the adjudication turned upon some issue or issues of fact. Hence the doctrine, founded upon those decisions extends only to matters of fact. Any dicta in any case to the contrary does not affect the principle nor the law thus established. A title, or legal right, often depends upon the determination of a point of fact. Where that is the case the ascertainment of the fact determines also the title or legal right. This does not conflict in the least with the doctrine of "Former Verdict," above stated.

Various deductions, in a given case, may follow the determination of a single point of fact—as that the plaintiff should

recover, or that the defendant is exempt from taxation—but it is not such deductions, but only the point of fact determined, that may be relied on as an estoppel in another cause of action.

Had the determination of said former cases turned upon a question of acceptance of the Hewitt Bill by the banks, or other like question of fact, the determination of such question might, upon the principle announced in Cromwell v. Sac, be conclusive in these cases. But (as before stated) the said former cases did not turn upon any question of fact, nor upon any mixed question of law and fact, but turned entirely upon a question of law as to the proper construction of a general statute.

If the doctrine of estoppel by "Former Verdict" embraces the construction of a general revenue law, it also embraces the construction of every other character of laws—as statutes of limitation, statutes of frauds, statutes against usury, etc. Indeed, if that be true, it embraces the construction of the organic law of a State and of the United States. The organic and statutory laws, adopted by the people and expounded by the courts, would not constitute the law. The law, in its common acceptation, would not be the law. Certain statutes, as revenue laws, which the organic law declares must be equal and uniform, would not be equal nor uniform. Yet that is the proposition advanced by the banks herein. They contend that the constitutional principle that "taxation must be equal and uniform" does not apply to them—that the same applies to some banks of Kentucky, but not to these banks, or if to these, only in some cases and at some places.

In view of the banks' contention in these cases, we can understand why the courts of this country hesitated before taking the first step in the direction of estoppel by "Former Verdict."

Aspden v. Nixon, 4 Howard, 467.

Packet Co. v. Sickles, 24 Howard, 340.

The courts, while they recognized the convenience and the justice of the doctrine when properly applied, also saw and

apprehended the danger of its abuse. The language of Justice Keating, applied by this court in Cromwell v. Sac, is certainly applicable to these cases, namely: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

As declared by Mr. Bigelow, in his work on Estoppel, 5th Edition, page 101, "There could be no advantage in extending the doctrine of res judicata to such cases."

That the courts, both of this country and England, concur with Mr. Bigelow in the foregoing, is apparent from the fact that the said doctrine has never been held to embrace a construction of a general law, in any reported case. At least we have not found nor been cited to any such case.

Even the cases in which the doctrine has been extended to the construction of private contracts are few and arose under exceptional circumstances, and each of such cases will be found on examination to be sui generis and confined, as authority, within very narrow limits. The case of Tioga Railroad v. Blossburg Railroad, 20 Wallace, is a case of that character. The case turned upon the meaning of a short clause in a lease, which depended upon external facts and circumstances, which were referred to and determined by a referee. The judgment of the court was founded entirely upon the report of the referee as to said clause of the lease.

The case of Southern Minnesota Co. v. St. Paul Co., 55 Fed. Rep., is not a case to the purpose of the banks herein. That was a second suit upon substantially the same cause of action.

Besides, the former suit turned upon two distinct issues of fact, which were submitted to and determined by a referee, and, as in the said Tioga case, the judgment of the court was based entirely upon the report of the referee. In that case the court said: "In the former case two findings of fact were made and reported by the referee, upon which the decree in that case undoubtedly depended."

The dictum of the said Minnesota Co. case is not sustained by the authorities therein cited.

However, the doctrine of estoppel by "Former Verdict" is not based upon exceptional cases; but upon such leading cases as Outram v. Moorewood, 3 East, 346; Richardson v. City of Boston, 19 Howard, 267; Duchess of Kingston's case; Packet Co. v. Sickles, 24 Howard, 333, and Cromwell v. Sac, 94 U. S., 351, which, fairly construed, extend only to questions of fact.

In the first of said last-named cases, Outram v. Moorewood, the court held:

> "If a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded, by way of estoppel, in another action between the same parties or their privies, in respect to the same fact or title."

Evidently the "title," held in said case to be conclusively determined by the former verdict, is a title tried and found by a jury.

The same is clear from the language of this court in the said case of Richardson v. City of Boston, 19 Howard, 268, namely:

> "If on the last trial new evidence has been discovered, or if the question of title submitted on the first trial was connected with instructions in law which have since been found to be erroneous; or if a different verdict would have resulted from the different instructions given on the last, it is plain that the first verdict could have but little or no persuasive effect.
>
> "Title is often a question of mixed law and fact, and a party is not concluded by an erroneous opinion of the court pronounced in a former case."

This comports with the opinion of this court in the case of South Ottawa v. Perkins, 94 U. S., 267, before referred to, in which this court said: "That which purports to be the law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circum-

stances of parties. * * The doctrine of estoppel is totally inadmissible in the case."

It also comports with the language of this court in Keokuk & Western Railroad v. Missouri, 152 U. S., 316: "It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision."

In the case of New Orleans v. Citizens Bank, 167 U. S., the former adjudication relied on turned upon the construction of a private charter, not a general statute of the State.

And it appears that the City of New Orleans, in that case, did not rely upon the principle that estoppel by "Former Verdict" does not apply to an erroneous adjudication as to a matter of law. Hence that subject was not considered by this court in that case. Nor was it necessary that the same should be considered by this court in that case.

Section 905, of the Revised Statutes of the United States, required that this court should give to the judgments relied on as estoppel in that case the same effect which the Supreme Court of Louisiana had awarded them in the case of Citizens Bank v. Board of Assessors, 48 La. Ann., 35, which was the basis of the opinion of this court in said case of New Orleans v. Citizens Bank.

It was not the intention of this court in the last-named case to overrule, nor change, the doctrine of estoppel by "Former Verdict" announced by the standard writers on Estoppel, after a thorough review and careful examination of all the principal adjudications on that subject. If there be error in the effect awarded the Louisiana judgments, the responsibility is upon the Supreme Court of that State.

We submit that the erroneous adjudication relied upon by the banks herein, being entirely as to a matter of law and the proper construction of a general statute of the State, the same is not conclusive in these cases.

IV.

The Question of Contract in Said Former Cases was not the Same as the Question of Contract Presented in These Cases, nor did the Question Arise Under the Same Circumstances in the Former as in These Cases.

The question of contract in said former cases was: Whether or not Article two (2) of the Hewitt Bill was repealable, in view of that article itself independently of any judicial construction thereof?

The question of contract presented in these cases is: Whether or not that article was repealable, in view of the article itself and the recent adjudications of the Kentucky Court of Appeals construing the same?

When the construction of a State statute is proposed in a Federal court the first inquiry always is, has the same been construed by the highest court of the State in which the statute was enacted? And whatever construction the highest court of any State may place upon a statute of that State the same is always followed by the Federal court, except where the construction infringes the Constitution or some law or treaty of the United States.

Likewise, the State courts will generally follow former judicial constructions of statutes. Will always do so, except where the former construction is clearly erroneous.

The principle of "stare decisis" prevails in all courts. Upon that principle even decisions that are clearly erroneous are sometimes followed and applied. Hence the law, in its application at least, is every day changed more or less by judicial decisions, and a change in the judicial construction of a law is, as to all practical purposes, a change of the law. The effect is the same where the change is made by judicial determination as where it is made through legislative enactment.

In Douglas v. County of Pike, 101 U. S., 686, this court said: "As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly. * * * Undoubtedly this court will always feel itself bound to respect the decisions of the State courts and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. * * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Hence the last opinion of the Kentucky Court of Appeals, in March, 1897, delivered by Judge Paynter, construing Article two (2) of the Hewitt Bill, must be read into said article, as if said opinion had been a legislative enactment.

The question of whether or not that article, with said opinion read into it and being a part thereof, is repealable is a very different question from that involved in said former cases.

Had the Kentucky Legislature of 1897 amended said article according to the import of said opinion, would the question of the proper construction of the article thus amended be the same question as that determined in said former cases? Clearly not. Yet the effect of said opinion upon the question was the same as such legislative enactment would have had. The banks may raise a question as to what the effect of such enactment would have been. Still the question of contract, after such enactment, is different from the question of contract before such enactment.

Suppose that, prior to the adjudication now relied on by the banks, the said opinion of the Kentucky Court of Appeals, delivered by Judge Paynter, had been rendered. What would have been the effect of the same upon the trial and determination of the said former cases? Probably the determination of those cases would have been directly the reverse of what it was. Suppose also that there had never been any construction of said article by the courts of Kentucky. Would not the question now in this court, as to construction of the same, be a different question from what it now is in view of said last adjudication by the State court?

Had the Legislature of Ohio, in 1886, enacted a revenue law identical with the said Hewitt Bill, and the courts of Ohio had construed same to be irrevocable, and the courts of Kentucky had construed same to be repealable, if two cases, one from Ohio and the other from Kentucky, involving a construction of that statute, were brought to this court for review, this court would hold the Ohio act to be irrevocable and the Kentucky act to be repealable, because of the different constructions of the same by the courts of said States.

So that the question of the proper construction of a State statute varies and changes, according to the different adjudications of the same by the courts, especially the State courts.

A question of law embraces all laws that must be considered in its determination, and every change of such laws, whether by legislative enactment or judicial construction, changes the question.

Nor did the question arise under the same circumstances in the former as in these cases.

When said former cases arose, there had never been any judicial construction of said Article two (2) of the Hewitt Bill.

When these cases arose, there had been two different adjudications of the same by Kentucky Court of Appeals, the last adjudication overruling the former and showing by argument and authority that the former was erroneous.

There could not be a greater change in the circumstances attending the trial of any case or question than the said reversal in the law of the State relative to the subject of the controversy in the case.

The law of the case, as to the rights in controversy between the parties, was thereby changed and completely reversed. A new ground of defense against the injunction, and a new ground for demanding the taxes in controversy, were thereby conferred upon the defendants to the former suits.

In Cromwell v. Sac, 94 U. S., 356, this court said: "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time.

A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

The foregoing principle, more than once announced by this court, applies to legal grounds of recovery or defense no less than to matters of fact, not considered in the former suit.

If a material fact, not considered in the former suit, may be adjudicated in the second suit, certainly a law, not considered and which could not have been considered in the former suit, may be considered and its effect determined in the second action.

In Nesbit v. Riverside Independent District, 144 U. S., 620, this court said:

> "Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others. * * * Many reasons may induce or prevent the introduction into the first case of all the facts. It is

> well said in Cromwell v. Sac, page 356, that: 'Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand,' " etc.

The opinion here quotes in full, and applies, the language of Cromwell v. Sac, which we have herein before quoted. Then the opinion observes another aspect of the case, and concludes as follows:

> "So we have in this case a new question not presented in the Des Moines suit, the existence of facts never called to the attention of the court in that case, which in themselves create a perfect defense."

In the case of Howlett v. Tarte, referred to with approval by this court in Cromwell v. Sac, Mr. Justice Willes said:

> "It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action. I think we should do wrong to favor the introduction of this new device into the law."

Is not the law of a case in behalf of a defendant a defense in his behalf? And is he estopped from relying upon the law in his behalf in a second suit against him, upon a new cause of action which arose after the said change of the law, because he failed to rely upon the same in a former suit tried before the law was enacted or established by judicial construction?

At the time of said former adjudication the author of the opinion therein evidently thought it practicable to maintain a system of equal and uniform taxation among the banks of the State under the Hewitt Bill. Subsequent events have shown

that to be a mistake. New banks have been organized. The charters of old banks have expired. Numerous banks have voluntarily accepted the provisions of the new Constitution of the State. So that now the estoppel claimed herein would give a few banks of the State an enormous advantage over the other banks and a monopoly of the banking business of the State.

These conditions did not exist when the former erroneous decision was rendered, and the same would not have been rendered under the present conditions.

Besides, the revenue laws of Kentucky, in respect to the taxation of banks, as expounded by the latest adjudication of the Kentucky Court of Appeals, and as declared in the State Constitution, have now been generally recognized by the banks as the established and organic law of the State. Had this condition existed in 1895 the said former decision would not have been rendered. To now give the said former judgments, based on the opinion written by Judge Pryor, the effect as estoppel asked by the banks, would be to give said opinion directly the opposite effect from that which the author thereof and the Kentucky Court of Appeals intended that the same should have. That opinion aimed at uniformity. The estoppel under present conditions would produce the opposite effect.

In support of the proposition that to constitute an estoppel by "Former Verdict" the question in the second case must be identically the same question, and must arise under identically the same circumstances as in the first case, we need not cite any other authority than New Orleans v. Citizens Bank, 167 U. S.

V.

Judgments Opened and Waived by the Banks.

"If by the pleadings of a party entitled to the benefit of a judgment, he, in seeking by a proceeding ab extra to enforce it, opens the judgment, it is open for general purposes in the second proceeding; and the party opening it can not insist upon the rule of res judicata, if the record of the judgment disclose error such as shows that there was no cause of action whatever."

Bigelow on Estoppel, 5th Edition, page 103, and authorities there cited.

In the case of Brownsville v. Loague, 129 U. S., pages 502 to 505, this court said:

"Under the legislation between the issuing of the bonds in 1870 and this application in March, 1886, authority to levy taxes to pay debts of the character represented by these judgments, when uncompromised, did not exist at the latter date; so that plaintiff was remitted, in the assertion of a right to that remedy, to the time when the bonds were issued, and as the city had then no power to tax to pay them other than that derived from the act of February 8th, 1870, the relator by his pleadings opened the facts which attended the judgments for the purpose of counting upon that act as furnishing the remedy which he sought.

"In this he in effect asked the court to order the levy of a tax to pay the cupons, and relied upon the judgments principally as creating an estoppel upon a denial of the power to do so.

"Thus invited to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff ex debito justiciæ to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued? * * * In the case at bar it appeared from the judgment records, if not from relator's petition, that the bonds

were issued under an abrogated statute, and were consequently void, and that the respondents possessed no power to tax to pay them, because that power was given only by the statute which had ceased to exist. * * * Res judicata may render straight that which is crooked, and white that which is black, but when application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error intervened in the rendition of such judgments, but that they rest upon no cause of action whatever.

"The judgment is reversed and the cause remanded, with directions to dismiss the petition."

There appears to be no material difference between the said case of Brownsville v. Loague and these cases in so far as the question of estoppel is concerned. In that case the judgments were conclusive of Loague's right to the amount recovered, and could not have been rendered without a finding that the bonds and coupons were valid. The bonds and coupons and the judgments thereon being supposed to be valid, the power of the city to satisfy same was implied.

But the complainant, deeming it necessary or proper, went behind the judgments and disclosed the fact that they were based upon an abrogated statute.

The complainant himself having shown the invalidity of the judgments upon which he relied as an estoppel, this court declined to aid in giving effect to the judgments.

So in the cases now under consideration, the banks, deeming it necessary or proper, have themselves gone behind the judgments upon which they rely, and shown that the claim to exemption from local taxes and said judgments are based entirely upon Article two (2) of the Hewitt Bill, which had been abrogated before said judgments were rendered—same having been repealed by the present Constitution of Kentucky in 1891.

The banks, in their bills of complaint herein, set forth their charters and the history thereof, also Article two (2) of the Hewitt Bill and their acceptance thereof, and declare that the same constitute an irrevocable contract between the banks and the State. The said bills also set forth such portions of the State Constitution and statutes as are claimed to be an impairment of said alleged irrevocable contract. Said bills set forth fully and particularly the entire grounds of the judgments relied on, and invite inquiry as to the original question of contract and invoke judgment of the Federal court as to same.

The banks, in their bills, thus opened the law and facts which attended said judgments and set forth the said charters and Hewitt Bill and laws of Kentucky for the purpose of counting upon the same as furnishing a Federal question of contract, and inducing the Federal court to take cognizance of their complaint.

Why do the banks invite inquiry into the original question of contract if no such inquiry may be made? And why do they invoke judgment of the Federal court as to same, if no such judgment may be rendered? If this court may not examine the grounds of the judgments relied on, why were those grounds fully and particularly set forth in the bills?

Did the banks allege and set forth in their bills matters which they did not intend should be considered by the court?

To answer that said grounds (including a complete transcript of the record and proceedings in each case) were set forth in explanation of the judgments, would be only an evasion of the question. Said judgments are set forth in the bills, but not as an estoppel nor as conclusive of the original question of contract; and were evidently only intended by the banks as a support to the claim of irrevocable contract.

Otherwise, one part of each bill is inconsistent with the remainder thereof—the court being invited and invoked to adjudge as to the original question of contract, and at the same time denied the liberty of doing so.

The claim of estoppel is diametrically inconsistent with the very nature and character of the bills of complaint themselves.

> "It has recently been held that where a person partly opens in his pleadings the facts of a judgment on which he relies, he can not object to the other party's treating the whole case as opened."
> Bigelow on Estoppel, 5th Edition, page 103.
> Weed v. Burt, 78 N. Y., 191.

By setting forth the grounds of said judgments the banks have shown that the judgments relied on rest upon no cause of action whatever.

Assuming, as said bills of complaint fully show, that there was no irrevocable contract between the banks and the State, it follows that there was no ground nor cause of action in behalf of the banks. Their suits for injunction and their resistance to the local taxes in controversy were without any foundation whatever.

The banks themselves, then, in their bills of complaint, having invited inquiry as to the original question of contract, and set forth the grounds of the judgments relied on, and shown that the same do not rest upon any cause of action whatever, said judgments are open for the purposes of this litigation and the bills of complaint should be dismissed.

The proposition that a party may apply to a court of equity for equitable aid, showing at the same time in his bill of complaint that he is not in truth entitled to the aid sought, and yet obtain assistance from the chancellor upon a presumption of evidence which his own bill shows to be contrary to the truth, and on that erroneous presumption have a decree in his favor contrary to the merits of the case, is not supported by any authority and is repugnant to reason and good conscience.

A litigant may waive any right he possesses. Especially, he may waive an unjust advantage accidentally obtained, and in every suit in equity upon a judgment or in which a judgment

is relied on, if the complainant sets forth the entire grounds of the judgment and relies upon the same, he thereby waives any conclusive effect of the judgment, as to the pending litigation, and, if there be any principle of estoppel that applies to every case, it is that a party litigant is estopped to deny what he himself has shown to be the truth.

VI.

Aid of Chancellor in Giving Effect to Judgments.

> "When a complainant in equity seeks the means of carrying into effect a decree or judgment rendered in another litigation, but not providing such means of execution, it devolves upon the complainant to show that the decree or judgment is right. * * * So Lord Redsdale and the House of Lords held in the year 1820; and so the Lord Keeper has declared in the year 1700; and so it has been laid down by other and later authorities."
>
> Bigelow on Estoppel, 5th Edition, page 102, and authorities cited.

In Wadhams v. Gay, 73 Ill., 428, the Supreme Court of Illinois, after reviewing the merits of the case and coming to the claim of estoppel, said:

> "Arriving, as we do now, to the conclusion that, upon the evidence in this case, as matter of fact, this consent decree does not rest upon any basis of real right and equity, we come to the inquiry whether a court of equity should lend its aid in carrying it into execution, or give relief which would be tantamount to that. * * * There is no ground in moral right, equity and good conscience to call upon a court of equity to interpose and assist in carrying it into execution. The only ground is, that it stands a decree, a technical right; and the true nature of the application is to enforce a technical estoppel. * * The decree rests on mistake. The jurisdiction of chancery is

> exercisable in relief against mistakes, not to carry them into execution. The decree is a misconstruction of the will, in declaring a life estate, when the will gave a fee, and although error of law is not to be alleged against a judgment or decree by consent, so as to reverse it, it does not necessarily follow that where an application is made by a bill in chancery for the aid of equity, in carrying the same into execution, and really to supply an omission therein, the character of the judgment or decree, as whether rightful or not, must be entirely shut out of view in determining whether the court will be moved to act, or remain passive. * * We are brought to conclude that, upon all the facts and circumstances, there is shown to be no equitable claim for interposition of a court of equity."

The foregoing opinion of the Supreme Court of Illinois was considered and approved by this court, in Gay v. Parpart, 106 U. S., 699—this court declaring as follows:

> "We can not better express ourselves than in the following language from the opinion of the court in the case before referred to (Wadhams v. Gay, 73 Ill.): 'Upon an appeal to equity by original bill to lend its assistance for carrying a decree into execution, because of an omission in the decree providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension and want of consideration, to remain passive.'"

The foregoing opinions of the Supreme Court of Illinois and of this court are fully sustained by Bigelow, Herman, Adams and all the other authorities, so far as we have examined.

Bigelow on Estoppel, 5th Edition, page 706, says:

> "The estoppel by record is legal, and hence, to give a court of equity jurisdiction to entertain it, it would be necessary to show some equity apart from the estoppel."

Herman on Estoppel and Res Judicata, Vol. 1, page 10, declares:

> "An estoppel can never be allowed, where it would itself perpetrate fraud, work injustice, or fail to protect the innocent."

"Adam's Equity," page 788, speaking of this kind of actions, says:

> "It is competent for the court, in respect of the special application, to examine the decree, and if it be unjust, to refuse enforcement."

Lord Sugden, on complaint of the same character as those herein, said:

> "I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree is right."
>
> O'Connel v. McNamara, 3 Dr. & Warren, 411.

This was fully concurred in by Lord Hardwick, who expressed the same view as follows:

> "When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong."
>
> 1 Eq. Cas. Abr. 83, pl. 3.

We understand the equity practice of this court to be substantially the same as that of the English court of chancery.

> "The jurisdiction in equity of the Federal courts is subject to the limitations of the Constitution, substantially the same as that of the English court of chancery."
>
> Foster's Federal Practice, 2d. Ed., Vol. 1, § 5.

And that, we may infer (with respect to these cases) from the language of this court in the case of Gelpcke v. City of Dubuque, 1 Wallace, 206, in which the court, speaking through Mr. Justice Swayne, said:

> "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."

If this court would not, in that case, "immolate truth, justice, and the law," in deference to the latest decision by the highest court of the State of Iowa in regard to the proper construction of the Constitution and statutes of that State, a fortiori, will this court not, in these cases, immolate truth and justice in deference to a rule of evidence which, in this instance, would contradict the truth and the law of each case under consideration.

See also, Semonin & Dixon v. Duerson, 13 Ky. Law Rep., 169, decided May 6th, 1891.

The foregoing authorities show:

1st. That, to be available herein, said judgments must appear to be just.

2d. That it is competent for this court to inquire as to the character and foundation of said judgments.

3d. That if it appears from the record, and especially if it appears from the banks' own bills of complaint, that said judgments are erroneous and unjust, the chancellor will not interpose, but remain passive.

Assuming that there was not, in truth, any irrevocable contract between the banks and the State, it follows necessarily that said judgments were erroneous and unjust, and that the banks' claim to exemption from local taxes is unfounded and without any consideration to support it.

To take the property of the citizen taxpayer against his consent, and without any consideration therefor, is repugnant to

good conscience. Yet that is what the banks propose herein, and that is what the injunctions prayed for herein would (if granted) in effect and in fact do.

The banks propose that this court exempt them from taxation without any consideration therefor, and thus impose the taxes which the banks should pay upon other taxpayers, thus taking the property of other taxpayers against their consent and without any consideration therefor.

Lexington v. McQuillans' Heirs, 9 Dana (Ky.), 517.

Another form of the banks' proposition herein is: That they be awarded the benefits of local government, local protection, and local improvements without charge or expense to them, and at the cost of other taxpayers.

The authorities in support of the doctrine, that the chancellor will not interpose to aid in giving effect to an erroneous and unjust adjudication, are unanimous. The English and American, State and Federal, decisions all concur on that subject.

Of course, this court will keep in mind the fact that, by remaining passive in these cases, the court does not impeach nor impair the said judgments. After dismissal of the bills herein, the said judgments will continue in all respects the same that they were before the institution of these suits. And the State courts will give to them their due and proper effect.

But this court will not exercise its equitable jurisdiction where no ground for the exercise thereof has been shown. Especially, will this court not interpose by the extraordinary writ of injunction, "which will never be granted except in cases of urgent necessity" (according to High on Injunction), for the purpose of enjoining a State from enforcing its own Constitution and revenue laws, upon any such grounds as those set forth in the bills of complaint herein.

This court will not undertake to administer equity by doing that which would be inequitable.

A party may, by some means, have obtained judgment upon

a promissory note that had been satisfied before the judgment was obtained, and the same may be enforcible, but this court would not aid in its enforcement.

Yet, such a judgment does not differ, in its equitable character, from the judgments which this court is now asked to enforce, if Article two (2) of the Hewitt Bill was, in truth, repealable.

That same was repealable, being shown by each Bill of Complaint herein. The chancellor, we submit, should not interpose, but should leave the complainants where they were before the institution of these suits.

As to the Cases Generally.

1st. Comparison of these with other Cases—

The several radical differences between these cases and that of New Orleans v. Citizens Bank, 167 U. S., are manifest.

1. In that case, appeals were not pending from the former judgments relied on. In these cases, such appeals are pending.

2. In that case, the parties and privies to the former cases were the same as in the subsequent case.

In these cases, the parties and privies are different from those of the former cases relied on herein.

3. In that case, the question determined in the former cases was not as to the proper construction of a general statute of the State. Besides, the objection that the former adjudication was as to a matter of law was not made nor considered; and the effect of the former judgments had been fixed and determined by the Supreme Court of Louisiana, which determination this court followed pursuant to § 905 of Rev. Stats. U. S.

In these cases, on the contrary, the question determined in the former cases was as to the proper construction of a general statute of the State; and it is earnestly and confidently urged that a former erroneous construction of a general statute of the State is not conclusive of that construction in a subsequent

case as to a different cause of action from that in which the erroneous construction was adjudged; and the effect of the particular former judgments relied on herein has not yet been determined by the courts of Kentucky in favor of the alleged estoppel, on the contrary, in Commonwealth v. Douglas, 15 Ky. Law Rep., 581 (decided December 16th, 1893), the Kentucky Court of Appeals held: That where a former judgment in one case has been overruled in another case, the last opinion destroys the effect of the former judgment as res judicata in subsequent cases.

4. In that case (New Orleans v. Citizens Bank), the question of contract determined in the former cases relied on was the same, and arose under the same circumstances as in the subsequent case.

In these cases, the question of contract presented is not the same, nor does it arise under the same circumstances, as in the former cases relied on herein.

5. In New Orleans v. Citizens Bank, the bank did not go behind the judgments relied on and show the same to be erroneous and unfounded and based upon no cause of action whatever, thereby waiving and defeating the presumption on which they relied, as the banks have done in these cases.

6. In that case, it did not appear, either from the bills of complaint or the record, that there was no consideration for the alleged exemption from taxation and no equity in the cause of complaint. Nor did it appear that the bank was not, in truth, protected by irrevocable contract.

In these cases, it appears from the record, and from the banks' own bills of complaint, that there is no consideration for the alleged exemption and no equity in the causes of complaint, and that the banks are not, in truth, protected by irrevocable contract of exemption.

In addition to the foregoing cardinal differences between the said Citizens Bank case and these cases, there are other differences that should be observed. When these suits were insti-

tuted there were pending in the Franklin Circuit Court at Frankfort, Ky., suit for mandamus, styled Board of Councilmen v. L. C. Norman, Auditor, &c., to which the Bank of Kentucky, Farmers Bank and Deposit Bank of Frankfort were parties, involving every question and matter involved in these cases, and in which the rights of said banks involved herein could have been, and would have been, fully protected, if not by the State courts, by writ of error from this court. Hence there was no necessity nor occasion for the appeal to equity herein. That suit is now pending in the said State court, but proceedings therein are embarrassed and restrained by the proceedings in these suits, in violation of § 720, Rev. Stats. U. S.

See printed record of Bank of Kentucky case, pages 111 to 138.

Besides, New Orleans v. Citizens Bank, 167 U. S., was notably a case sui generis. The Citizens Bank of New Orleans, while nominally a private corporation, was a quasi public corporation. Its capital had been advanced and furnished by the State. The State held a mortgage upon all its assets. No stockholder, except the State, had ever drawn any dividend. The State was represented in and controlled the directory thereof. The bank was indebted to the State to the extent of several millions of dollars. The extinguishment, or not, of that indebtedness depended upon the successful operation of the bank.

All taxes, therefore, paid by the bank were deducted from the State's dividends, and really paid by the State.

To have subjected the bank to the taxation involved in that case might have resulted in embarrassment and bankruptcy to the bank, and immense loss to the State. The foregoing were considerations for the exemption of that bank from all taxation, and were very material in the determination of said case.

The banks in these cases, on the contrary, are ordinary private corporations, instituted and conducted solely for private

gain, and not entitled to any privilege or immunity in the matter of taxation.

We will not tax the attention of the court by further comparison of these with other cases.

We regard the case of Phœnix Ins. Co. v. Tennessee, 161 U. S., as conclusive of these cases. So the case of Keokuk & Western R. R. Co. v. Missouri, 152 U. S., seems no less conclusive of the merits of these cases. This court will, itself, compare the last mentioned two cases (161 U. S. and 152 U. S.) with these cases.

2d. Inconsistent Positions Occupied by Banks—

The inconsistent positions occupied by the banks herein are obvious. They invite inquiry into the original question of contract and invoke judgment as to same. Yet they contend that there can not now be any inquiry as to that question nor adjudication of the same. They show in their bills that there was no irrevocable contract, yet undertake to show the contrary by a presumption which they have shown to be erroneous.

They claim, that said former judgments apply to all the taxes in controversy herein, and to all the parties hereto, and to the question of contract herein, and protect them against all taxation except as provided in the Hewitt Bill. Yet they ask this court to render a second judgment for the same purpose and to the same effect. According to the banks' construction of the said former judgments, the same are a complete bar to these suits by the banks.

In view of § 905, Rev. Stats. U. S., the banks must concede that this court should not give to the said former judgments of the State court any greater or other effect than is awarded them by the State court.

Yet the only ground for asking the interposition of the Federal court is that the State court will not award said judgments their due and proper effect.

Their (banks') only argument is, that the interest of the Re-

public requires an end of litigation, while they persist in the prosecution of unnecessary suits, for that which they claim they already have, and which is now sub judice in cases pending in the State courts.

3d. Jurisdiction—

We have deferred consideration of the subject of jurisdiction until after presentation of other aspects of the cases, because we thought the best method of showing the absence of jurisdiction, to be by showing in advance the real character of the cases. Having done so, we think it apparent, without any specific discussion of that subject, that no sufficient ground for the exercise of this court's jurisdiction has been shown.

We submit that, according to In Re Ayer, 123 U. S., 443, and authorities therein cited, these are suits against the State of Kentucky in violation of the 11th amendment to the Constitution of the United States. The State can not, without its consent, be enjoined from carrying into effect its own Constitution and revenue law, when the same do not infringe the Constitution nor any law or treaty of the United States. The State Constitution and revenue laws, in controversy, can not be carried into effect without the assessment and certification and collection of taxes pursuant thereto.

We submit also that, according to Phœnix Insurance Co. v. Tennessee, 161 U. S., there is no question of contract and no Federal question in these cases (after the original question of contract has been eliminated). Were these cases here on writ of error to the State court, the bills would be dismissed on authority of the said Phœnix Insurance Co. case.

These cases are here on appeal from the U. S. Circuit Court, but the fact remains, as in the last-named case, that there is no question of contract and no Federal question in the case, after it has been determined that the Hewitt Bill was repealable. 'Tis true that the U. S. Circuit Court will, where a Federal question remains in the case, dispose of the entire case.

But we do not understand that, on original bill in that court, after it has been ascertained that there is no ground for invoking the Federal jurisdiction the court will retain and exercise jurisdiction solely for the purpose of disposing of a non-Federal question. This court is familiar with the authorities pertinent to that subject.

After one decision to the contrary by a majority of the Kentucky Court of Appeals, it may seem presumptious to contend that there was never any substantial ground for a claim to irrevocable contract by virtue of the Hewitt Bill; but, in that contention, we are supported by the said opinions of Judges Taft and Paynter.

Supplement to the Revised Statutes of the U. S., Vol. 1 (1874-1881), page 175, section 5 of chapter 137, provides:

> "That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after said suit has been brought or removed thereto, that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

Besides, it is not every case involving a question of contract, of which the U. S. Circuit Court will exercise jurisdiction. To give the jurisdiction on the ground of contract, it must be "a case arising under the Constitution or laws of the United States," and this court has repeatedly declared that, to make such a case, it must involve "a construction of the Constitution or laws of the United States."

These cases do not involve any such construction. They involve only the construction of a State statute, and application of the principle of estoppel as a rule of evidence.

As to what constitutes a case arising under the Constitution

and laws of the United States, see Foster's Federal Practice, 2d Ed., Vol. 1, § 17, and authorities there cited.

It will be observed from the foregoing act of congress, that the jurisdiction of the U. S. Circuit Courts, in cases of this character, is more limited than the jurisdiction of this court on writs of error to the State courts.

See Foster's Federal Practice, 2d Ed., § 477.

Independently of the Federal jurisdiction, there is no equitable jurisdiction of these cases. It appearing that the banks are not, in truth, protected by irrevocable contract, there is no equity in their bills. Their bills do not present a cause of action that is cognizable in equity.

In support of the foregoing proposition, as to equitable jurisdiction, we need not cite any other authority than "Foster's Federal Practice," 2d Ed., Vol. 1, § 12.

The position of the banks herein is precisely the same as if they were asking the chancellor to aid in giving effect to a judgment upon a promissory note shown by their bills to have been paid and satisfied before rendition of the judgment thereon.

It is so obviously fair, just and right, that taxation should be equally apportioned among the beneficiaries thereof, that this court has uniformly held and now holds: That, where any person claims immunity from equal taxation, he must establish the exemption beyond doubt.

That principle applies with increased force to cases in which the claim of exemption is based solely upon a technical estoppel against the truth.

We most respectfully submit: That the court below did not err in holding that Article two (2) of the said Hewitt Bill was repealable and was repealed by the State Constitution of 1891 and Revenue Act of 1892; but that, in so far as the claim to

estoppel was sustained, the judgment of said court was erroneous, and that the bills of complaint herein should be dismissed.

W. S. TAYLOR, Attorney General,
For Kentucky.

T. H. CROCKETT, City Attorney,
For the City of Frankfort.

JAS. [illegible]. POLSGROVE, County Attorney,
For the County of Franklin.

IRA & W. H. JULIAN,
For said City and County.

Authorities.

1st. Appeals Pending—Prevent Estoppel—

Freeman on Judgments, 4th Ed., Vol. 1, § 328, and authorities there cited.

Yocum v. Moore, 4 Bibb, 221.

Talbot v. Morton, 5 Littell, 326.

Cox v. Griffith, 12 Ky. Law Rep., 482.

Civil Code of Practice, Ky. (last Ed.), § 747.

Civil Code of Practice, Ky. (last Ed.), § 734.

Phœnix Ins Co. v. Tennessee, 161 U. S., pages 183 to 186.

Revised Statutes U. S., § 905.

2d. Parties and Privies—

Bigelow on Estoppel, 5th Ed., page 142, and authorities there cited.

In Re Ayer, 123 U. S., 443, and authorities therein cited.

Mechem on Agency (1889 Ed.), page 1.

American and English Enc. of Law, Vol. 21, pages 184 to 234.

Opinion of lower court herein as to Northern Bank of Kentucky.

3d. Adjudication as to Matter of Law—Conclusive only as to the case determined—

Bigelow on Estoppel, 5th Ed., pages 100 to 101, and authorities there cited.

South Ottawa v. Perkins, 94 U. S., 267.

Richardson v. City of Boston, 19 Howard (U. S.), 268.

Goodale v. Tuttle, 29 N. Y. Reports (2 Tiffany), 467.

Bernard v. City of Hoboken, 3 Dutcher's (27 N. Y. L.) Reports, 412.

Packet Co. v. Sickles, 5 Wallace, 585.

Sawyer v. Woodbury, 7 Gray (Mass.), 502.

Last Chance Min. Co. v. Tyler Min. Co., 157 U. S., 691.

Bigelow on Estoppel, 5th Ed., page 80.

Aspden v. Nixon, 4 Howard (U. S.), 467.

Packet Co. v. Sickles, 24 Howard (U. S.), 340.

Outram v. Moorewood, 3 East, 346.

Cromwell v. Sac, 94 U. S., 351.

Keokuk & Western R. R. Co. v. Missouri, 152 U. S., 316.

Revised Statutes, U. S., § 905.

48 La. Ann., 35.

4th. Identity of Questions and Circumstances, necessary—

Douglas v. County of Pike, 101 U. S., 686.

Bank Tax Cases (Ky.), decided March 24th, 1897 (39 S. W. Rep., 1030).

Cromwell v. Sac., 94 U. S., 356.

Nesbit v. Riverside Ind. Dist., 144 U. S., 620.

Howlett v. Tarte, referred to in Cromwell v. Sac.

New Orleans v. Citizens Bank, 167 U. S.

5th. Judgments relied on opened and waived by Banks—

Bigelow on Estoppel, 5th Ed., page 103, and authorities there cited.

Brownsville v. Loague, 129 U. S., 502 to 505.

Weed v. Burt, 78 N. Y., 191.

6th. Aid of Chancellor in giving effect to judgments—

Bigelow on Estoppel, 5th Ed., 102, and authorities there cited.

Wadhams v. Gay, 73 Ill., 428.

Gay v. Porpart, 106 U. S., 699.

Bigelow on Estoppel, 5th Ed., 706.

Herman on Estoppel and Res Judicata, Vol. 1, page 10.

Adams' Equity, page 788.

O'Connel v. MacNamara, 3 Dr. & Warren, 411.

1 Eq. Cas. Abr., 83, Pl. 3.

Foster's Federal Practice, 2 Ed., Vol. 1, § 5.

Gelpcke v. City of Dubuque, 1 Wallace, 206.

Semonin & Dixon v. Duerson, 13 Ky. Law Rep., 169.

As to cases generally—

In Re Ayer, 123 U. S., 443, and authorities therein cited.

Phœnix Ins. Co. v. Tennessee, 161 U. S., 183 to 186.

Keokuk & Western R. R. Co. v. Missouri, 152 U. S., 301 to 317.

11th Amendment to Constitution, U. S.

Rev. Stats U. S., § 720.

Rev. Stats U. S., § 905.

Sup. Rev. Stats U. S., Vol. 1, page 175.

Foster's Fed. Practice, 2d Ed., Vol. 1, § 17, and authorities there cited.

Foster's Fed. Practice, 2d Ed., Vol. 1, § 12.

Bank Tax Cases (Ky.), decided March 24th, 1897, known as Owensboro cases, made appendix to this brief.

APPENDIX.

DEPOSIT BANK OF OWENSBORO, - - - *Appellant,*
versus
DAVIESS COUNTY, &c., - - - - - - - *Appellees.*
FARMERS AND TRADERS BANK, - - - *Appellant,*
versus
CITY OF OWENSBORO, &c., - - - - - - *Appellees.*
OWENSBORO SAVINGS BANK, - - - - - *Appellant,*
versus
CITY OF OWENSBORO, &c., - - - - - - *Appellees.*
CITIZENS SAVINGS BANK, - - - - - - *Appellant,*
versus
CITY OF OWENSBORO, - - - - - - - *Appellee.*
DEPOSIT BANK OF OWENSBORO, - - - *Appellant,*
versus
CITY OF OWENSBORO, &c., - - - - - - *Appellees.*
CITY OF CARLISLE, - - - - - - - - *Appellant,*
versus
DEPOSIT BANK OF CARLISLE, - - - - *Appellee.*
NICHOLAS COUNTY, - - - - - - - *Appellant,*
versus
DEPOSIT BANK OF CARLISLE, - - - - *Appellee.*
CITY OF CARLISLE, - - - - - - - *Appellant,*
versus
FARMERS BANK OF CARLISLE, - - - *Appellee.*
SIMPSON COUNTY BANK, - - - - - - *Appellant,*
versus
CITY OF FRANKLIN, - - - - - - - *Appellee.*

Opinion of the court delivered by Judge Paynter.

These cases were pending either in this or the lower courts when the cases known as the bank tax cases were decided. (97 Kentucky.)

From that opinion the writer of this one dissented, in which Judges Lewis and Guffy concurred.

The questions of law involved in these cases are similar to those in cases mentioned; we, therefore, re-examine and reconsider the question as to whether the opinion of the majority shall stand as the law regulating the taxation of the banks of the State.

The conclusion which we have reached is that the shares of stock, etc., in the banks are subject to county and municipal taxation, hence the opinion referred to should be and is overruled. So is the case of Franklin County Court, &c. v. Deposit Bank of Frankfort, &c., 87 Ky., overruled for the reasons which shall hereinafter appear.

This conclusion of the court renders it necessary to discuss the questions of law in the other "bank tax cases," and we will consequently use parts of the dissenting opinion without quotation marks. There were four banks in the State commonly designated as the "old banks," and they were the Bank of Kentucky, chartered in 1834; the Northern Bank, in 1835; the Bank of Louisville, in 18—; the Farmers Bank of Kentucky, in 1850. The charters of the first three banks named were extended by the same act of the General Assembly in 1858, and each of the charters were extended by subsequent legislative acts. In neither of the acts of extension is reference made to the act of 1856, nor does either contain express limitation upon the taxing power of the State.

The charter and amendments of the Farmers Bank of Kentucky were extended by an act of the General Assembly in 1876, but the right to repeal the charter and its amendments by "either by general or special act" was reserved in the act. The charters of all other banks operating under charters were granted after the act of 1856. This was the situation when the revenue bill of 1886, generally called the "Hewitt Bill," became a law. The provisions of it relating to the taxation of banks is article 2, chapter 92, General Statutes, and reads as follows:

The Hewitt Law.

"Sec. 1. That shares of stock in State and national banks and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, State, county and municipal."

"Sec. 4. That each of said banks, institutions and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank, and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly, provided they pay the tax provided in section 1 from the passage of this act."

"Sec. 7. If any bank, State or national, shall fail or refuse to pay the tax imposed by this act, or shall fail or refuse to

make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations and undivided profits shall be assessed as directed by section 2 of this act, and the taxes, State, county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: Provided, That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

"Sec. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes."

Section 8 of chapter 68, referred to in section 6 above, is as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

These statutes were in force when the Constitutional Convention met to frame the present Constitution. This instrument was adopted on the 28th day of September, 1891.

Section 174 is as follows: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license or franchise."

Power to Tax Not Surrendered.

Section 175, present Constitution of Kentucky, provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

In pursuance to these provisions of the Constitution the General Assembly enacted laws under which the taxes were levied on the shares of the capital stock, etc., for county and municipal purposes about the imposition of which these controversies arose.

The General Assembly, by the laws imposing the taxes for county and municipal purposes, reduced the amount which the banks had been paying the State so as to only collect forty-two and one-half cents on each one hundred dollars of the value of the property interest in the bank assessed. This is the rate of taxation paid by individual property. The rate under the "Hewitt Bill" was seventy-five cents on each share of the capital stock equal to one hundred dollars, or on each one hundred dollars of stock therein, and in addition thereto pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeded an amount equal to 10 per cent. of their capital stock, which was in full of all tax, State, county and municipal. We assume the banks filed their written consent as provided for in section 4 of artice 2. It is claimed that the banks have irrevocable contracts with the State from which it can not recede without their consent: that the Constitutional Convention and the State had no power to change the mode or fix a higher rate of taxation than was imposed in the act of 1886.

It is gravely asserted that when those who gave the State its organic law and statutory law seek to impose the burden of taxation equally on those who should bear it, that a contract is attempted to be violated and the State is acting in bad faith.

Obligation of Contract.

We fully realize the wisdom of that provision of the Federal Constitution which declares that no State shall pass any law "impairing the obligation of contracts." The State should deal honestly with its citizens, thus setting an example worthy of the imitation of those who constitute the State.

It has been said "a compact lies at the foundation of all national life; contracts make the progress of communities in civilization and prosperity. They guard as far as possible against the fluctuations in human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellowmen. They are the springs of business, trade and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals."

While this is true, we feel that the fervid eloquence of an orator could not in too earnest terms plead the justness of this demand of the citizens that each integral part of the State shall bear its fair proportion of the burdens of the State. The one which seeks to show that it is just to grant the privilege of exemption from taxation except in consideration of a public service has assumed a vast undertaking.

The State which refuses to surrender one of its attributes of sovereignty, the power to impose taxes on corporations or individuals, demonstrates its regardful care of the rights of its citizens and manifests its purpose to preserve its existence.

When the State has in express terms declined to surrender any part of its sovereignty and seeks to exercise its prerogative, we are unable to see the slightest foundation for the imputation of bad faith.

From the Dartmouth College case to the present time the Supreme Court of the United States has uniformly held that whenever the Legislature granting the charter reserved the

right to amend or repeal it, either by so providing in the charter or by a general law, the right to amend or repeal such charter exists, and to do so is not to impair the obligation of a contract, the charter being accepted with the full understanding that the right of repeal is part of the contract, and to the exercise of which right the grantee has consented.

Many of the States, after the Dartmouth College case, began to realize the importance of reserving the right to control corporate organizations which from time to time were being created, and to make sure such power was being reserved they passed general laws expressly reserving such powers, which statutes became a part of every act of incorporation as fully as if written therein, unless a different purpose was therein plainly expressed.

The Legislature of this State, being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as the statute of 1856, which is section 8, chapter 68, General Statutes.

Charters Subject to Change.

It seems so plain that charters and grants since the 14th of February, 1856, are subject to amendment or repeal at the will of the Legislature, unless a contrary intent is plainly expressed therein, that it is needless to discuss it.

The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it.

Acts of the character of the act of 1856 have uniformly been adjudged to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made, and to be as much a part of the charters as if incorporated into them. Any other interpretation would render the statute inoperative, and wholly

deprive it of its power to accomplish the purpose of its enactment.

In 1841 South Carolina passed a statute substantially the same as the statute of 1856. The Southeastern Railroad Co. was incorporated in 1851. In 1855 an act was passed to amend its charter, the amendment exempting the railroad company from taxation. In 1868 the State adopted a new Constitution, in which it was declared that the property of the corporations then existing or thereafter created should be taxed. The Legislature of the State passed an act to enforce that provision of the Constitution.

The question involved in Tomlinson v. Jessup, 15 Wallace 454, was as to the enforcement of such legislation. Justice Field, in delivering the opinion of the court in the case, said: "It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the State and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character; and it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him; but these considerations can not be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interest with knowledge of the existence of this power and of the probability of its exercise at any time in the discretion of the Legislature. The object of the reservation, and of similar reservation in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contracts

with corporators which, without that provision, would be irrepealable and protected from any measures affecting its obligation."

State's Power to Tax.

"There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power, such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made.

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

The same doctrine is enunciated in Railroad v. Maine, 96 U. S., 499; Railroad Co. v. Georgia, 98 U. S., 359; Hoge v. Railroad Co., 99 U. S., 348; Greenwood v. Freight Co., 105 U. S., 13, 21; Spring Valley Waterworks Co. v. Scholter, 110 U. S., 347-352; Close v. Greenwood Cemetery Co., 107 U. S., 466-476; Louisville Gas Co. v. Citizens Gas Co., 115 U. S., 683-696; Gibbs v. Consolidated Gas Co., 130 U. S., 369-408; Sioux City Street Ry. Co. v. Sioux City, 138 U. S., 98-108.

It was said in Hamilton Gas Light Co. v. Hamilton, 146 U. S., 271:

"This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract, but where one of the conditions of the grant is that the Legislature may alter or revoke it, a

law altering or revoking, or which has the effect to alter or revoke, the exclusive charter of such privileges can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation.

"In Greenwood v. Union Freight Co., 105 U. S., the question was as to the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed, after a named day, 'shall be subject to amendment, alteration or repeal, at the pleasure of the Legislature.' This court, referring to that clause, said: 'Such an act may be amended—that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it that may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reason which prompted it.

"The words 'at the pleasure of the Legislature' are not in the clauses of the Constitution of Ohio or in the statute to which we have referred; but the general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the Legislature."

Supreme Court Decision.

It must be conceded from the authorities cited the Supreme Court of the United States has repeatedly held that the Legislatures of the States have the power, when reserved in the charter or by general law, to change or repeal acts granting corporate privileges or franchises. The decisions of this court are in accord with these opinions.

The case of Griffin v. Kentucky Insurance Co., 3 Bush, 592, has been quoted with approval in the case of Louisville Water Co. v. Clark, 143 U. S., 14, and in that case the court held that in all cases of charters or grants of corporate franchises, where the intention of the Legislature was not "plainly expressed," not to exercise the power reserved by the statute of 1856 to amend or repeal at the will of the Legislature, such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them.

Judge Robertson, in delivering the opinion in Griffin v. Kentucky Insurance Co., 3 Bush, 595, said: "Then was the general reservation of power, like a special reservation in the charter itself, a part of the contract; or was the contract made subject to it and the obligation defined or modified by it? We think so. And whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute, over which the judiciary has no jurisdiction, our conclusion as to the mere power of repeal is, as we think, sustained by reason and abundant authority.

"All contracts, except such as are municipal, are made subject to law, and their obligation is defined by the lex loci contractus.

"Why should the contract in this case be excepted? Such exception would be unreasonable, and the authorities fortify the reason."

In the case of Cumberland & Ohio Railway Co. v. Barren County Court, 10 Bush, 604, in reference to the act of 1856,

the court said: "The act was intended to preserve to the State control over all acts of incorporation thereafter passed. Experience has demonstrated the propriety of, if not the absolute necessity for, such a reservation of power, and it would be a manifest disregard of the clearly expressed will of the Legislature for the courts to resort to technical rules of construction or finely-drawn legal implications to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal 'unless a contrary intent be plainly expressed.'"

We conclude that the Legislature in 1886, when it passed the Revenue Bill, had the right to amend or repeal at will all charters and grants of or to corporations, or amendments thereof enacted or granted since the 4th of February, 1856, "unless a contrary intent was plainly expressed."

National Banks Also Subject.

The national banks were subject to have the same tax imposed on their shares of stock as are imposed on State banks doing business under charters granted since the 14th of February, 1856. Their real estate is subject to taxation. Their shares of stock may be taxed at their actual value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the State.

In the case of the Covington City National Bank v. City of Covington, &c., 21 Federal Reporter, 491, Justice Matthews, discussing this subject, said: "When, therefore, as statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits."

The interest which Congress has left subject to taxation by

the States under the limitation prescribed, and which is a distinct, independent interest in property held by the shareholder, like any other property that may belong to him, is that interest, as defined in Van Allen v. The Assessor, 3 Wall., 573, which "entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter in proportion to the number of its shares, and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts, and (page 587) it includes for taxation the whole interest of the shareholder, such as would pass to the purchaser of the share on a transfer of his certificate. So when a State law taxes shares of national bank stock it taxes the same interest of the shareholder that he would transfer on a sale. The State may tax them at their actual or at their market value, or at any other rate of appraisement which does not violate the act of Congress."

To the same effect are the cases of People v. Commissioners of Texas, 94 U. S., 415; Mercantile Bank v. New York, 121 U. S., 138.

In the latter case the court said (page 155): "The main purpose, therefore, of Congress in fixing limits to State taxation on investments in the shares of national banks was to render it impossible for the State, in levying such tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The Legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for county, school, municipal and local purposes. The Supreme Court, in Hepburn v. The School Directors, 23 Wallace, 480, held the statute valid.

It has been decided that it is competent for the States to tax the shares of national bank stock, notwithstanding the capital

of the bank was invested in bonds of the United States which were not subject to taxation. (National Banks v. Commonwealth of Kentucky, 9 Wallace.)

The national banking law does not prevent the State from taxing stock in national banks at a higher rate than that imposed on the most favored banks operating under the laws of the State.

This question was fully determined in Lionberger v. Rouse, 9 Wallace, 468, when the court said:

Concessions by Congress.

"It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which, it was supposed, would operate to restrain them from legislating adversely to the interests of the national banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing as that the power of the State to tax should depend on its doing an act which it had obligated itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different States, while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes; others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, with this condition of things in the country, meant to confer a privilege by one section of a law which, by another, it made

practically unavailable? If the construction contended for by the plaintiff in error be allowed, then a State so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given to tax the shares of national banks. And this further consequence would follow, that the shareholders of national banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the national banking act than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, so far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

What Was the Intention of the Legislature.

The court should endeavor to ascertain the legislative intent in the act of 1886 with reference to the taxation of banks, as all depends in this controversy upon what was that intent. To aid in reaching a conclusion as to what the intent was, it is well to recall some official facts within the knowledge of the members of the Legislature.

The 1st of July, 1885, was the date of the last report of the capital stocks of the bands in the State before the enactment of the revenue law of 1886. From that it is learned that the capital stock of the fifty-nine national banks amounted to $9,708,900. The capital stock of sixty-five State banks, doing business under charters granted subsequent to 1856, amounted to $6,224,891. The capital stock of the four State banks—Farmers Bank of

Kentucky, Bank of Kentucky, Northern Bank and the Bank of Louisville—incorporated prior to 1856, was $5,144,500.

It will be seen from this statement that the capital stock of the national banks and of the State banks chartered since 1856 amounted in round numbers to $16,000,000, while the capital stock of banks whose charters antedate 1856 amounted to about $5,000,000, being less than one-third of that of the other banks named.

It must be presumed that the Legislature knew that the banks claiming irrevocable contracts to pay only fifty cents on each share of their capital stock equal to $100 paid less than one-third of the revenue coming from the banks under the then existing law.

Contract Not Irrevocable.

It can hardly be said that the Farmers Bank of Kentucky was in a condition to claim an irrevocable contract because the act extending its charter, which became a law on March 10, 1876, expressly reserved the right to amend or repeal its charter and amendments thereto. It reads as follows: "That the charter of the Farmers Bank of Kentucky, as amended, be extended for a period of twenty-five years from the termination of its charter as therein fixed: Provided, That said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act: And provided further, That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract. This left but three banks in the State which could claim an irrevocable contract, and 125 without any claim whatever to immunity against increased taxation.

The revenue act repealed several acts by particularly naming them, and excluded certain other acts from the repealing clause, and declared all other acts, general and special, and parts of acts inconsistent or not in conformity therewith, were thereby repealed. Chapter 92, General Statutes, contained the revenue law. The only part of the act relating to the taxation of banks and other institutions of loan or discount is article 2, chapter 92, General Statutes. Section 1 of the article relates to the amount of tax which the banks shall pay, and designating the method of levying the tax. Section 2 imposes certain duties on the cashier of the bank with reference to making a report to the Auditor of Public Accounts. Section 3 exempts banks having certain money invested in bonds or funds of the United States from taxation named in the section.

By the terms of section 7 if the banks failed or refused to make the consent or agreement as provided in section 4, then they are to be assessed and the same tax, State, county and municipal, shall be imposed, levied and collected, etc., as is imposed on the assessed taxable property in the hands of individuals.

Without section 4 the remaining sections of the article would have been a complete system for levying and collecting taxes on the banks chartered after 1856. The article treats of nothing except the taxation of banks. Under section 4 the banks were asked to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation.

The national banks were subject to the payment of taxes for State, county and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose. It was needless to ask this class of banks to enter into the agreement.

The Legislature may have entertained some doubt, not as to the right to tax banks for State, county and municipal purposes, but as to the method prescribed and desired to remove

all doubt by obtaining the consent of such banks to that method. It was greatly to the interest of the national banks and the State banks chartered subsequent to 1856 to enter into the agreement because they were thus released from the payment of county and municipal taxes.

Beneficial Concessions.

In agreeing to pay the amount provided in the article for State purposes they were released from local burdens, which in some instances are two or three times as great as that which they agreed to pay the State. It was greatly to their interest to accept the proposition of the State.

As a matter of fact these banks were relinquishing no rights. They were apparently yielding a right which the State, in its sovereingty, already possessed. The right had never been relinquished, but had been expressly reserved. So vigilant had been the State to retain control of corporations and retain its power to tax them, its purpose to do so was declared in the form of a legislative enactment which was understood to be written in every act of incorporation.

It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned, as shown by the revenue act, as their charters were declared repealed so far as they were inconsistent therewith.

It was the evident purpose of the Legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired that all banks should be placed upon the same footing in the matter of taxation with the other banks of the State. The Legislature had been renewing their charters, and if they were again renewed an appeal must be made to the same power. These banks may have realized that the act of 1856 should have, by a proper interpretation, been made applicable

to the acts renewing their charters. However, it is needless to speculate further as to the reason which induced them to enter into the contract with the State by which they released any irrevocable contract which they had under their charter against increased taxation. These banks had the right to give their consent to the increased taxation.

The courts had always recognized the right of a corporation to consent to legislation or accept its provisions and be bound thereby, though it may have the effect of depriving such corporation of a vested right. This brings us to the question as to what were the terms and conditions of the contract into which all these banks entered. The banks must be presumed to know the law, and the effect of the contract to which they agreed. Those who represent banks are among the brightest and most sagacious business men of the country. The law is brief, simple and without ambiguity. In short, the State agreed to accept and the banks agreed to pay seventy-five cents annually on each share of their stock equal to $100, and, in consideration thereof, be exempt from all other taxation whatsoever so long as this tax shall be paid during the corporate existence of such bank. If these were all its terms, then it might be contended with some reason that it was irrepealable during their corporate existence.

Being mindful of the policy which had been pursued for thirty years, it said in effect to the banks it is desired that the statute shall be accepted in the formal way prescribed, but it must be understood that the right to alter or change it is reserved to the State. That its purpose might be fully understood, the Legislature placed in the article section 6, which in terms makes the statute of 1856 a part of the contract.

It is expressly provided that the article shall be subject to the provisions of section 8, chapter 68, General Statutes. The Legislature was determined that the provisions of the act of 1856 should not depend on rules of construction to be read into the contract by implication, but in terms said that it should

be part thereof. It is admitted that when the word "act" appears in article 2 it has reference to the article (2). Article 2 was an independent measure, offered as a substitute to article 2 of the original bill.

Old and New Alike.

The substitute was adopted and became a part of the revenue bill. It now appears as part of the bill in the exact language as offered. This section 6 has no reference to any part of the revenue bill except the article of which it is a part. It has been suggested that it had reference to new banks that might be organized. This could not be so because article 2 is dealing with banks in existence, and asks them to give their consent, etc., thereto, and says, if at all, they must do so before the meeting of the next General Assembly.

When it was admitted that the word "act," as used, is synonymous with "article," then it must be admitted that the provisions of section 6 of article 2 are applicable alone to the article (2) of which it is a part. If there could be any doubt from the language used as to the meaning of the Legislature, then that must be removed by an examination of the House and Senate Journals.

An amendment (page 1241, House Journal, 1886), was offered to article 2 of the original revenue bill, and section 7 of that amendment reads as follows: "This act shall not be subject to the provisions of section 8, chapter 68, of the General Statutes." The amendment (page 1243, House Journal, 1886) was defeated.

While the revenue bill was pending in the Senate it was proposed to amend section 6 of article 2 by inserting after the word "shall" in the first line the words "not for ten years" (page 1315, Senate Journal, 1886). This amendment was defeated. Had it been adopted then the section would have

read: "This act shall not for ten years be subject to the provisions of section 8, chapter 68 of the General Statutes."

The proceedings of the House and Senate show the Legislature fully understood the purpose for which this section was made part of article 2. It was the purpose of the Legislature not to be restricted for any period of time in its right to repeal the article and withdraw from the contract.

In view of the plain provision of the statute, about the meaning of which there should be no doubt, and the intent of the Legislature being fully explained by its record, it seems to us there should be no hesitation in concluding the act of 1856 should be read as part of the statute, hence an irrevocable contract did not exist. The fact that a written consent was asked and secured does not alter the application of the act of 1856. The act of 1856 should be read as part of the act of 1886 even if it had not been referred to as part of it.

Waterworks Case.

In Louisville Water Co. v. Clark, 143 U. S., 10, this rule of construction was recognized. The court said: "But in respect to all the acts passed after 1856 amending the charter of or relating to the Water Co., including that of 1882, each must be read as if all the provisions of the act of 1856 were incorporated in it, because in no one of them is plainly expressed an intent to waive the right of amendment or repeal at the will of the Legislature." Greenwood v. Freight Co., 105 U. S., 20, is to the same effect. New Jersey v. Yard, 95 U. S., 104, is cited by counsel for appellees and also by counsel for appellants.

The facts of that case were as follows: The Morris & Essex Railroad Co. was created a corporation by an act of the Legislature of New Jersey, passed January 29, 1835. The act provided that as soon as the net proceeds of the railroad amounted

to 7 per cent. on its cost it should pay a State tax of one-half of 1 per cent. on the cost of the road, and no other tax should be levied upon it. The twentieth section reserved to the Legislature the right to amend or repeal the act whenever it should think proper. A supplemental act was passed March 2, 1836, in which the right to repeal or amend was reserved.

On the 14th of February, 1846, the Legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856. Another supplemental act to the charter of the railroad was approved March 23, 1865, authorizing a branch road to be built, and by which the company was vested with all the powers and franchises given by the original and supplemental act, etc. The third section of the last-named act reads as follows: "Be it enacted that the tax of one-half of 1 per cent. provided by this said original act of incorporation, to be paid by the said company to the State whenever the net earnings of the said company amount to 7 per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatever, by or under the authority of this State or any law thereof: Provided, That this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal and filed in the office of the Secretary of State, shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of the act, or this act is void."

The instrument required by the section was duly executed by the company. In the act of 1865 there was no reservation of the right to repeal or amend. Acts of the Legislature imposed more burdensome tax on the railroad company than it provided for it in section 3, supra. The sole question in New Jersey v. Yard was whether the act of 1865, and its acceptance

by the railroad company, constituted a contract which could not be impaired by any subsequent Legislature of the State.

The New Jersey Decision.

The court held that it was an irrevocable contract because the Legislature had not reserved the right to amend or change it. It is plain from the opinion that had the Legislature reserved the right to alter or change the contract, or act by which it was made, the court would have held the act of the Legislature doing so did not impair the obligation of the contract Justice Miller, in delivering the opinion, said: "But, as we have already said, since the Legislature which passed the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, did they intend to make such a contract? * * * In the case now under consideration it is conceded on all hands that the act of 1865 was a contract for a tax of one-half of 1 per cent. per annum on the cost of the Morris & Essex Railroad and no more. But counsel for defendant says the contract was repealable; that the Legislature, of its own volition, could impose other and more burdensome taxes at its discretion; that it was a contract so long as the Legislature of New Jersey was satisfied with it, and no longer. It is conceded also that the construction of it can not be sustained unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846.

"We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it can not be done because it is inconsistent with the legislative intent in passing the act of 1865. * * * The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair con-

struction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose."

From the language of this opinion, and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, etc.

In New Jersey v. Yard the court held the act was invalid because the right to repeal or modify had not been reserved.

In this case we are asked to hold the organic and statutory laws invalid because the right to repeal or modify was reserved in express terms.

By the very terms of the act of 1856 a rule of interpretation is given that "all charters and grants of or to corporations or amendments thereof and all other statutes" shall be subject to amendment or repeal at the will of the Legislature unless a contrary intent be therein "plainly expressed."

It is proposed now by those representing the banks to disregard this statutory rule of construction. It is now in effect insisted that, in order to reserve the right claimed, it must be "plainly expressed" in the act that it is reserved; this being done, it is still disregarded. The Legislature, doubtless anticipating such contention and versatility, "plainly expressed" in the article that whatever was done thereunder or in pursuance thereof could only continue during its will. If section 6 was not for this purpose we would like to have had some one suggest some reason as to why it was placed in the article. The doctrine is that when it is asserted that a State has bargained away her right of taxation in a given case the contract must be clear, and can not be made out by dubious implication. (New Jersey v. Yard, supra).

Chief Justice Taney, delivering the opinion of the court in Ohio Life Insurance and Trust Co. v. Debolt, 16 Howard 425, gave a rule of construction as follows: "The rule of construction in cases of this kind has been well settled by this court. The grant of privileges and exemptions to a corporation are

strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty, which the community have an interest in preserving undiminished, will be held by the court to be surrendered unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of Billinge v. The Providence Bank, and reaffirmed in the case of the Charles River Bridge Co."

Court of Appeals of Kentucky Sustains this View.

The Supreme Court has enunciated substantially the same rule in numerous cases.

The taxing power of the State is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. (Bradley v. McAtee, 7 Bush, 667.)

It is a familiar rule of construction of statutes that effect must be given to every provision, except in cases of absolute and irreconcilable incongruity. (Dazey v. Killem, 1 Duvall, 407.)

If one statute refers to another for the power given by the former, the statute referred to is to be considered incorporate in the one making the reference. (Nunes v. Wellisch, 12 Bush, 365.)

Mr. Cooley, in his work on Taxation, page 204, says: "As taxation is the rule and exemption the exception, the intention to make an exception ought to be expressed in clear and unambiguous terms; and it can not be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain."

For the interpretation of statutes, this court, in Nicholas v. Wells, Sneed, 259, said that "the most natural and genuine way of construing a statute is to construe one part by another

part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another; and, if it can be prevented, no clause or sentence or word shall be superfluous, void or insignificant."

As there is a clear expression of the legislative intent in the statute, no rules are really necessary to aid in its interpretation.

It can hardly be said it was unwise on the part of one hundred and twenty-five of the one hundred and twenty-eight banks in the State, as by the very terms of the act under which the contract was entered into they were required to pay State, county and municipal taxes, with the power in the Legislature to increase it at will.

It certainly was a very advantageous contract for them to enter into, when these banks paid more than two-thirds of the taxes paid by all the banks, with the power in the Legislature to increase the amount if they should so desire. What reason can be suggested as to why the Legislature would desire to reverse the policy which had been steadily adhered to for so long and enter into an irrevocable contract with such banks? Why should it want to surrender a power which it had been so zealous to preserve?

The contract was made subject to the right of the Legislature to withdraw from it whenever it regarded the public interest demanded it should do so.

Rights to Immunity Surrendered.

Whenever the banks accepted the provisions of the act of 1886 they surrendered any rights to immunity from increased taxation which their charters gave them.

The acceptance of the act of 1886 was a consent to the repeal of so much of their charters as were inconsistent therewith. Hence they stood in such relation to the State as to future taxation as the Legislature saw proper to impose. If the pro-

visions of their charters relating to taxation were repealed, as it must be admitted they were by the act of 1886, then such provisions were no longer in force. It is unreasonable to say that the provisions of the charters fixing the rate of taxation on the banks at fifty cents on each share of the capital stock of the banks equal to $100 can be in force if the act of 1886 fixing such tax at seventy-five cents instead of fifty on shares is in force. In doing this it must be admitted the charter privilege has been repealed. If repealed, then, by the act of 1886, surely the only way in which the provisions of their charters could be restored would be by the Legislature so providing in some act. There is no pretense this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of their charters.

Section 644, Kentucky Statutes, provides: "When a law which may have repealed another shall be repealed the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

It is a most groundless contention to say that if the present law is sustained the old banks will be restored to the former privileges under their charters.

It has been suggested that the provisions of their charters with reference to taxation were vested rights, and, although they consented to the legislation of 1886 and became subject to the provisions of the act of 1856, still, as the charter privilege as to taxation was a vested right, therefore, it was saved to them by the provision which preserves "other rights previously vested."

The proviso of the act of 1856 is "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

If a corporation by its charter or a general law is exempted from the payment of taxes it is released of a duty or burden. It enjoys an immunity or exemption from a general law which imposes the burden of the government on others. It may be

said it enjoys a privilege. "Franchise is a branch of the king's prerogative subsisting in the hands of a subject." (2 Sharswood, Blackstone, Comm., 37.)

The Legislature has reserved the right to amend or repeal the privileges and franchises, thus reserving the power to destroy or qualify the privileges and franchises which have been granted. The "other rights" which have become vested while operating under the charter can not be impaired by an amendment or repeal. These "other rights" do not embrace "privileges and franchises."

Privileges and Franchises.

The "privileges and franchises" are the rights bestowed by the State, to be withdrawn or destroyed at the pleasure of the Legislature. In the exercise of its pleasure the Legislature may fix a higher rate of taxation, or it may declare to those enjoying the franchise that they shall no longer have it. Privileges and franchises are not "vested rights," either in the letter or spirit of the act of 1856.

"Other rights" referred to in that act are such as the beneficiaries under the charter or general laws may have in property, contracts, choses in action, real and personal property, in fact every interest which they could acquire in operating under the charter or law, and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment or otherwise in property belonging to the corporation.

The purpose of the act of 1856 was to reserve in the Legislature the power to destroy the privileges and franchises granted in the charters. If it does not have this effect it would be entirely inoperative, and the effect to retain control of the corporations would be abortive. The claim that the privileges granted by article 2 can be repealed, but without the right to

terminate their enjoyment, is not founded in reason. The only privilege which the banks enjoyed was to pay the seventy-five cents on each share of stock in lieu of all other taxes. To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted, and still leave the banks in its enjoyment (as is the effect of the opinion of the court in the bank tax cases), is to disobey a plain statute, to ignore the authority of the opinions of the Supreme Court, and is a failure to follow sound reasoning in the settlement of a question of vast importance to the State and the people. The former opinion on this question gave the banks the substance and the State the shadow. Had section 6 of article 2 provided that the act of 1856 should not be considered part of it, we do not doubt the representatives of the banks would have early seen the meaning of the provision. As it is plainly written that the act of 1856 is to be considered a part of the article, they have the very greatest difficulty in seeing the purpose of the provision.

It was said in Griffin v. Kentucky Insurance Co., 3 Bush, 594, "the proviso was intended to secure the right of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise."

To the same effect is the Cumberland & Ohio Railroad Co. v. Barren County Court, 10 Bush, 600. Section 174 of the Constitution recognized a just principle when it declared that all property, whether owned by persons or corporations, should be taxed in proportion to its value unless exempted thereby, and that all corporate property should pay the same rate of taxation paid by individual property.

The Legislature, in obedience to that provision of the Constitution, enacted the law for levying and collecting tax from the banks of the State, the validity of which is in question in these cases.

Some of the best lawyers in the State were members of the

convention which framed our Constitution, who gave an earnest consideration to the questions involved in these cases, and the conclusions which they reached were crystallized into section 174 of the Constitution. We believe that their conclusions are correct.

The former opinion of the court denies the power is in the Legislature to say what taxes the banks of the State shall pay for State purposes during the existence of their several charters. It denies the right of the Legislature to compel them to bear any of the burdens of county and municipal government.

The Reversal of Policy.

We can not believe the Legislature did or intended by article 2 of the act of 1886 to reverse its policy so earnestly pursued for a generation and surrender to sixty odd banks of the State its rights previously reserved, to control them in the matter of taxation, and to give up its power to increase or diminish the taxes imposed on one hundred and twenty-five banks, this including the national banks.

Exigencies may arise requiring the levying and collecting of vast sums to meet the public demand, yet, however great the emergency may be or imperative the demand for money to meet such wants, the Legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporate existence.

The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the State are compelled to incur large expense to support the county governments, to pay for bridges and public highways, and support their unfortunate citizens. The municipalities must incur great expense in making all necessary improvements for the comfort, safety and health of their citizens, to supply water and lights and to give police protection to their citizens and to the banks.

The organic and statutory law of the State, in our opinion, require that the banks should contribute their proper share of such expense to the local governments. In Franklin County Court, &c. v: Deposit Bank of Frankfort, &c., 87 Ky., the court adjudged that there was a broad distinction between the extension of a charter and the grant of a new one. This is true in a certain sense. To extend a charter requires a statute to be enacted, and which grants certain rights to the corporation.

Under the act of 1856 all statutes and also grants to corporations are subject to amendment or repeal. All acts granting extensions to the charter of corporations since the 14th of February, 1856, are as much subject to amendment or repeal as are acts of incorporation passed since that date. In so far as the case of Franklin County Court, &c. v. Deposit Bank of Frankfort, &c., 87 Ky., 370, is in conflict with this opinion, it is overruled. (Shields v. Ohio, 95 U. S., 323; Railroad Co. v. Maine, 96 U. S., 503; Commonwealth v. Masonic Temple Co., 87 Ky., 349.)

There are many National and State banks organized since the passage of the Hewitt Bill. They certainly can not claim, with any degree of reason, that they have any, much less an irrevocable, contract with the State. If there could have been any doubt on the question it is overruled by Bank of Commerce v. Tennessee, &c., 163 U. S., 416.

If the banks which accepted the Hewitt law are to be exonerated from the payment of county and municipal tax, then, during the existence of their respective charters, the burden placed upon the banks is not equal and just. In the same city or town we will have part of the banks paying county and municipal tax, whilst others have immunity from such burdens. It will greatly increase the value of the stock of the banks enjoying special privileges, whilst it will necessarily render less valuable stock in the banks which have the burden of a share of county and municipal taxes. It will be a check

on the organization of new banks. It will give the favored banks a monopoly of the business in their respective communities. The effect would be an unjust and unwarranted discrimination. It was seriously argued in the former opinion of this court that the enforcement of the Constitution and laws will diminish the revenues of the State government. With this we have nothing to do. It is our business to obey the Constitution, and respect the statutes enacted in accordance therewith. Were this a question of policy involved, it is not considered a great task to vindicate its wisdom. While more of the citizen's tax will go to support the State government, yet he is trebly compensated by the banks contributing the fair share of county and municipal taxation, and thus reducing the amount which each citizen will be required to pay to sustain the local governments.

The cases of the Deposit Bank of Owensboro, Farmers and Traders Bank, Owensboro Savings Bank, Citizens Savings Bank v. City of Owensboro, &c.; Deposit Bank of Owensboro v. Daviess County, Simpson County Bank v. City of Franklin, are affirmed, and the cases of City of Carlisle v. Deposit Bank of Carlisle, Nicholas County v. Deposit Bank of Carlisle and City of Carlisle v. Farmers Bank are reversed, with directions that further proceedings conform to this opinion.

COMMONWEALTH OF KENTUCKY.

At a Court of Appeals, held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 19th day of June, 1897, the following order was entered: Deposit Bank of Owensboro v. City of Owensboro, Daviess; Farmers and Traders Bank v. Same, Daviess; Owensboro Savings Bank v. Same, Daviess; Citizens Savings Bank v. Same, Daviess; Owensboro National Bank v. Same, Daviess.

The court being sufficiently advised, the petition for rehearing in each of the foregoing five cases is overruled.

Afterwards at a Court of Appeals, held as aforesaid, on June 23, 1897, the following order was entered: Deposit Bank of Owensboro v. Daviess County, &c., Daviess.

The court being sufficiently advised, the petition for rehearing in this case is overruled.

Copies—Attest: A. ADDAMS,

Clerk Kentucky Court of Appeals.

NEW ORLEANS v. CITIZENS BANK, 167 U. S., 385.

In the above-styled case, this court said:

"Since this case was decided below, the Supreme Court of the State of Louisiana has had before it a suit brought by the bank against the Board of Assessors, asserting its non-liability to assessment and taxation under its charter, for taxes against real estate acquired by it under foreclosure of its stock mortgages. Certain judgments (presumably those relied upon in this record) were set up as constituting res judicata.

"The court of last resort of the State said in its opinion on the first hearing that it was not necessary to pass upon the plea of the thing adjudged, since the judgments relied upon did not embrace the question of whether property bought by the bank under foreclosure of its stock mortgages was included in the exemption. In that case both the act of 1880, above referred to, and the act of 1874 were set up as conclusively establishing that the bank was not exempt from taxation at all.

"In an opinion on a rehearing the court somewhat modified the grounds of its conclusions, and in the course of the opinion said: 'We refrain from stating the effects as to the taxation of the bank's capital in consequence of act 79 of 1880' (We now do the same, because we think it unnecessary to do so.) 'We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered.'"

In concluding the opinion the court said:

"'We think the Citizens Bank has heretofore obtained all that it is entitled to, the exemption from taxation of its capital proper and the real estate necessary for carrying on its legitimate business or purposes.'"

State, ex rel. Citizens' Bank v. Board of Assessors, 48 La. Ann., 35.

> "From the foregoing statement it is evident that the contention of the plaintiffs in error, if maintained, will overthrow the construction of a statute of the State of Louisiana, sanctioned by nearly sixty years' of practical execution, and supported by decrees of the courts of that State which are final, which were regularly rendered during a long period of time whenever an attempt was made to assess the property of the bank.
>
> "It is true that during the greater portion of the time when the charter was construed by the officers of the State of Louisiana, and interpreted by the courts as rendering taxation of the bank illegal, the original charter was in force, and the question whether the bank was subject to taxation during the term of its extended charter could not therefore technically arise. But the old charter period expired in 1884, and it is clear that from 1884 until 1892, not only was the bank generally treated as not liable to taxation under its charter, but whenever an attempt was made to tax it the courts of the State held the assessment unlawful.
>
> "Indeed the language of the Supreme Court in the case to which we have referred, decided since the decree under review was rendered, sustains the construction which the charter of the bank had previously received under so many years of practice approved by the repeated adjudications of the Louisiana courts."

In the foregoing state of case, it is difficult to understand how this court could have properly reached any other conclusion in that case than that which the court did reach.

Section 905, Rev. Stats. U. S., applies, not only to the mere admissibility of "records and judicial proceedings" as evidence, but also to their force and effect.

See authorities cited in margin of said section.

~~See also many recent decisions of~~ Mills v. Duryee, 7 Cr., 481, ~~of this court on same subject.~~

In the said New Orleans case, the officers were threatening

to act ultra vires. Hence same was not a suit against the State.

There was a good consideration for the exemption, and there was no want of equity in the bill of complaint.

PHŒNIX INSURANCE CO. v. TENNESSEE, 161 U. S., 174.

In the above-styled case, this court said:

> "Second. Concluding, as we have, that this plaintiff in error, insurance company, is not exempt from taxation, by the language of the statutes above mentioned, we come to the consideration of the second defense interposed by its shareholders.
>
> "It seems that some time in the year 1873 the shareholders, or some of them, were sued by the city of Memphis to collect from them certain taxes alleged to be due that city for the year 1872 upon the shares of stock held by them."

(Here the court recites proceedings in the above-mentioned suit, in the Tennessee court and this court, which resulted in a final judgment in favor of the shareholders, sustaining the exemption and perpetually enjoining collection of the taxes in controversy.)

> "This judgment was entered by consent, and pursuant to the stipulation of the parties entered into at the time the writ of error was sued out in the Hill case, and it is now set up and offered in evidence in favor of the shareholders of the insurance company, who are admitted to be the direct successors of the shareholders of the company sued in the former action, and the decision of the State court, refusing the benefit of that adjudication to the shareholders, is claimed to have been error, and to present a Federal question for review by this court.

* * * "We think the decision of the Supreme Court as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. The former judgment determined that, as between the city and the shareholders, the latter were not subject to pay the taxes for the years specified. In the action now under consideration we have determined that there was no immunity conferred either upon the corporation or the stockholders by the statutes cited. On the trial of this action the former judgment was offered in evidence by the shareholders, and it was held to constitute no bar to the maintenance of this action by the plaintiff, nor did it operate as an estoppel upon their right to claim taxes for subsequent years.

"The judgment offered in evidence was the judgment of a State court, and the refusal to accord to it all that was claimed for it as an estoppel by counsel for plaintiffs in error was, in any event, no more than a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was by general law entitled to.

* * * "If a State court erroneously decides a question of law regarding the weight to be given one of its own judgments and among its own citizens, that error is not subject to review by this court, because it constitutes no Federal question.

"If it were otherwise, every decision of a State court, claimed to be erroneous, which involved the failure to give, what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here.

"There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a State court operated as an estoppel against the plaintiff below, and prevented the State court from granting it the relief to which it would otherwise be entitled.

* * * "We hold that the question in any event, as presented in this case, was not a Federal question."

KEOKUK & WESTERN RAILROAD v. MISSOURI, 152 U. S., 301.

In the above-styled case, this court said:

> "To the argument that this judgment constitutes an estoppel, there are two answers: First, there was no such privity of estate between the defendant in the suit, namely, Missouri, Iowa and Nebraska Company, and the defendant in this suit as makes the judgment in that case res judicata in this case. * * *
>
> "Second. A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac, 94 U. S., 351.
>
> * * * "It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision. * * *
>
> "In addition to the fact above stated that a suit for taxes for one year is not an estoppel to a suit for taxes for a different year, there is the same absence of that privity of estate so indispensable to an effective estoppel, which we hold to be fatal in respect to the judgment in the State court."

When a decision is based upon two distinct grounds, each of which is expressly declared to be sufficient, the decision of one ground is as much authority as that of the other. However, both grounds of the above decision apply to these cases.

No. 356 etc.

FILED
FEB 1 1899
JAMES H. McKENNEY,

Brf. of Taylor & Stone for Stone Auditor

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Nos. 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, and Nos. 404, 405, 406, 407, 408, 409, 634, 635.

Filed Feb. 1, 1899.

SAMUEL H. STONE, AUDITOR, ET AL., . . . APPELLANTS,

VERSUS

BANK OF KENTUCKY, ... APPELLEE.

AND SEVENTEEN OTHER BANK TAX CASES.

Appeals from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR SAMUEL H. STONE, Auditor, et al., AND THE CITY OF LOUISVILLE.

WILLIAM S. TAYLOR, ATTORNEY GENERAL,
For Samuel H. Stone, Auditor, et al.

HENRY LANE STONE, CITY ATTORNEY,
For City of Louisville.

THE BRADLEY & GILBERT COMPANY, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 356.
BANK OF KENTUCKY ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 357.
BANK OF KENTUCKY ..... Appellee.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 358.
BANK OF LOUISVILLE ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 359.
BANK OF LOUISVILLE ..... Appellee.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 360.
LOUISVILLE BANKING COMPANY ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 361.
LOUISVILLE BANKING COMPANY ..... Appellee.

SAMUEL H. STONE, AUDITOR, ET AL. ..... Appellants,
vs. No. 362.
BANK OF COMMERCE ..... Appellee.

CITY OF LOUISVILLE ..... Appellant,
vs. No. 363.
BANK OF COMMERCE ..... Appellee.

CITY OF LOUISVILLE.....Appellant,
vs. No. 364.
THIRD NATIONAL BANK.....Appellee.

CITY OF LOUISVILLE.....Appellant,
vs. No. 365.
CITIZENS NATIONAL BANK .....Appellee.

THIRD NATIONAL BANK.....Appellant,
vs. No. 404.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

CITIZENS NATIONAL BANK .....Appellant,
vs. No. 405.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

FIDELITY TRUST AND SAFETY VAULT CO., Appellant,
vs. No. 406.
CITY OF LOUISVILLE.....Appellee.

FIDELITY TRUST AND SAFETY VAULT CO., Appellant,
vs. No. 407.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

LOUISVILLE TRUST COMPANY.....Appellant,
vs. No. 408.
CITY OF LOUISVILLE.....Appellee.

LOUISVILLE TRUST COMPANY.....Appellant,
vs. No. 409.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

FIRST NATIONAL BANK.....Appellant,
vs. No. 634.
SAMUEL H. STONE, AUDITOR, ET AL.....Appellees.

FIRST NATIONAL BANK.....Appellant,
vs. No. 635.
CITY OF LOUISVILLE.....Appellee.

BRIEF FOR THE CITY OF LOUISVILLE, AND SAMUEL H. STONE, Auditor, et al.

STATEMENT.

These eighteen cases, which have been ordered to be heard together, were commenced by the above named banks and trust companies, with others which have not been appealed to this court, April 17, 1897, in the Circuit Court of the United States for the District of Kentucky. The City of Louisville, in which said institutions are located, is an appellant in the first ten, and an appellee in the last eight cases, in the order above stated.

The object of each of said actions brought against the City of Louisville alone was to enjoin said city from collecting ad valorem taxes for the years 1893 and 1894, on the assessments of the franchise of the complainant made and certified by the State Board of Valuation and Assessment, as required by the general revenue act of November 11, 1892; and the object of each of the actions brought against Samuel H. Stone, Auditor, George W. Long, Treasurer, and Charles Finley, Secretary of State, constituting said board, and the City of Louisville, was to enjoin the said board from making or certifying under said act for ad valorem taxation by the State and city any assessment of the franchise of the complainant for the years 1895, 1896, 1897, and 1898, or any subsequent year during its corporate existence.

In each of the bills filed in these actions, the complainant institution alleges it has, by virtue of its acceptance and compliance with the provisions of the revenue act of May 17, 1886, commonly called the "Hewitt Act," an irrevocable or irrepealable contract with the State, by the terms of which, upon the payment of State taxes as therein provided, it is entitled to exemption, during its corporate existence, from the payment of municipal taxes, except on its real estate or building owned and used by it for conducting its business.

The decision of the Court of Appeals of Kentucky of June 1, 1895, in certain Bank Tax Cases (97 *Ky.*, 590), was relied on by the complainant institutions to sustain this contention.

In the cases brought by the appellees, Bank of Kentucky, Louisville Banking Company, and Third National Bank, they pleaded as *res judicata* on the question of their alleged tax exemption, the judgment obtained in suits instituted by said banks respectively in 1894, in the Circuit Court of Jefferson County, State of Kentucky, against the Judge of the Police Court of the City of Louisville, prohibiting the said court from proceeding further in the prosecution of warrants issued therein for the recovery of a fine against said three banks for carrying on the business of banking in said city without having paid to the Commissioners of the Sinking Fund of said city, a license tax of four per cent. on their gross earnings imposed by an ordinance of said city, approved January 29, 1894. The judg-

ment of the Jefferson Circuit Court in the suit brought by the Bank of Kentucky overruled the defendant's demurrer to the petition, and prohibited said Police Court from proceeding further in the prosecution mentioned, which, on appeal, was affirmed by the Court of Appeals, being one of the bank tax cases, *supra*, decided by that court June 1, 1895.

In the suits brought by the Louisville Banking Company and Third National Bank, the Jefferson Circuit Court sustained the defendant's demurrer to the petition, and dismissed the same in each case, but on appeal said judgments were reversed by the Court of Appeals, being two more of the bank tax cases, *supra*, decided June 1, 1895, and in pursuance of the mandate of that court, judgments were subsequently entered in said circuit court, like that in the case of the Bank of Kentucky, prohibiting further proceedings in the prosecution of the warrants issued against the said two banks. (*See these judgments, Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 88–89; *Record, No.* 360, *Stone, et al.*, v. *Louisville Banking Company*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57.)

In each of these prohibition suits, the grounds for the relief sought were (1) that the plaintiff bank had an irrepealable contract with the State to pay taxes, as provided in the Hewitt Act; and (2) that so much of the "Act for the government of cities of the first-class," approved July 1, 1893, as gave the city of Louisville the power by ordinance to collect a license tax from banks, and the license ordinance of January 29, 1894, passed in pursuance of the latter act, impaired the obligation of the plaintiff bank's alleged contract, and were "both unconstitutional and void."

The other six institutions that are parties to these appeals claimed to be privies to the three banks which brought the prohibition suits mentioned by virtue of an alleged agreement with the Commissioners of the Sinking Fund, and their attorney (who was at the time also City Attorney of the City of Louisville), and likwise pleaded as *res judicata*, on the question of their alleged tax exemption, the judgments rendered in said prohibition suits; that is to say, the Bank of Louisville, under said alleged agreement, claimed to be privy to the Bank of Kentucky; the Bank of Commerce, Fidelity Trust and Safety Vault Company, and Louisville Trust Company claimed to be privy to the Louisville Banking Company; and the Citizens National Bank and the First National Bank claimed to be privy to the Third National Bank in the judgments aforesaid.

In denying in its answer the claim of each of the institutions that are parties to these appeals to an irrepealable contract with the State to pay taxes only as provided in the Hewitt Act, the city of Louisville relied on the decision of the Court of Appeals of March 24, 1897, in other bank tax cases, holding that the Hewitt Act was repealed by the general revenue act of November 11, 1892, and all of the banks in the State were subject alike to municipal taxation. (39 *S. W. Rep.*, 1030; *S. C.* 19 *Ky. Law Rep.*, 248.)

With respect to the plea of *res judicata* made by the three banks that brought said prohibition suits, the City of Louisville and Samuel H. Stone, Auditor, et al., contended (1) that the parties to those suits

were not the same as the parties to these; (2) that said city was not made a party defendant to the petitions of said banks in the Circuit Court of Jefferson County, and that it was made a party to the appeals without authority of law; and (3), that the only thing adjudged in said suits was the non-liability of said three banks to pay a license tax to the Commissioners of the Sinking Fund of the City of Louisville, a separate and distinct corporation from said city, on their occupation or business, under the act of July 1, 1893, and the ordinance of January 29, 1894; and that the question of their liability to pay ad valorem taxes to the State and City of Louisville on their franchises, or property, tangible or intangible, under the general revenue act of November 11, 1892, was neither involved in the subject-matter of said actions, nor decided by the court in said judgments.

As to the contention of the other six institutions or parties to these appeals, that they were privies to the three banks, as above stated, in said prohibition suits by agreement and entitled to claim the benefit of the alleged estoppel of the judgments therein rendered, the City of Louisville, in its answer, denied that the alleged agreement between the counsel of said banks and trust companies on the one side, and the Commissioners of the Sinking Fund of the City of Louisville, and their employed attorney (who was also City Attorney), on the other side, was of any legal force or effect on either party; and insisted that so far as said City Attorney undertook to represent the City of Louisville in making said agreement, he acted without authority of law, and that said alleged agreement was not the act and deed of the City of Louisville.

The Bank of Kentucky and Bank of Louisville were originally organized under charters granted by the legislature prior to the act of February 14, 1856, reserving power to amend or repeal charters of corporations and amendments thereof. Under their original charters, and amendments thereto, enacted prior to said reservation act, the legislature imposed for State purposes, a tax of fifty cents on each share of stock of the par value of one hundred dollars in each of said two banks "in full of all tax or bonus." Their original corporate existence extended beyond February 14, 1856, the date of said reservation act; and, after the passage of that act, the legislature amended the charter of the Bank of Kentucky, February 1, 1872, so as to extend its corporate existence until October 1, 1909; and likewise amended the charter of the Bank of Louisville, May 1, 1880, so that its corporate existence was extended until January 1, 1903.

The question as to whether the effect of these charter extensions was to place said old banks on the same footing under the tax laws of the State with the new banks, chartered and organized after February 14, 1856, had not been determined by the Court of Appeals when the Hewitt Act was passed, May 17, 1886. The latter act imposed a tax for State purposes on all banks then doing business in the State, which should, in the manner and within the time provided therein, accept its provisions before the next session of the legislature, which convened December 30, 1887, of seventy-five cents on each share of their capital stock of the par value of one hundred

dollars; and, in addition, on their surplus in excess of ten per cent. of their capital stock, the same rate of taxation assessed upon real estate; but, by the terms of a proviso, nothing in said act was to be construed as exempting from taxation for county or municipal purposes the real estate or building owned and used by said banks in conducting their business. It was further provided in said act if any bank, State or National, should refuse or fail to pay the tax imposed thereby, or should fail or refuse to make the consent and agreement prescribed therein, the shares of such bank and its surplus, undivided accumulations, and undivided profits, should be assessed as directed by said act, and the same taxes, State, county, and municipal, should be imposed, levied, and collected thereon as was imposed on the assessed taxable property in the hands of individuals. With the exception of certain specified acts (having no bearing on the questions involved in these cases) all other acts, general or special, or parts of acts inconsistent or not in conformity therewith, were by said Hewitt Act expressly repealed. (*Session Acts* 1885–6, *volume* 1, *pp.* 144–147; *Ib.*, 201.)

After the passage of the Hewitt Act, the Court of Appeals decided, June 5, 1888, that the amendments enacted after February 14, 1856, to the charters of the old banks granting them extensions of their corporate existence, did not come within the purview of the reservation act referred to. (*Franklin County Court, &c.*, v. *Deposit Bank of Frankfort, &c.*, 87 *Ky.*, 370.) This opinion, however, and that of June 1, 1895, above mentioned (97 *Ky.*, 590), were both expressly overruled by the Court of Appeals in the Bank Tax Cases, decided March 24, 1897. (39 *S. W. Rep.*, 1030; *S. C.* 19 *Ky. Law Rep.*, 248.)

This last decision is not mentioned in the bills of the complainants, but is expressly pleaded and relied on in the several answers of the City of Louisville, as being the last and true construction of the Hewitt Act, and the nature and extent of the alleged contract with the banks that accepted its provisions. This defense of the City of Louisville, as set out in the Bank of Kentucky case, which is substantially the same as that in the other cases, is as follows (*Record*, 356, *Stone, et al.* v. *Bank of Kentucky*, 97–98):

"This defendant, for further answer and defense to complainant's bill, states that the Court of Appeals of Kentucky, on March 24, 1897, in the case of *Deposit Bank of Owensboro* v. *Daviess County*, and other bank tax cases, wherein the same legal questions were involved, and issues were made as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of *Franklin County Court* v. *Deposit Bank of Frankfort*, *Same* v. *Bank of Kentucky*, and other bank tax cases, decided June 5, 1888, reported in 87 *Ky. Rep.*, 370, were expressly overruled; and said court furthermore decided that no bank, State or National, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, and by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all

said banks and similar institutions in the State, were repealed by the State Constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the Legislature of Kentucky reserved in section six (6), article two (2), of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation, provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State Constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in complainant's bill, and were all subject to amendment or repeal by the legislature."

The decision of March 24, 1897, is now before this court for review on writs of error to the Court of Appeals of Kentucky, the plaintiffs in error being the Owensboro banks.

The national banks that are parties to these appeals in their bills alleged that the revenue act of November 11, 1892, with respect to the taxation of such banks, provided for a tax on their franchises granted under the laws of the United States, and their other intangible property, such as their surplus, undivided profits, and investments, instead of a tax on their shares of stock, and was thus repugnant to the provisions of the act of Congress concerning national banks. This construction of said revenue act was controverted by the answers of the City of Louisville in the cases of the national banks, three of which are parties to these appeals.

In the bills of the Third National Bank it was admitted that its charter life or corporate existence, which it had when it accepted the provisions of the Hewitt Act, expired August 6, 1894, and, under the National Banking Acts, its charter life was extended and renewed for a second period of twenty years from that date. (*Record No.* 364, *City of Louisville* v. *Third National Bank*, 1; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 1.)

In the bills of the Citizens National Bank the like admission is made, the extension and renewal as alleged being from August 8, 1874, for a second period of twenty years. (*Record No.* 365, *City of Louisville* v. *Citizens National Bank*, 1; *Citizens National Bank* v. *Stone, et al.*, 1.)

In the bills of the First National Bank there is no allegation that it accepted the provisions of the Hewitt Act in the manner and within the time therein prescribed, although its charter life had been extended and renewed September 6, 1882, prior to the passage of said

act, for a second period of twenty years; but it does allege that it had paid taxes as provided in the Hewitt Act from July 1, 1887, to the date of the institution of its actions, and that the State had received and appropriated said taxes. "In this way" said bank alleged it had accepted the provisions of the Hewitt Act. (*Record No.* 634, *First National Bank* v. *Stone, et al.*, 3–4; *Record No.* 635, *Same* v. *City of Louisville*, 3–4.)

The records in the cases of the Louisville Banking Company show that its corporate existence will expire January 1, 1899, and they likewise show in the cases of the Bank of Commerce that its corporate existence will expire February 10, 1910.

The Fidelity Trust and Safety Vault Company was chartered by the legislature April 22, 1882; and the Louisville Trust Company was chartered in like manner April 22, 1884. The corporate existence of both of these institutions is unlimited, the charters of each providing that the incorporators shall have 'perpetual succession."

These trust companies in their bills claimed the same tax exemption as the banks under the provisions of the Hewitt Act, the only difference consisting in the fact that the trust companies claimed perpetual exemption, while the banks claimed exemption for the respective periods of their corporate existence as limited by their charters.

The City of Louisville by its answers controverted the allegations of the bills of these trust companies, and denied that either of them was a bank or empowered to do a banking business, and alleged that by the charter of each of said banks it was expressly provided: "Nothing herein shall be construed to permit such company to discount paper, or to engage in the business of banking." (*Record No.* 406, *Fidelity Trust and Safety Vault Co.* v. *City of Louisville*, 17; *Record No.* 408, *Louisville Trust Co.* v. *Same*, 17.)

The City of Louisville, as well as the other defendants, Samuel H. Stone, Auditor, et al., filed demurrers to the bills of all said institutions, and by stipulation with the complainants' counsel, answers were filed at the same time by said city without waiving said demurrers. The grounds of each of these demurrers filed by the City of Louisville and Samuel H. Stone, Auditor, et al., respectively, were as follows:

"1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

"2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant." (*Record No.* 356, *Stone, et al.*, v. *Bank of Kentucky*, 93; *Ib.*, 110.)

Each of the complainants moved the court for a preliminary injunction, and, after oral argument, all of the cases having been heard together, they were submitted May 28, 1897, on said demurrers and motions. (*Ib.*, 100–102.)

The court below, June 4, 1898, filed its several opinions overruling the demurrers to the bills and granting preliminary injunctions in the cases of the Bank of Kentucky, Bank of Louisville, Louisville Banking Company, Bank of Commerce, Third National Bank, and Citizens National Bank, and sustaining the demurrers and dismissing

the bills of the Fidelity Trust and Safety Vault Company, Louisville Trust Company, and First National Bank. Most of these opinions have been copied into the transcripts of the respective records on these appeals, but all of them have been published in 88 Federal Reporter.

The Circuit Court, in the case of the Northern Bank of Kentucky, (which was one of the old State banks, whose charter had been extended after the passage of the reservation act of February 14, 1856), heard with these cases, which has not been appealed to this court, expressly decided these points:

1. That in a suit by a bank to enjoin one county from collecting its tax is under the provisions of the act of November 11, 1892, an adjudication that the bank had an irrevocable contract with the State for exemption from such taxes by reason of its acceptance of the Hewitt Act, is not conclusive, when pleaded as *res judicata* in a subsequent suit involving the right of the State and other counties and municipalities to collect taxes from such bank under the act of November 11, 1892, against either the State or such other counties or municipalities.

2. That the reservation statute of February 14, 1856, applies not only to subsequent grants of original charters, but to extensions of pre-existing charters.

3. That the acceptance of the Hewitt Act by a bank merely created a contract of exemption from other taxation than that therein prescribed, which, by section six of said act, the legislature could revoke at pleasure, and had in fact revoked and repealed by the revenue act of November 11, 1892. (*Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413–427).

The views of the court below in sustaining and upholding the pleas of *res judicata* in behalf of the three banks which were parties to the prohibition suits mentioned, are fully and particularly stated in the Bank of Kentucky case. (*Bank of Kentucky* v. *Stone, et al., Ib.*, 385–398.)

The opinion in the Bank of Commerce case states the grounds on which the lower court sustained the plea of *res judicata* by a bank claiming to be a privy by agrreement to one of the three banks that brought and prosecuted said prohibition suits to judgment. (*Bank of Commerce* v. *City of Louisville, Ib.*, 398–407.)

The reasoning of the Circuit Court in holding that the revenue act of November 11, 1892, with respect to the taxation of national banks, does not violate section 5219 of the Revised Statutes of the United States, is given in the opinion in the First National Bank case. (*First National Bank* v. *Stone, et al., Ib.*, 409–412.)

In the trust company cases, the court below held that a plea that they were privy, by agreement, to the Louisville Banking Company in its said prohibition suit, and that their claim to tax exemption was *res judicata* by the judgment in favor of said bank in that suit, could not be sustained, because the City Attorney had no power to bind the City of Louisville by consenting that the exemption from municipal taxation of the trust companies should depend on the result of

the litigation involving the question of the exemption of a bank, the point adjudged and the point at issue being different.

Upon the question of an irrevocable contract, claimed by the trust companies, on its merits, the Circuit Court reached the same adverse conclusion it did in the case of the Northern Bank of Kentucky, *supra*. (*Louisville Trust Co.* v. *Stone, et al., Ib.*, 407–409.)

After these opinions were delivered, the defendants, Samuel H. Stone, Auditor, et al., stood on their demurrers to the bills, and the issues were made up by the filing of replications to the answers of the City of Louisville. Final decrees were entered June 25, 1898, by the Circuit Court in both cases of the Bank of Kentucky (Nos. 356 and 357); both cases of the Louisville Banking Company (Nos. 360 and 361); and in the case (No. 364) of the Third National Bank *v.* City of Louisville (which latter action involved the taxes of 1893 and 1894), granting in each case perpetual injunctions as prayed for.

At the hearing of each of these five cases, the City of Louisville read a stipulation made with complainants' counsel, together with certain ordinances of said city, the special statutes incorporating the Commissioners of the Sinking Fund, and defining its powers and duties, and a statement of facts bearing on the plea of *res judicata* based on said prohibition suits, all of which are set forth in said stipulation. (*Stipulation, Record No.* 356, *Bank of Kentucky* v. *Stone, et al.*, 163–165.) No other proof was taken or read by the parties at the hearing of the five cases referred to, except the copies of records and documentary evidence made exhibits with their pleadings. At the same time (June 25, 1898), the Circuit Court entered final decrees sustaining defendants' demurrers to the bills and dismissing the same in the cases of the Third National Bank and Citizens National Bank (Nos. 404 and 405), in which said banks claimed an exemption from municipal taxes for years subsequent to the expiration of their first period of corporate existence, in August, 1894 (the court holding that the corporate existence, which said two national banks had when they accepted the Hewitt Act, was the contract period of their tax exemption); in the two cases (Nos. 406 and 407) of the Fidelity Trust and Safety Vault Company; in the two cases (Nos. 408 and 409) of the Louisville Trust Company; and in the two cases (Nos. 634 and 635) of the First National Bank.

The two cases of the Bank of Louisville (Nos. 357 and 358); the two cases of the Bank of Commerce (Nos. 362 and 363); and the case of the Citizens National Bank (No. 365), which was against the City of Louisville alone, involving the taxes of 1893 and 1894, were left open for proof on the issues of fact raised by the pleadings as to the alleged agreement under which said three banks claimed they were entitled to the relief prayed for as privies to the banks which had obtained judgments in said prohibition suits. On these issues of fact the complainant banks took the depositions of ex-City Attorney Henry S. Barker and John H. Leathers, cashier of the Louisville Banking Company; and the City of Louisville took the deposition of J. Moss Terry, secretary of the Commissioners of the Sinking Fund. (*Record No.* 362, *Stone et al.* v. *Bank of Commerce*, 42–92.)

While these depositions were taken and filed in the case of Bank

of Commerce v. Stone et al., they were by stipulation between counsel used and read as evidence in all of the five cases last mentioned. The City of Louisville filed exceptions to certain parts of the depositions taken by said complainants, as well as to the exhibits therewith, and the record evidence offered and read at the final hearing. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 93). These exceptions were all overruled by the court below, to which the City of Louisville excepted. (*Ib.*, 41.)

In these five cases of the Bank of Louisville, Bank of Commerce, and Citizens National Bank, the Circuit Court entered final decrees July 14, 1898, granting perpetual injunctions as prayed for.

At this hearing, the City of Louisville, in addition to the deposition of said Terry, and the exhibits therewith, read in evidence a similar stipulation to that filed in the other cases tried on their merits, and the ordinances of the city, statutes and statements of fact therein mentioned. (*Stipulation, Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 95–97.)

This court will observe from what has been stated that the decrees rendered June 25, 1898, in cases Nos. 356, 357, 360, 361 and 364, in favor of the Bank of Kentucky, Louisville Banking Company, and Third National Bank, respectively, were granted solely on the plea of *res judicata*, said three banks having been parties to the record, the plaintiffs in said prohibition suits, in which the judgments relied on were obtained.

The court will further observe that the decrees rendered July 14, 1898, in cases Nos. 358, 359, 362, 363 and 365, in favor of the Bank of Louisville, Bank of Commerce, and Citizens National Bank, respectively, were granted solely on the plea of said three banks that they were privies by agreement to the plaintiff banks in said prohibition suits, and were thereby likewise entitled to the benefit of such former adjudication.

The decree in the case of Bank of Kentucky v. Stone, et al., will illustrate what the Circuit Court adjudged in the first set of decrees, as follows (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 143.):

"And it is now adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and Geo. W. Long be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Jefferson County, or to any officer of the city of Louisville, or to the county clerk of Franklin County, or to any officer of the Board of Councilmen of the city of Frankfort, or the county of Franklin; and the defendants, the City of Louisville, County of Franklin, and board of councilmen of the city of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuation; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

"It is further adjudged, ordered, and decreed, by reason of the sev-

eral pleas of *res judicata* relied on by complainant in its bill, and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky, and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2, and 3 of article 2 of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void."

The county of Franklin and city of Frankfort were not parties to the other four cases above mentioned, decided June 25, 1898.

The decree in the case of Bank of Commerce *v.* Stone, et al. will show the character of the second set of decrees, as follows (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 94):

"It is adjudged, ordered, and decreed that the complainant is entitled to the benefit of the proceedings taken in the case of the Louisville Banking Company *vs.* R. H. Thompson, judge, &c., in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the Court of Appeals of Kentucky, wherein the Louisville Banking Company was appellant and the said R. H. Thompson, judge, &c., and the City of Louisville were appellees, to the same extent as if the camplainant had been a party to said proceedings.

"That it is *res adjudicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11, 1892, or certifying the same to the city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the Constitution of the State of Kentucky and any provision of the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, other than as allowed by the said Hewitt law is, during the corporate existance of the complainant,

unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant."

The defendants in the court below filed their assignment of errors and petition for an appeal to this court from each of said decrees, entered June 25 and July 14, 1898. These appeals were allowed and perfected by the execution of appeal bonds, and the issuance and service of citations were waived by complainants' counsel.

SPECIFICATION OF ERRORS.

The errors assigned in the case of the Bank of Kentucky v. Stone et al., and now specified as those relied on by the appellants, City of Louisville and Samuel H. Stone, Auditor, et al., in this court are as follows (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 166–167; *lb.*, 165–6):

"1. The court erred in overruling and not sustaining each ground of its demurrer to complainant's bill and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against this defendant.

"2. The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky, to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of complainant, Bank of Kentucky, against R. H Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, July 24, 1894, affirmed by the Court of Appeals of Kentucky June 1, 1895, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against complainant in said police court for carrying on the business of banking without paying the license fee to the Sinking Fund Commissioners of the City of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant city of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the Board of Valuation and Assessment of the State of Kentucky, under the act of November 11, 1892, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction, enjoining and restraining them from valuing and assessing the franchise on intangible property of complainant, and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897, and 1898, and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act impaired the

obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States."

The same errors in substance were assigned and are specified as those relied on by the appellants, City of Louisville and Samuel H. Stone, Auditor, et al., in the other four cases, decided June 25, 1898, and it is deemed unnecessary to repeat them in this brief, but the court is referred thereto. (*Record No.* 357, *City of Louisville* v. *Bank of Kentucky*, 25–26; *Record No.* 360, *Stone, et al.* v. *Louisville Banking Company*, 51–53; *Ib.*, 51–52; *Record No.* 361, *City of Louisville* v. *Same*, 31–32; *Record No.* 364, *City of Louisville* v. *Third National Bank*, 32–33.)

The errors assigned in the case of the Bank of Commerce *v.* Stone et al., and specified as those relied on by the appellants, City of Louisville and Samuel H. Stone, Auditor, et al., in this court, are as follows (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 97–99.):

"1. The court erred in overruling and not sustaining each ground of their respective demurrers to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against the defendants or either of them.

"2. The court erred in overruling the exceptions of the defendant City of Louisville to the depositions, exhibits, documents and records offered and read in evidence by complainant on the final hearing of this cause.

"3. The court erred in decreeing that complainant has an irrevocable or irrepealable contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of the Louisville Banking Company against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuauce of the mandate of the Court of Appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Louisville Banking Company in said police court for carrying on the business of banking without paying the license fee to the Sinking Fund Commissioners of the City of Louisville, in violation of the ordinance of the City of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the Board of Valuation and Assessment of the State of Kentucky, under the act of November 11, 1892, on account of the alleged agreement with ex-City Attorney Barker and the Commissioners of the Sinking Fund of the City of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant members of said State board, enjoining and restraining them from valuing

and assessing the franchise or intangible property of complainant, and from certifying such assessments for State and municipal taxation for the years 1895, 1896, 1897 and 1898, and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act, the city charter and the State Constitution, or either of them, impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated, and was repugnant to, the Constitution of the United States."

The same errors in substance as those last stated were assigned and are specified, as those relied on in this court, by the appellants City of Louisville and Samuel H. Stone, Auditor, et al., in the other four cases decided July 14, 1898, and need not be here repeated, the court being referred thereto. (*Record No.* 358, *Stone, et al.* v. *Bank of Louisville*, 37–38; *Record No.* 359, *City of Louisville* v. *Same*, 31–32; *Record No.* 363, *City of Louisville* v. *Bank of Commerce*, 33–34; *Record No.* 365, *Same* v. *Citizens National Bank*, 33–34.)

BRIEF OF ARGUMENT.

For the City of Louisville and Samuel H. Stone, Auditor, et al., in the ten cases where they are appellants, we shall undertake to maintain the following propositions:

1. The bill in each case fails to state facts sufficient to show jurisdiction in the Circuit Court of the United States.

2. The bill in each case fails to state facts sufficient to give the Circuit Court of the United States jurisdiction in equity, and should have been dismissed for want of equity.

3. None of the judgments pleaded by the complainants estops the State of Kentucky, or appellants, Stone, Auditor, et al., from making assessments of complainants' franchises and collecting State taxes thereon under the act of November 11, 1892.

4. Neither the State nor the City of Louisville, by the judgments of the State court in the prohibition suits, is not estopped to deny that the Bank of Kentucky, Louisville Banking Company, and Third National Bank have an irrepealable contract of exemption from any greater burden of taxation than that provided in the Hewitt Act.

5. The Bank of Louisville, Bank of Commerce, and Citizens National Bank were not privies to the banks that were parties plaintiff in the prohibition suits, and neither the State nor the City of Louisville is not estopped to deny their claim to a like tax exemption.

I.

NO JURSIDICTION SHOWN BY THE BILLS.

The bills on their face disclose facts which show the complainants by their acceptance of the Hewitt Act did not acquire irrepealable contracts with the State to pay taxes only as prescribed in that act during their corporate existence; and which further show that the legislative act of November 11, 1892, did not impair the obligation

of their contracts with the State, because in the Hewitt Act there was an express reservation of the power to repeal that act and to substitute in its place a different scheme of bank taxation. The Circuit Court, on an examination of the bills in considering the demurrers thereto, readily reached the conclusion that the complainants had no irrepealable contract by reason of their acceptance of the Hewitt Act, and that said act was subject to repeal at the will of the legislature, and had been in fact repealed by the revenue act of November 11, 1892. (*Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413.)

The only Federal question suggested in the bills being whether the State Constitution, adopted September 28, 1891, and the act of November 11, 1892, or either of them, impaired the obligation of complainants' contracts acquired by their acceptance of the Hewitt Act, and that question having been determined adversely to the complainants, no jurisdiction remained in the Circuit Court to determine the mere question of evidence, or the effect to be given to certain former judgments of the State court.

It is well settled that the Circuit Court or this court will decide for itself the construction that should be given to the State legislative act under which the contract is claimed, and will not accept as conclusive the construction which the Supreme Court of the State has put upon such act, nor be bound thereby unless such construction of the State court has been so long and firmly established as to become a rule of property. (*Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 *U.S.*, 486; *Shelby Co.* v. *Union & Planters Bank*, 161 *U. S.*, 149.)

The allegation in the bills that the Court of Appeals of Kentucky in the Bank Tax Cases, decided June 1, 1895, held that the banks which had accepted the Hewitt Act acquired contracts with the State which could not be repealed, did not bring these cases within the jurisdiction of the Circuit Court, if the latter court discovered, on an examinationof the Hewitt Act, recited in the bills, and of which it was bound to take judicial notice, that there was an express reservation therein of the power of the legislature to repeal said act at will, and that there was no such contract as claimed. If there was no irrepealable contract, there was no impairment of its obligation by the passage of the repealing act, and if the latter act did not impair the obligation of the contract made between the banks and the State, there was no Federal question left on which the Circuit Court could retain jurisdiction of these cases.

In *Phoenix Fire & Marine Insurance Co.* v. *Tennessee*, 161 *U. S.*, 183, the share holders, as well as said company, were parties to the action and claimed immunity from taxation by the city of Memphis. After this court, from its own construction of the State statute, had reached the conclusion that there was no contract of exemption, the plea of *res judicata*, interposed by the shareholders as a defense to the action, was disposed of as follows:

"Concluding, as we have, that this plaintiff in error insurance company is not exempt from taxation by the language of the statutes above mentioned, we come to the consideration of the second defense interposed by its shareholders. It seems that some time in the year 1873 the shareholders, or some of them, were sued by the city of

Memphis to collect from them certain taxes alleged to be due that city for the year 1872 upon the shares of stock held by them. By the decision of the Supreme Court of Tennessee the city recovered a judgment. A stipulation was then entered into between the parties to that suit, which is in the record, by which it appears that the same questions involved in that suit were fully and fairly presented in the case decided in favor of the plaintiffs, at that term of court, wherein the state of Tennessee and Shelby County were complainants, and Napoleon Hill and others, stockholders in the Memphis Fire and General Insurance Company, were defendants, and which action had been carried to the Supreme Court of the United States by writ of error for its decision of the questions, and, therefore, to save the expense of argument in the case, it was agreed by counsel for all parties that the *Memphis City Case* should abide by the decision of *Tennessee* v. *Hill*, which should be conclusive upon the parties to the stipulation in all things the same as though actually rendered in that case. If the decree in the *Hill Case* were affirmed, then this decree was to to be affirmed, and if the other should be reversed, then this was to be reversed. After the signing of that stipulation, the *Hill Case* was duly prosecuted by writ of error and argued before the Supreme Court of the United States, where the judgment in favor of complainant was reversed and the cause remanded to the Supreme Court of Tennessee with directions to enter its decree therein for the defendent Hill. This was done, and, in accordance with the stipulation above mentioned, a decree was thereupon entered in the Memphis city action, reversing the judgment in favor of plaintiff, and adjudging and decreeing that the tax levied and assessed by the city of Memphis upon the defendant's shares of stock was illegal, and adjudging that the city of Memphis could not legally assess said shares of stock for taxation, in the hands of the owners thereof, and that such shares were exempt from any and all municipal taxation, and the city and its officers were perpetually enjoined from collecting or proceeding to collect such taxes. This judgment was entered by consent, and pursuant to the stipulation of the parties entered into at the time the writ of error was sued out in the *Hill Case*, and it is now set up and offered in evidence as an adjudication in favor of the shareholders of the insurance company who are admitted to be the direct successors of the shareholders of the company sued in the former action, and the decision of the State court, refusing the benefit of that adjudication to the shareholders, is claimed to have been error, and to present a Federal question for review by this court. * *

"We think the decision of the Supreme Court as to the weight to be given the judgment is not reviewable by us, because it is not a Federal question. The former judgment determined that, as between the city and the shareholders, the latter were not subject to pay the taxes for the years specified. In the action now under consideration we have determined that there was no immunity conferred either upon the corporation or the stockholders by the statutes cited. On the trial of this action the former judgment was offered in evidence by the shareholders, and it was held to constitute no bar to the maintenance of this action by the plaintiffs, nor did it operate as an

estoppel upon their right to claim taxes for subsequent years. The judgment offered in evidence was the judgment of a State court, and the refusal to accord to it all that was claimed for it in the nature of an estoppel by counsel for plaintiffs in error was, in any event, no more than a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was by the general law entitled to. In no event was it anything other than error committed by the court below in regard to the general law or rule of evidence, which has nothing of a Federal question connected with it. * * *

"There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a State court operated as an estoppel against the plaintiff below, and prevented the State court from granting it the relief to which it would otherwise be entitled. In granting relief it was bound to consider the Federal question *as to whether there was or was not a contract of immunity*, and that question was open to review here, and we have just reviewed it. It is, however, quite doubtful whether the court below committed any error, even if the question were to be regarded as of a Federal nature and open to us for review. (*Keokuk & W. R. Co.* v. *Missouri*, 152 *U. S.*, 301, 314.)

"It is said that a suit for taxes for one year is no bar to a suit for taxes for another year; that it is not the same transaction, and the judgment in a prior action can never operate as an estoppel other than as to those matters which were in issue and controverted, and upon the determination of which a finding or verdict was rendered. It is not necessary in this case, however, to determine whether there was any one particular fact in issue and litigated in the first case, and which would be closed from further controversy, and which, as thus decided, would preclude a recovery in this case. We hold that the question in any event, as presented in this case, was not a Federal one."

Although that case was brought to this court on a writ of error to the Supreme Court of Tennessee, it would appear that the same ruling should apply to a case brought originally in the Circuit Court of the United States, and thence to this court on appeal. Suppose the shareholders in the said insurance company had filed their bill in equity in the Circuit Court of the United States, for the Western District of Tennessee, against the City of Memphis, to enjoin that city from collecting its taxes on their shares of stock on the ground (1) that they had by the charter of said company a contract of immunity from municipal taxes; and (2) that their right to such contract of immunity was *res judicata* by reason of the judgment of the State court relied on as an estoppel in the case last cited, and that this supposed case had been brought to this court on appeal by either party, would not this court, after deciding on the face of the bill that there was no contract of immunity from municipal taxation, further hold that the plea of *res judicata* "had nothing of a Federal question connected with it;" that it was "wholly one of evidence as to whether or not a prior judgment in a State court operated as an estoppel?"

In *New Orleans* v. *New Orleans Water Company*, 142 *U. S.*, 79, this court held that before it can be asked to determine whether the stat-

ute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and that a contract, which is subject to the will of the legislature, could not be impaired by subsequent legislation. In that case it will be observed that the prior judgment of the Supreme Court of Louisiana was relied on as having fixed the rights of the parties to the contract alleged.

In *St. Paul, M. & M. Ry. Co.* v. *St. Paul & N. P. R. R. Co.*, 68 *Fed. Rep.*, 11, Judge Thayer, for the Court of Appeals, in the Eighth Circuit, in reversing the judgment and directing the court below to dismiss the bill, said:

"A case which in fact depends for its decision upon questions of local or general law, can not be brought within the jurisdiction of a Federal tribunal as one arising under the Constitution and laws of the United States merely by referring in the complaint or declaration to some Federal statute or statutes, and by setting up a cla m thereunder, which is merely colorable and obviously without any reasonable foundation. If such a practice was tolerated, the result would be that the jurisdiction of the Federal courts would be unduly enlarged and made to comprehend a class of cases which were never intended to be tried therein."

In *Goldstein* v. *Whelan*, 62 *Fed. Rep.*, 125, the court, by Judge Coxe, said:

"It is probably true that where a Federal question is involved, the court is justified in adjudicating upon all questions growing out of the transaction involved. But is this true where it appears that there is no Federal question? In other words, can the court retain jurisdiction to pass upon a cause of action solely cognizable by the State courts, after it is demonstrated that no Federal question is involved, simply because the bill alleges facts which, if true, would give the Federal court jurisdiction?"

In *New Orleans* v. *Benjamin*, 153 *U. S.*, 411, this court, by Chief Justice Fuller, said:

"Ordinarily a question of the repugnancy of a State statute to the impairment clause of the Constitution is to be passed upon by the State courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require, (*Chic. & A. R. Co. Wiggins Ferry Co.*, 108 *U. S.*, 18), and if there be ground for complaint of their decision the remedy is by writ of error under section 709, Revised Statutes."

By section 5 of the Judiciary Act of March 3, 1875, still in force, it is expressly provided: "That if in any suit commenced in a circuit court * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit."

Of course, this means a dismissal without prejudice.

In *Morris* v. *Gilmer*, 129 *U. S.*, 315, it was held that whether the circuit court had or had not jurisdiction of the case, was a question which this court must examine and determine, even if the parties

forbear to make it or consent that the cause may be considered on its merits, and that it was the duty of the circuit court to dismiss the suit if it appeared any time after it was brought, and before it was finally disposed of, that it did not involve a controversy of which it might take cognizance.

In the case last cited, the jurisdiction depended on the diverse citizenship of the parties. A motion was made in the court below by the defendants to dismiss the action because the complainant was not a resident of Tennessee when he brought suit in the Circuit Court of the United States for the Middle District of Alabama, and the motion was overruled on the proof, and the case went to final decree on the merits. (*Gilmer* v. *Morris*, 35 *Fed. Rep.*, 682). This court held that complainant was not a citizen of Tennessee when his action was commenced, but of Alabama, and having disposed of this jurisdictional fact, declined to proceed further, using this language:

"It is unnecessary to decide whether the Circuit Court erred in overruling the plea of former adjudication, or in rendering the decree appealed from; for we are of opinion that the motion to dismiss the suit, as one not really involving a controversy within its jurisdiction, should have been sustained."

In these cases the bills all allege that the highest court in the State, on June 1, 1895, held that the Hewitt Act was still in force with respect to the banks which had accepted its provisions; and that subsequent legislation had not repealed that act or impaired the obligation of the complainant banks' contracts. It is not alleged that the Court of Appeals had subsequently overruled its former decision, or had applied the operation of the act of November 11, 1892, to the complainants' contracts so as to impair the obligation thereof, nor is it alleged that the rights of either of the complainant banks in these cases, growing out of their plea of *res judicata*, had been adjudicated by the State court, or that the latter court had refused to grant them the protection claimed under the Hewitt Act. The truth is, these cases were brought about three weeks after the decision of the Court of Appeals of March 24, 1897, in the Owensboro Bank Tax Cases, under the apprehension that said court might apply to the complainant banks the operation of the act of November 11, 1892, notwithstanding the former adjudication. In other words, these cases were manifestly brought because the complainant banks were fearful that the Court of Appeals of Kentucky would not give effect to and enforce its own former judgment when pleaded by them as *res judicata*.

It is not alleged in these bills that since the adjudication of June 1, 1895, there had been any *legislative* enactment which operated upon the complainants or impaired the obligation of their contracts.

In *New Orleans* v. *Citizens Bank*, 167 *U. S.*, 371, the judgments of the State court, pleaded as *res judicata*, were rendered March 10, and May 3, 1887, and enjoined the collection of taxes for the years 1886 and 1887, respectively, on the ground that the bank, under its charter, had a contract of exemption from all taxation. The legislative acts, devising a scheme for the assessment and taxation of all banks and their shares of stock—which the Citizens Bank, in the case cited, alleged were an impairment of the obligation of its charter

contract of immunity from all taxation, in violation of the Constitution of the United States—were passed in 1888 and 1890, subsequently to the rendition of said State court judgments, and it was under the latter acts that assessments for taxation for State, parochial, and city purposes were about to be made for the years 1889 to 1892, inclusive, when the suit for an injunction was instituted by said bank in the Circuit Court of the United States. While this court unanimously held in that case that the bank, under the language of its charter and the construction given thereto by the State in all of its taxing departments for forty years, and by the supreme and district courts of the State for twenty years more, had a contract of exemption on the subjects of taxation as defined in the opinion, three members of this court dissented from the opinion rendered on the ground that the judgments relied on by said bank did not sustain the plea of *res judicata*.

The conclusion reached in that case by the whole court was, because, deciding for itself independently, the true interpretation of the language used in the bank's charter entitled it to a contract for immunity from all taxes on certain subjects of taxation, and this opinion was fortified by the previous decisions of the State courts, which had been so long and firmly established as to become a rule of property.

In the case last cited, the Circuit Court and this court were entirely justified in retaining jurisdiction and disposing of said case on its merits, not because of the plea of *res judicata*, but on the ground that the bank in its bill alleged and showed it was "contractually exempt from State and municipal taxation under its charter, and the acts supplementary thereto;" and on examination of the charter amendments referred to in the bill, the Circuit Court (54 *Fed. Rep.*, 73) found this allegation to be true. The Federal question whether or not the State statutes of 1888 and 1890 impaired the obligation of this charter contract was thus directly presented and sustained, and the jurisdiction of the court established.

The jurisdictional facts, as shown by the record in that case, however, are very different from those developed in these cases; besides, the question of jurisdiction in that case, while made by a demurrer to the bill in the lower court, was not pressed in this court on the appeal.

In *Commercial Bank* v. *Buckingham*, 5 *How.* (45 *U. S.*), 317, the question involved was whether a statute of Ohio, enacted in 1824, as construed by the Supreme Court of that State, impaired the obligation of a contract in the bank's charter granted in 1829. By the former act all banks were made liable to pay six per cent. interest on their notes from the date of demand and refusal of payment; and by the subsequent act chartering the bank, it was provided that in case the bank suspended payment and refused to pay its notes or bills, it should be liable to pay, "as additional damages" to the holder, twelve per cent. per annum thereon. The Supreme Court of Ohio had construed the latter act as requiring the bank to pay twelve per cent. in addition to the six per cent. interest provided in the prior act in case of non-payment by a bank of its notes or bills on demand. This court, in dismissing the case for want of jurisdiction, said (*Ib.*, 342–343.):

"It is conceded that the act of 1824 is valid and constitutional, whether it applies to the plaintiff's charter or not; and if so, it follows as a necessary consequence that the question submitted to the court and decided by them was ~~of~~ one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase 'additional damages,' as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the State courts to construe their own statutes, and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their *judgments* have impaired the obligation of contracts. The power delegated to us is for the restraint of *unconstitutional legislation* by the States, and not for alleged errors committed by their *judiciary*."

So, in these cases, the act of November 11, 1892, is admitted and held by the Circuit Court to be constitutional as applied to banks in the State generally, old and new, State and National; and, when enacted and made applicable by the legislature to all banks in the State, that it did not impair the obligation of existing contracts between the State and banks which accepted the Hewitt Act, because such contracts were made on the express condition that they might be altered or repealed at the will of the legislature. But in complainants' bills it is alleged that ~~because~~ the Court of Appeals of Kentucky, June 1, 1895, in deciding the cases of ten particular banks held that said act when applied to the banks which had accepted the Hewitt act, impaired the obligation of their contracts, and thus violated the Constitution of the United States. It is insisted that this fact presents a Federal question, and gave the Circuit Court jurisdiction, and imposed the duty on that court to also declare said act repugnant to the Constitution of the United States, so far as the complainant banks are concerned, although it was entirely convinced that the State, through its legislature, in passing said act of November 11, 1892, had not impaired the obligation of the contract made between the State and any of said banks. In other words, it is claimed that the Circuit Court, as between citizens of the same State, had jurisdiction of these cases, because the Board of Valuation and Assessment and the City of Louisville were about to impair the obligation of complainants' contracts—not that such obligation was impaired by the legislature in enacting the law of November 11, 1892, nor that it had been impaired by any judgment of the State court. On the contrary, these banks in their bills allege the rendition of only one judgment of the highest court in the State, and admit in their bills that that judgment was in their favor.

The Federal court is, therefore, called on by complainants to take jurisdiction in these cases merely for the purpose of enforcing the State court's erroneous judgment of June 1, 1895. Will not this court say to these complainant banks, in the language of the opinion

last cited, "the power delegated to us is for the restraint of unconstitutional *legislation* by the States," not, when we know the law complained of does not violate the Constitution of the United States, to prevent the disregard of a State court's erroneous judgment by the executive officers of such State?

That kind of controversy is within the jurisdiction of the State court alone, and the presumption must be indulged that it will give such force and effect to its own prior judgment as it is entitled to under the law. Had the bills of complainants alleged that the State had, since the State court's judgment of June 1, 1895, taken *legislative* action and passed a law that impaired the obligation of their contracts, arising out of a former adjudication, as in the case of New Orleans *v.* Citizens Bank, *supra*, there might have been some plausible ground on which to uphold the Circuit Court's jurisdiction in these cases.

In all the cases arising under the Constitution or laws of the United States, which we have examined, where this court has sustained the jurisdiction of the Circuit Court, as to questions involved other than Federal questions, it has been on one of these grounds: (1) the Federal law drawn in question was held to be constitutional; or (2) the State statute drawn in question was held to be unconstitutional. In other words, where the Federal question has not been established, this court has not sustained the jurisdiction of the Circuit Court to proceed to the determination of other questions involved in the case. (*Mayor* v. *Nashville*, 5 *Wall.*, 247; *Tennessee* v. *Davis*, 100 *U. S.*, 257; *Railroad Co.* v. *Mississippi*, 102 *U. S.*, 135; *Carey* v. *Railroad Co.*, 150 *U. S.*, 170; *Chappell* v. *United States*, 160 *U. S.*, 499; *Scott* v. *McDonald*, 165 *U. S.*, 58; *Holder* v. *Aultman*, 169 *U. S.*, 81.)

So far our discussion of the question of jurisdiction has been applicable to all of these cases against the City of Louisville, as well as those in which the Auditor, Treasurer, and Secretary of State, constituting the Board of Valuation and Assessment, have been joined as co-defendants. These officers, representing as they do the State of Kentucky, by their demurrers to the bills likewise contested the jurisdiction of the Circuit Court, and claim on these appeals that the actions to which they have been made defendants are, to all intents and purposes, against the State of Kentucky. Although the eleventh amendment to the Constitution of the United States does not in terms prohibit the judicial power of the United States from extending to a suit commenced against a State by one of its own citizens, still this court has decided that a suit in the Circuit Court of the United States by a citizen against his own State, without its consent, will not lie, although a Federal question be involved. (*Hans* v. *Louisiana*, 134 *U. S.*, 1.)

Suits brought like these for relief against State officers are virtually against the State itself. (*Louisiana* v. *Jumel*, 107 *U. S.*, 711; *Hagood* v. *Southern*, 117 *U. S.*, 52; *Ex parte Ayers*, 123 *U. S.*, 443.) The relief asked in these cases is not against the defendants, Stone, Long, and Finley, as individuals, but in their representative capacity as officers of the State of Kentucky. The acts sought to be

enjoined are the assessments of complainants' franchises by the Auditor, Treasurer, and Secretary of State, constituting the Board of Valuation and Assessment for State, as well as city taxes, and the collection by the Auditor of State taxes, as well as by the City of Louisville of city taxes on such assessments. The same assessments answer for both purposes. The prayer in each bill against Stone, et al., in these cases is for a perpetual injunction against said officers, enjoining them from making any assessment of the complainant's capital stock, franchise, or other property, under the act of November 11, 1892, and the Auditor from collecting taxes due the State based on such assessments, and on final hearing a decree is asked establishing the complainant's contract right to be taxed in the method prescribed in the Hewitt Act, and not otherwise. (*See prayers of bills, Record, No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 14–15; *Record, No.* 358, *Same* v. *Bank of Louisville*, 12–13; *Record, No.* 360, *Same* v. *Louisville Banking Company*, 12; *Record, No.* 362, *Same* v. *Bank of Commerce*, 12; *Record, No.* 405, *Citizens National Bank* v. *Stone, et al.*, 12–13; *Record, No.* 407, *Fidelity Trust & Safety Vault Co.* v. *Same*, 12–13; *Record, No.* 409, *Louisville Trust Company* v. *Same*, 12; *Record, No.* 634, *First National Bank* v. *Same*, 9–10.)

These prayers are substantially alike, hence we quote, for example, that in the case of the Louisville Banking Company, as follows:

"To the end, therefore, that your orator may not be subjected to the false claims and suits which will be instituted by the city and *State*, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpoena against the defendants, Samuel H. Stone, auditor, Charles Finley, secretary, George W. Long, treasurer of the State of Kentucky, and the city of Louisville, to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding the said Sameul H. Stone, Charles Finley, and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone, be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson County, or any other officer, and that the defendants, including the city of Louisville, and each of them, be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the *State of Kentucky* or the city of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the 'Hewitt bill,' *and not otherwise*, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or claimed penalties in behalf of either the city or *State*; and for all general and equitable relief to which your orator may be entitled."

So the final decrees, already quoted by us in the statement of these cases, where Stone, et al., are defendants, awarded to the complainants therein the exact relief prayed for *against the State*, as well as the city of Louisville. In other words, the Circuit Court decreed that by reason of the plea of *res judicata*, and the complainant's acceptance of the Hewitt Act, "the complainant has an established contract with the Commonwealth of Kentucky * * the terms of which contract the *Commonwealth of Kentucky* can not alter or change without the consent of the complainant; that by the terms of this contract, the complainant and its shares of stock, can not, during its corporate existence, be assessed for taxation for *State purposes* in a different mode or at a greater rate of taxation than as prescribed in said act." (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 143).

In none of the bills is the judgment in any action to which the State was a party, or in which its taxes were involved, pleaded as *res judicata*. No such judgment had ever been obtained by either of the institutions that are parties to these appeals. The following allegations in the bills of the Louisville Banking Company, which are the same in substance as those in the other bills, show conclusively these suits are really against the State itself, and seek (1) to conclude its rights by the judgments in the prohibition suits; and (2) to perpetually enjoin it by its officers from making any assessments of the complainant's franchise, and from collecting its taxes, interest, and penalties thereon, under the act of November 11, 1892:

"In the Court of Appeals, which is the court of final resort in the State of Kentucky, the City of Louisville was represented by its corporation counsel *and the Commonwealth of Kentucky appeared by its attorney general*, and by oral argument and printed brief opposed the contention of the several banks. The city *and the State*, through their respective official attorneys, both insisted that none of the banks or trust companies had any contract under the 'Hewitt bill.'" (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Co.*, 8.)

"Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00, exclusive of interest and cost." (*Ib.*, 11.)

Could a cause of action be stated more aptly or clearly in a suit instituted directly against the State? Why allege that the amount of the *State* taxes against the complainant, based on the assessment of its franchise, "exceeds two thousand dollars, exclusive of interest and costs," unless the object was to show that the Circuit Court had jurisdiction of the action as against the State itself by reason of the amount in controversy?

In this connection, we call the court's attention to the fact that in the bill of the appellee, Bank of Commerce, against Stone, et al., and that of the appellee, Louisville Banking Company, against the same defendants, the allegations as to the amount in controversy are not sufficient to bring these two cases within the jurisdiction of the Circuit Court. In the former case the bill alleges:

"As applied to your orator the tax under the act of November 11, 1892, before referred to, will exceed the tax which it would have

to pay under the Hewitt bill by $20,000." (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 5.)

Again, the bill in that case alleges:

"Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000, exclusive of interest and cost, and the taxes claimed by the City of Louisville, based on the assessment of your orator's franchise, exceeds the sum of $2,000, exclusive of interest and cost". (*Ib.*, 11.)

These are all the allegations of the complainant in that case with respect to the amount in controversy. The tax rate levied by the State or by the City of Louisville for either of the years 1895–6–7–8 is not stated. No assessment of said complainant's franchise was made by the Board of Valuation and Assessment for either of said years, the taxes for which alone are in controversy. The amount of such assessments, therefore, was not stated. The value of the complainant's franchise in either of said years is not alleged, or that it was as much as it was in 1893 or 1894, when the same was assessed by said board. What are we then to understand by the allegations quoted above? Simply that during the corporate existence of said bank, not during said four years merely, the taxes of the State and of the city, respectively, will exceed $2,000, exclusive of interest and cost. But this court has recently expressly held, in a similar case, such allegations were insufficient to give the Circuit Court jurisdiction.

In *Citizens Bank* v. *Cannon*, 164 *U. S.*, 319, the bill alleged that the defendants, who were sheriffs, respectively, of a number of parishes of Louisiana, were about to assess and collect State and parish taxes for the years 1889 to 1892, inclusive, but did not contain a specific allegation as to the amount of the assessment or taxes for any one parish, but averred that the taxes so assessed exceeded, exclusive of interest and costs, the sum of $2,000. This was construed to refer to the taxes during the charter life of the bank. On this point the court held that the facts showing jurisdiction did not affirmatively appear in the bill, and observed (*Ib.*, 322):

"The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and if the amount of such taxes does not confer jurisdiction, it is from the nature of things impossible for a court to foresee what, if any, taxes may be assessed in the future."

Precisely, the same allegations are made in the bill of the Louisville Banking Company, and the same objection is applicable. (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Company, p.* 11).

The amount in controversy is in like manner defectively alleged in the bills against Stone, et al., of the Citizens National Bank, Fidelity Trust & Safety Vault Company, Louisvile Trust Company, and First National Bank, to all of which demurrers were sustained (*Record No.* 405, *Citizens National Bank* v. *Stone, et al.*, 8, 11; *Record No.* 407, *Fidelity Trust & Safety Vault Company* v. *Same*, 5, 11; *Record No.* 409, *Louisville Trust Company* v. *Same*, 5, 11; *Record No.* 634, *First National Bank* v. *Same*, 9.)

Again, in none of the bills in these cases is it alleged that the

State court in the prohibition suits had jurisdiction of the parties or the subject-matter of said suits, nor is it alleged that the judgments relied on therein are final and in full force and effect, or have not been set aside, annulled, or superseded. With respect to the judgments in two of said suits, those of the Louisville Banking Company and Third National Bank, it appears they were not rendered until April 13, 1897, after the demurrers to the petitions were sustained, and the defendant had declined to plead further. (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Company*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57.) Under the statute of the State, the right of appeal from said two judgments, and to supersede the same, exists for two years thereafter, or until April 13, 1899. (*Ky. Civil Code, sec.* 745.) It seems reasonably clear that if such appeals should be taken, the Court of Appeals, in view of its decision of March 24, 1897, in the Owensboro bank tax cases, will reverse said judgments.

In *Osborn* v. *Bank of United States*, 9 *Wheat.*, 738, the jurisdiction was upheld against Osborn, Auditor of the State of Ohio, to enjoin him from collecting the State tax levied on the Bank of the United States by an unconstitutional and void legislative act of that State. There the State officers had, for the taxes claimed, seized $100,000 of the bank's money, which was in danger of being lost to the bank, and the necessity of a discovery justified the application to a court of equity. The State officers, made defendants in that action, had a personal interest therein, being individually responsible for the money thus taken from the bank, which had been declared by this court to be exempt from State taxation before the passage of said act, and the wrongful seizure of the bank's money for such taxes.

In these cases, however, the Circuit Court discovered, on an inspection of the bills when demurred to, that the statute of November 11, 1892, was constitutional and valid, and did not impair the obligation of the contract between the complainants and the State; that the State was not a party or privy in any of the litigation set up in the bills; and that its Auditor, Treasurer, and Secretary of State had full power and authority under said act to make the assessments of complainants' franchises for State as well as city taxes, and that the Auditor's right to collect the State taxes on such assessments was manifest. Was not the Circuit Court, under these facts thus presented in the complainants' bills, without jurisdiction to proceed further? Was there anything left for it to do except to dismiss the bills? Yet it retained jurisdiction and rendered the final decrees appealed from by which these State officers are powerless to take a step toward the assessment of the complainants' franchises or intangible property, or in the collection of the State's taxes from the complainants under the only revenue law of the State now in force, or under any statute that may hereafter be enacted, during the corporate existence of these banks.

By its legislative department, the State has repealed the Hewitt Act authorizing its officers to execute its alleged contract on its behalf, and thereby forbidden its said officers from collecting taxes thereunder.

In *Hagood* v. *Southern*, *supra*, it was decided that in a bill for specific performance, where the State was not nominally a party to the record brought against its officers and agents having no personal interest in the subject-matter of the suit, and defending only as representing the city where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constituted a performance of the alleged contract by the State," the court was without jurisdiction because it was a suit against the State.

In *Ex parte Ayres*, *supra*, this court, in referring to this principle announced in the case last cited, said:

"The converse of that proposition must be equally true, because it is contained in it: That is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State."

On this point, this court further stated:

"But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution."

The State not being a party to the prohibition suits, do the judgments in these cases operate as an estoppel against the State for any purpose in executing through its officers the franchise tax law of November 11, 1892, for the benefit of the City of Louisville, the largest city in the State, and which, in many respects, governs for the State?

In the case of *City of Louisville* v. *Commonwealth of Kentucky*, 1 *Duv.*, 297, the court said:

"A municipal corporation, like a State, a county, or the city of Louisville, is much more than a person. While nominally a person, it is vitally a political power; and each, in its prescribed sphere, is '*imperium in imperio.*' All are constituent elements of one total sovereignty. The City of Louisville, to the extent of its jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality."

Can the wise policy of the State, embodied in its present Constitution, and said act of November 11, 1892, of dividing the revenue derived from the taxation of such institutions as these between the

State and the municipality, where they are located, and which protects their property, and affords them all the facilities for the successful transaction of their business, be blocked and nullified by a plea of *res judicata* founded on a judgment in a suit to which the State was not a party? Suppose the Auditor should refuse to accept State taxes from the appellee banks under the Hewitt Act, and he, together with the Treasurer and Secretary of State, constituting the Board of Valuation and Assessment, should proceed to assess their franchises for State taxes, and the Auditor or Attorney General should then take steps by suit to collect from them the State's taxes on such assessments, as required by the revenue law of 1892, which the court below and the highest court in Kentucky have declared to be constitutional, would the Circuit Court, under its decrees herein, have any jurisdiction to punish these State officers for contempt? We insist it would not; and, if not, it was without jurisdiction to render its decrees herein against them. But it may be said it is not likely that these State officers will take that course, because the State taxes against these banks under the Hewitt Act are more than they are under the act of 1892; but this question of jurisdiction can not be made to depend on the will or discretion of the State's officers. The State has already increased its *ad valorem* tax rate for State purposes from 42½ cents on the one hundred dollars, fixed in the act of 1892, to 52½ cents, and may long before the corporate lives of these banks expire increase the latter rate to 80 cents, or to a point in excess of the rate imposed on banks in the Hewitt Act. The interests of the State, as well as the law, would then be with the Auditor in refusing to accept from these banks State taxes under the Hewitt Act, and in demanding the rate fixed in the existing revenue laws of the State. Again, it may be claimed that the *tender* to the Auditor by these banks of the amount of their State taxes under the Hewitt Act would be a compliance with their part of the contract with the State, so as to keep in force its obligation as between them and the City of Louisville. But is that true? Would anything short of *actual payment* by the banks of the taxes to and acceptance by the State, as stipulated in the Hewitt Act, be a compliance therewith, so as to keep the alleged contract in force with respect to the City of Louisville? The immunity is based on this condition precedent in section 4 of the Hewitt Act: "Such bank, and its shares of stock, shall be exempt from all other taxation whatsoever so long as said tax shall be *paid* during the corporate existence of such bank." We are ready to grant as true the proposition that if the State by its Auditor was any longer legally bound to accept the tender from these banks of the amount of their State taxes under the Hewitt Act, and refused to do so, then the tender would be as efficacious to continue in force the contract as an actual payment; but such is not the case, and we contend that if the State is no longer bound by the contract, the City of Louisville is not. The contract was made between two parties, the banks and the State, the latter acting for itself and the City of Louisville, and having the right to withdraw therefrom at any time. This right to withdraw has been exercised by the State through its legislative department, and in doing so, the

status of the parties has been so materially changed that neither party any longer has the legal right to call on the judiciary to specifically enforce the contract against the other. The mutuality of the obligation has legally ceased. Neither the State, nor its officers, can be legally compelled to accept a compliance by the banks of the condition precedent, which is indispensable to entitle the latter to immunity from taxation by the City of Louisville during their corporate existence. The legal right of the State to sue and recover from any of these banks the franchise taxes due the State under the act of 1892, can not be questioned. To such a suit none of these banks has any legal defense whatever. Neither a plea of the acceptance of the Hewitt Act, nor a plea of *res judicata*, would avail, for the State is not estopped by either the original contract or the judgment in any suit to which it was not a party, or in which county and city taxes alone were in controversy. (*Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413.

It seems to us that the peculiar nature of the contract between the banks and the State, as disclosed by the bills in these cases, was such that if all of the parties thereto are no longer bound thereby, neither party is, and unless the plea of *res judicata* set up in the bills estops the State, it does not estop the City of Louisville. We have seen that this plea does not estop the State. Therefore, we contend that the Circuit Court, on the face of the bills, had no jurisdiction; and that the separate demurrers thereto on that ground, filed by Stone, Auditor, et al., and the City of Louisville, ought to have been sustained, and each of them dismissed.

II.

NO JURISDICTION IN EQUITY AND WANT OF EQUITY IN THE BILLS.

1. Before the Federal courts will entertain a suit in equity to restrain the collection of a tax on the ground that the tax is illegal or unconstitutional, there must be some additional grounds shown. As said in the case of *Shelton* v. *Platt*, 139 *U. S.*, 594, where the whole subject was elaborately reviewed by the court:

"There must be some special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is *real estate*, throw a cloud upon the title of the complainant."

To the same effect is the case of *Dows* v. *Chicago*, 11 *Wall.*, 108. In the suits against the City of Louisville it is alleged that the bank will suffer irreparable injury. This is a mere conclusion of law, and is not sufficient to authorize the granting of an injunction.

As stated in *High on Injunctions, vol.* 1, *sec.* 491:

"Nor will mere general averments in the bill of the inadequacy of the remedy at law, or that irreparable injury will be sustained by the sale of complainant's property for taxes, suffice to warrant an injunction, but the *facts* must be stated upon which the court can determine whether such averments are true."

It will be observed in the case of *Shelton* v. *Platt, supra*, above referred to, that where there is an averment of a cloud upon complainant's title will be created by the taxes, in order to authorize a court of equity to intervene on that ground, it must be shown that the property upon which the cloud will be thrown is *real estate*. In only a few of these bills is there an averment that the complainant owns any real estate, and in none of them is it alleged that the title to any such property will be clouded by the taxes sought to be enjoined. This seems to conclusively dispose of the allegation as to a cloud upon the title.

Now, as to the multiplicity of suits, we readily admit that equity will always intervene by injunction to prevent a multiplicity of suits; but, as in the case of the allegation as to irreparable injury, where an injunction is sought on the ground of avoiding a multiplicity of suits, the *facts* must be stated tending to support the allegation as to the danger of a multiplicity of suits. To recover the taxes alleged to be due, the City of Louisville would, of course, have a right of action, and one suit against each particular bank would settle the question, and it is not by any means to be presumed that either the City of Louisville, or the State of Kentucky, would harass any taxpayer by a great number of suits when one suit would suffice to settle the controversy; nor, on the other hand, is it to be presumed that after a suit at law for the collection of the taxes was determined in favor of the taxing power that the bank would still require other suits to be brought. In other words, there is no allegation in these bills, from beginning to end, tending to show any reason for more than one suit at law to settle the question of exemption. In such suit each bank would have ample opportunity to present all its defenses, and to prevent the collection of the taxes claimed, if illegal. This point is aptly illustrated by the decision in the case of *Pacific Express Company* v. *Seibert*, 44 *Fed. Rep.*, 315, where it is said:

"It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each day's penalty, the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting for and in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with law suits. * * * The court will presume that a State is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights."

In the case of *Union Pacific Railway Co.* v. *Cheyenne*, 113 *U. S.*, 516, it is said:

"To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, can not, of themselves, furnish any ground for equitable interposition."

We can not see, therefore, how it can be claimed that there was either any danger of, or necessity for, a multiplicity of suits if the injunction prayed for was not granted, or that any irreparable injury would occur that could not be compensated for in money, or that any cloud upon the title to real estate would result, without the intervention of a court of equity by injunction.

In the case of *Allen* v. *Pullman Palace Car Co.*, 139 *U. S.*, 658, the bills to enjoin the tax contained jurisdictional averments much more comprehensive and specific than those in the cases at bar, and the court there held that the averments were insufficient to give a court of equity jurisdiction to enjoin a tax. So we insist that in order to enjoin a tax on the ground that a multiplicity of suits will ensue, or on the ground that the plaintiff would suffer irreparable injury, the facts must be clearly stated going to show not only the possibility, but the strong probability of a multiplicity of suits, and the facts going to show the irreparable injury alleged must be definitely set out, for it has been many times held that the mere allegation of irreparable injury is only a conclusion of law. Under the statute, the taxes due the City of Louisville on the State Board's assessment could only be collected by suit in court—not by distraint or garnishment, as in the case of tax bills made out on assessments by the City Assessor.

In the argument of these cases in the court below, it was suggested that the United States Circuit Court had recently taken original jurisdiction in the Express Company cases and the Western Union Telegraph Company cases in Ohio and Kentucky, to enjoin the collection of taxes, and that said cases were authority going to establish the jurisdiction in equity of that court in these cases. The cases of the Adams Express Company and the Western Union Telegraph Company in Kentucky were to restrain the Board of Valuation and Assessment from certifying the assessed value of the franchises of said companies respectively to various counties, municipalities, and taxing districts. In the cases in Kentucky it was averred in the bills that unless restrained the Auditor would certify to more than *sixty counties, cities, towns, and taxing districts* throughout the State of Kentucky. This was because the Adams Express Company operated over a large part of Kentucky, as did also the Western Union; so the court will see that there is a marked distinction between those cases and the cases under discussion, for in these cases the Auditor would have to certify to *but one municipality*, to-wit: The City of Louisville, except in the case of the Bank of Kentucky, where the certification would be to the City of Louisville, City of Frankfort, and the County of Franklin. Jefferson County, in which the City of Louisville is situated, under the law, can not and does not collect taxes from residents of the City of Louisville on their property. (*Sec.* 2744, *Ky. Statutes.*)

The bills of the Adams Express Company and Western Union Telegraph Company in the Kentucky cases set out the fact that the value of their franchises would be certified to this large number of counties, cities, towns, and taxing districts, and thereby conclusively showed to the court that these two companies would be subjected to

a multiplicity of vexatious suits, whereas in the cases at bar there is not an allegation of fact going to show even the possibility of a multiplicity of suits. The distinction between the cases is so marked that a statement of the facts is sufficient without further argument. I desire to emphasize the fact that the cases referred to were not suits to restrain the collection of any tax, but they were suits to prevent the Auditor from certifying the assessed value of the franchises of the said companies, already made by said board, which, if done, would subject the companies to great harassment, necessitating their going into various jurisdictions to contest the right to collect the taxes on such certified assessments. Moreover, the court will find that the question of jurisdiction in equity was not raised or discussed either in the Circuit Court or this court in the Kentucky cases. (*Adams Express Company* v. *Kentucky*, 166 *U. S.*, 171; *Western Union Telegraph Company* v. *Norman*, 77 *Fed. Rep.*, 13).

In the Express Company cases in Ohio, the bills sought to enjoin the State tax appraisers from certifying certain taxes to the auditors of *eighty-seven* counties in the State. (*Sanford, &c.*, v. *Poe*, 37 *U. S. App.*, 378; *Adams Express Company* v. *Ohio State Auditor*, 165 *U. S.*, 194).

Section 3008 (*Ky. Stats.*) is relied on to authorize this court to entertain jurisdiction in equity. The language of that section is as follows:

"Any court of competent jurisdiction, not inferior to a circuit court, may, in the *established* modes of proceedings, and upon *existing* principles of *law* or equity, *give redress* against unlawful distraints or garnishments of rents that may be wrongfully made or threatened under color of *this act;* but no injunction shall be granted in such proceeding except by the court or its judge, nor otherwise than upon notice to said city, and after a hearing."

This section is a part of the "act for the government of cities of the first class," approved July 1, 1893, and relates to the collection of tax bills made out upon assessments of the City Assessor. This is clearly apparent on an examination of the preceding sections, 2997 to 3007, inclusive. The City Assessor is required to make out the tax-bills on his own assessments as of September 1, in December, and list them with the Tax Receiver by the third day of January, or as soon thereafter as practicable. A discount is allowed on those paid in January, February, and March. All tax-bills which remain in the hands of the Tax Receiver on May 1, succeeding the date on which they are listed, bear interest at the rate of one-half of one per cent. for every month or fraction of a month. In the month of May and June, notices are required to be issued by the Tax Receiver to those in arrears, notifying them that if their taxes are not paid by August 20, the same will be "collected by distraint or garnishment of rents, with penalty added." On July 1 the Tax Receiver is required to make out a list of all tax-bills remaining unpaid, showing those notified, and file it with the Comptroller. Between August 1 and 21, the Comptroller is required to make out for the tax-bills unpaid warrants of distraint, which may be levied by the Tax Receiver on the goods

and chattels belonging to the person assessed; and after November 15, rents owing by tenants to tax-payers in arrears may be garnisheed. On May 1 of the second year after assessment, the Tax Receiver is required to make out a list of unpaid tax-bills and deliver the same to the City Attorney, whose duty it shall be to bring suits thereon.

These provisions have no application to the tax-bills of banks and trust companies made out on the assessments by the Board of Valuation and Assessment, under the act of November 11, 1892. The banks and trust companies are not required to file their annual reports until March 1, which are to be made up to and including December 31, preceding. The taxes owing by them are not due and payable until July 1, and a failure to pay them then subjects the delinquents to the same fines and penalties as are prescribed against other corporations, companies, and associations, whose franchises are required to be assessed by the board. (*Secs.* 4091, 4092, *Ky. Stats.*) The non-payment of State taxes, penalty, and interest, after becoming delinquent, is made a misdemeanor by the statute, punishable by a fine of $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction. The City of Louisville, therefore, has no remedy by *distraint or garnishment* against banks and trust companies in the collectien of taxes on their franchises. The banks and similar corporations are assessed, and taxes due from them to the city are collected in a different mode from ordinary tax payers. They are not entitled to any discount for prompt payment. (*L. & N. R. R. Co.* v. *City of Louisville*, 166 *U. S.*, 709.)

By *section* 3008 (*Ky. Stats.*), cited by counsel for complainants, courts may "give redress, in the established modes of proceedings and upon existing principles of law or equity, against unlawful restraints or garnishments of rents that may be wrongfully made or threatened under color of *this act.*"

Now, the appellee, City of Louisville, was not sought to be enjoined by any of the complainants in these actions from making "unlawful distraints or garnishments of rents, wrongfully made or threatened under color of this act;" that is, the "Act for the government of cities of the first class," approved July 1, 1893. The taxes claimed against the banks are under a different act, that of November 11, 1892. Furthermore, while the section referred to provides that courts may "give redress" against these "unlawful distraints or garnishments of rents," it does not prescribe any specific mode or that the "redress" shall be by injunction, or in a court of equity. It merely states, "but no injunction shall be granted in such proceeding, except by the court or its judge, nor otherwise, than upon notice to said city, and after a hearing." This clause is negative, not affirmative. It confers no power on a court not before possessed, nor is it a statutory provision that the remedy in such cases shall be by injunction. In the case of *Cummings* v. *Merchants National Bank of Toledo*, 101 *U. S.*, 156, the statute of Ohio expressly provided for an injunction against the illegal levy of taxes and assessments or the collection of them. (*Sec.* 5848, *Rev. Stats. Ohio*, 1880.) Even with respect to that statute, the court, in the case cited, stated:

"And though we have repeatedly decided in this court that the statute of a State can not control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a State created a *new* right or provided a *new* remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires."

No new right or new remedy is expressly conferred on complainants by the Kentucky statute. On this point we cite the following cases: *Van Norden* v. *Morton*, 99 *U. S.*, 378–82; *Thompson* v. *R. R. Co.*, 73 *U. S.*, 134. In the latter case the court said:

"The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the State courts have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit;" citing *Robinson* v. *Campbell*, 3 *Wheat.*, 212, and *Bennett* v. *Butterworth*, 11 *How.*, 669, to which we take leave to add: *Jones* v. *McMasters*, 20 *How.*, 8, and *Basey* v. *Gallagher*, 20 *Wall.*, 680.

In the case of *City of New Orleans, et al.* v. *Citizens Bank of Louisiana*, 167 *U. S.*, 371 (which we shall further notice on another point), the jurisdiction in equity was entertained evidently on the ground of avoiding a multiplicity of suits, for the action by the Citizens Bank was brought against the City of New Orleans, the Board of State Assessors, and the State tax collectors for the various collection districts in the parish of Orleans, and a supplemental bill was filed against the sheriffs of *thirteen* parishes in the State of Louisiana outside of the parish of Orleans. Furthermore, no question as to jurisdiction in that case appears to have been made in this court.

In a recent case (*Pittsburg, etc., Railroad Co.* v. *Board of Public Works of West Virginia, decided November* 28, 1898), following the doctrine of the cases above cited, this court, by Justice Gray, held that the collection of taxes assessed under the authority of a State is not to be restrained by injunction from a Federal court unless it clearly appears not only that the tax is illegal, but also that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction, and quoted with approval the following from the opinion of Chief Justice Fuller in *Shelton* v. *Platt, supra:*

"The trespass involved in the levy of the distress warrant was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express com-

pany to pay the amount of the taxes claimed, nor any averment showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage, and inconvenience which would be in their nature irremediable."

The grounds on which the Circuit Court sustained its jurisdiction in equity in these cases, as stated in the opinion in the Bank of Kentucky case (*Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 390–392), in substance are (1) the inadequacy of the remedy at law, and (2) the avoidance of a multiplicity of suits.

In Kentucky it is well settled that wherever by a statute a summary remedy exists for the collection of the taxes claimed, such as the power given to a collecting officer to distrain and sell personal property, although not exercised, the taxes paid to a municipality, if illegal, may be recovered back, because under such circumstances the payment is deemed involuntary. (*Covington* v. *Powell*, 2 *Met.*, 231; *Louisville* v. *Henning*, 1 *Bush*, 382; *Louisville* v. *Anderson*, 79 *Ky.*, 344.)

The statement in the opinion of the lower court last referred to, that "the remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint," is incorrect. It likewise exists where the collecting officer may by statute resort to distraint, whether he does so or not; and by the decisions of the Court of Appeals of that State it is as well settled that this right exists as if there were a special statute so providing, as there was in Tennessee in the case of *Shelton* v. *Platt, supra*. Of course, if taxes are paid to a State, county, or municipality when suit is the only remedy provided by statute for their collection, the payment is deemed voluntary, if made without or before suit is brought, and although the taxes may be illegal, they can not be recovered back. (*L. & N. R. R. Co.* v. *Commonwealth, for the use of Marion County*, 89 *Ky.*, 531.)

Section 733 of the Revised Statutes of the United States provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

If it be true, as alleged in the bills in these cases, that the City of Louisville has the power to distrain and sell property in collecting its taxes based on the assessments of the franchises of banks by the Board of Valuation and Assessment (which is not conceded), then the payment of such taxes by a bank would be involuntary and the amount could be recovered back from the city by a suit at law. The inability of the bank to pay, or the city to return the amount of such taxes, is not alleged in either case. The ability and solvency of both are conceded. On the other hand, if there is no power in the city to distrain and sell the bank's property to pay such taxes, and the remedy is confind under the statute to a suit at law for a personal judgment, the bank has the fullest opportunity in the State court to make all defenses it may have arising under the Constitution or laws of the State or United States, and if a Federal question is raised and decided adversely to it by the highest court in the State, that question may be reviewed on a writ of error by this court.

The penalties prescribed in the statute, recoverable by indictment or civil action in the Franklin Circuit Court, the fiscal court of the State, are imposed for delinquencies concerning and in the payment of State taxes, not municipal taxes. We have already seen, insofar as these cases are to be regarded as suits against the State, or to enjoin the State's taxes against banks under the act of November 11, 1892, they can not be maintained. Therefore, all the Circuit Court has said with respect to the remedy by defending a suit at law being attended with the risk of incurring such penalties during "the time necessarily consumed in a reasonable litigation of the question of the validity of the tax," has no application to the defense of a suit brought by the City of Louisville.

So the case of *Gates* v. *Barnett*, 79 *Ky*, 295, referred to by the Circuit Court as authority to sustain its jurisdiction in equity has no bearing on the question under discussion, viz.: the jurisdiction in equity to enjoin the taxes claimed to be due the City of Louisville. In that case the court sustained the right to enjoin an illegel State tax, because the officer acting in good faith and under color of right, was not liable as a trespasser, and as a suit would not lie against the State directly, the only complete remedy was by injunction against said collecting officer.

Under sections 162 and 163, Kentucky Statutes, it is made the duty of the Auditor, when it shall appear to him that money has been paid into the treasury for taxes when no such taxes were in fact due, to issue his warrant on the treasury for such money so improperly paid in behalf of the person who paid the same, where application is made therefor within two years from the time when such payment was made. It is clear that the discharge of this duty by the Auditor may be enforced by mandamus.

2. But there is another ground on which the Circuit Court should have refused to entertain jurisdiction in equity in these cases, viz: The want of equity in the bills under the plea of *res judicata*. The authorities are clear that where the aid of a court of equity is sought to carry into effect by the extraordinary remedy of injunction, a former judgment relied on as an estoppel, such aid should be refused unless it shall be made to appear that the judgment thus pleaded is right and just. Especially is this true where the complainant invites the court's inspection of the record in which the former judgment was recovered, or by by the allegations of his bill opens up the question of its validity or correctness, as do complainants here in stating all the facts connected with their acceptance of the Hewitt Act, and asking the court to adjudge that by reason thereof they have an irrepealable contract with the State to pay taxes only as provided in said act. (*Bigelow on Estoppel, 5th edition*, 102–3; *Herman on Estoppel and Res Judicata, volume* 1, 10; *Adams Equity*, 788; *Wahdams* v. *Gay*, 73 *Ill.*, 467, 428.)

In *O'Connell* v. *McNamara*, 3 *Dru. & War.*, 411, Lord Chancellor Sugden said:

"I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit

of a former decree, he must be prepared to shew, if the case requires it, that such decree was right."

In such cases Lord Hardwicke announced this rule as the one by which he was guided: "When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong." (1 *Equity Cases Abr.* 83, *pl.* 3.)

Herman on Estoppel (sec. 1295) states:

"Whenever the application of the doctrine of estoppel would be likely to defeat the principle upon which it rests—to effect justice and prevent wrong—it becomes the duty of the courts to prevent its application."

In *Brownsville* v. *Loague*, 129 *U. S.*, 502–5, the appellee, Loague's intestate, Baker, had recovered four judgments by default, in 1876–7–8, against the City of Brownsville, Tennessee, on certain coupons which had matured on said city's bonds issued under an act of the legislature, passed February 8, 1870, on which judgments executions had been issued and returned *nulla bona*. The appellee then instituted proceedings in the Circuit Court of the United States for the Western District of Tennessee, to compel said city by mandamus to levy and collect a tax to satisfy said judgments. In 1879 the legislature repealed the charter of Brownsville, but provided that the repealing act should "not be so construed as to impair the obligation of existing contracts into which said corporation has heretofore entered." The mandamus was awarded by the court below, which held that the judgments on the coupons conclusively established the validity of the bonds, and also the validity of the subsequent legislation giving a remedy by a levy of taxes for their payment. This court held that the city was not estopped by the judgments rendered from setting up the repeal of the act of February 8, 1870, by the State Constitution of May 5, 1870, before the bonds were issued. Mr. Chief Justice Fuller, in the opinion, states:

"Under the legislation between the issue of the bonds in 1870 and this application in March, 1886, authority to levy taxes to pay debts of the character represented by these judgments, when uncompromised, did not exist at the latter date, so that plaintiff was remitted, in the assertion of a right to that remedy, to the time when the bonds were issued, and as the city had then no power to tax to pay them other than that derived from the act of February 8, 1870, the relator by his pleadings opened the facts which attended the judgments for the purpose of counting upon that act as furnishing the remedy which he sought. In this he in effect asked the court to order the levy of a tax to pay the coupons, and relied on the judgments principally as creating an estoppel upon a denial of the power to do so.

"Thus invited to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff *ex debito justitiae* to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued?"

Further on the opinion states:

"*Res judicata* may render straight that which is crooked, and black that which is white, * * * but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever.

"The judgment is reversed and the cause remanded with a direction to dismiss the petition."

Should not the same rule be applied by this court where an injunction instead of a mandamus was applied for in the Circuit Court of the United States to enforce or give effect to State court judgments, when it has reached the conclusion, on the invitation of complainants "to look through the judgments to the contracts on which they are founded", that said judgments are not only erroneous, but that they "rest upon no cause of action whatever," by reason of the fact that the Hewitt Act had been repealed and was not in existence when said judgments were rendered?

Here the grossest discrimination results from granting the relief asked by injunction under the plea of *res judicata* to about one-half in number and capitalization of the banks of the City of Louisville, while the other half—by reason of what the Circuit Court in one of these cases is pleased to call "the accident of litigation" (*First National Bank* v. *Stone, et al.*, 88 *Fed. Rep.*, 412), and not from any inequality established by the law itself, which bears on all alike—must carry more than their full burden of local taxation. This renders it impossible for the tax-paying banks to compete successfully in business with the non-tax-paying banks.

In *Bigelow on Estoppel*, *5th edition*, 706, the author states:

"The estoppel by record is legal, and hence to give a court of equity jurisdiction to entertain it, it would be necessary to show *some equity* apart from the estoppel."

We submit that the Circuit Court erred in not sustaining appellants' demurrers to appellees' bills (1), because they did not state facts showing jurisdiction in equity; and (2) in not dismissing them for want of equity.

III.

PLEA OF RES JUDICATA BY THE BANKS THAT BROUGHT PROHIBITION SUITS.

Having already discussed, on the question of jurisdiction, the plea of *res judicata*, so far as the State is concerned, and shown that the State is not estopped thereby, we shall now discuss this plea by the three banks that were the plaintiffs in the prohibition suits wherein the judgments relied on were recovered. After the adoption of the present State Constitution, the legislature passed an act entitled "An

act for the government of cities of the first class," which was approved and took effect under an emergency clause, July 1, 1893. (*Kentucky Statutes, secs. 2742 to 3037, both inclusive.*) Louisville is the only city of the first class in the State. (*Ib., sec. 2740*).

By Section 3010, (*Ky. Stats*) it is provided:

"The Sinking Fund to pay the bonded debt of the city is hereby continued as now established by law."

Under the law then and now in force, the Mayor, the President of the Board of Aldermen for the time being, and three persons to be chosen by the General Council on joint ballot, and their successors in office, constitute the "Commissioners of the Sinking Fund of the City of Louisville;" and by that name they have corporate powers and existence, may sue and be sued, and do and perform all things necessary to execute the duties required and powers given them by the act of incorporation, which are to receive and manage the Sinking Fund set apart to pay the bonded indebtedness of the city, until the same is fully paid and satisfied.

By section 3011 (*Ky. Stats.*): "The General Council may, by ordinance, provide for certain licenses, to be paid into the Sinking Fund, on callings, occupations, and professions. In the list is the following:

"*Bank, trust, or title company.* For each bank, trust, and title company, the license tax shall be not less than four nor more than six per cent. of its gross earnings, exclusive of rent from real estate paying a tax to the city."

In pusuance of said section, an ordinance was passed by the General Council, entitled "An ordinance relating to assessments," which was approved by the Mayor August 9, 1892. (*Appendix to this brief, Ordinance No. 1.*) In this ordinance the City Assessor was authorized and directed to make an assessment as of September 1, 1893, for the ensuing fiscal year ending August 31, 1894, of "all lands and improvements, and all personal property, *not used or employed in some business or occupation from which a license tax is required*, subject to taxation in the City of Louisville." Following this assessment ordinance, the General Council passed a levy ordinance, entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," which was approved by the Mayor, December 21, 1893. (*Ib., Ordinance No. 2.*) The first section of this ordinance is as follows:

"That the following *ad valorem* tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements and such personalty as is *not used and employed in business paying a license tax for such business*, and in each case on each $100 in value, but shall not be levied upon any property exempt from taxation." (Here follows a list of the purposes and the amount levied for each, aggregating $1.88).

To carry out the theory of the city officials then in authority, and the system of taxation incorporated in said "Act for the government of cities of the first class," the General Council passed an ordinance, entitled "An ordinance concerning certain licenses in the City of Louisville," which was approved by the Mayor, January 29, 1894, (*Ib., Ordinance No. 3*). The third section thereof was as follows:

"Each bank and trust company shall pay an annual license tax of four per cent. of its gross earnings, exclusive of rent from real estate paying taxes in the City of Louisville."

Subsequently, the appellees, Bank of Kentucky, Louisville Banking Company, and Third National Bank, having refused to pay said license tax, were proceeded against by the Commissioners of the Sinking Fund. Warrants were taken out in the police court of the city against said three banks for conducting the banking business without paying the license tax therefor, the penalty of which, under said ordinance of January 29, 1894, was a fine of "not less than five dollars nor more than one hundred dollars for each offense," each day the violation was continued constituting a separate offense. These three banks instituted their separate actions in the Jefferson Circuit Court against R. H. Thompson, Judge of the Police Court of the City of Louisville, for a writ of prohibition *against said court* to prohibit it from proceeding in the matter of the warrants sued out therein against the plaintiff banks for failing to pay the license fee or tax The prayer in the petition in each of these cases also asked, on final hearing, that the court adjudge "that *said license ordinance* and *said act for the government of cities of the first class*, in so far as they authorize a tax in any form to be levied against and collected from plaintiff, be declared unconstitutional and void."

In the body of each of the petitions in these three cases it is in substance charged as the grounds for the relief sought that (1) the plaintiff bank had an irrepealable contract with the State under the Hewitt bill, and (2) that so much of the "act for the government of cities of the first class" as gave to the City of Louisville the power, by ordinance, to collect a license tax from banks, and the license ordinance of January 29, 1894, passed in pursuance of said act, were "both unconstitutional and void."

The City of Louisville, as the petition in each case shows, was *not* made a party defendant to either of said three actions. The Judge of the Police Court of the City of Louisville was the sole defendant in each case. (*Record No.* 356 *Stone,et al.* v. *Bank of Kentucky*, 77–83; *Record No.* 360, *Stone, et al.* v. *Louisville Banking Co.*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 17–21). The warrants in the Police Court, as alleged in these petitions, were sued out by the Commissioners of the Sinking Fund. Hon. Henry S. Baker was then City Attorney of the City of Louisville, and also the employed attorney of said Commissioners. He represented the defendant, and filed a general demurrer to the petition in each case. This demurrer was overruled by Hon. Emmet Field, Judge of the Common Pleas Division of the Jefferson Circuit Court, as to the petition of the Bank of Kentucky, and sustained as to the petitions of the Louisville Banking Company and Third National Bank. The judgment of said Circuit Court in the former case was as follows (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 88–89):

"At a court held for the court aforesaid on the 24th day of July, 1894.

"This cause having been heard and submitted on demurrer, and the court being advised, it is adjudged that the plaintiff's petition sets

forth a good cause of action, and the defendant's demurrer to said petition is overruled, to which the defendants except; and the defendants in open court declined to answer or plead further herein; and thereupon the plaintiff moved for judgment, and it is considered by the court that the prayer of the petition be granted and *that the City of Louisville and R. H. Thompson, Judge of the Louisville City Court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, the Bank of Kentucky, in the City of Louisville, or making any further order therein;* and it is further considered that the plaintiff recover of the defendant, the City of Louisville, its costs herein expended and may have execution therefor. To all of which defendants except and pray an appeal to the Court of Appeals, which is granted."

This judgment was affirmed by the Court of Appeals June 1, 1895, and remains as entered in the lower court. The judgments in the latter two cases entered by the Jefferson Circuit Court, in pursuance of the mandate of reversal from the Court of Appeals, after its decision of June 1, 1895, are as follows (*Record No.* 360, *Stone, et al.* v. *Louisville Banking Co.*, 25–35; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57):

"At a court held on the 13th day of April, 1897.

"This day came the plaintiff, the Louisville Banking Company, and filed the opinion and mandate of the Court of Appeals herein, the mandatory part of which is as follows: 'It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion.' And, thereupon, in pursuance of said opinion and mandate, the judgment heretofore entered herein is set aside and held for naught.

"It is now adjudged by the court that the plaintiff's petition sets forth a good cause of action and the defendant's demurrer to the said petition is overruled, and the defendant declined to plead further herein, and thereupon the plaintiff moved for judgment; and it is considered that the prayer of the plaintiff's petition be granted, and *that the defendant, R. H. Thompson, Judge of the Police Court of the City of Louisville, be and he is hereby prohibited from proceeding further with the warrant against the plaintiff, Louisville Banking Company, mentioned in the petition in the Police Court of the City of Louisville, or making any further order therein*; and it is further considered and adjudged that the plaintiff recover of the defendant its costs herein expended, and may have execution therefor, and the parties are hence dismissed."

"At a court held on the 13th day of April, 1897:

"This day came the plaintiff, the Third National Bank, and filed the opinion and mandate of the Court of Appeals herein, the mandatory part of which is as follows: 'It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion.' And, thereupon, in pursuance of said opinion and mandate heretofore entered herein, the judgment heretofore entered herein is set aside and held for naught.

"It is now adjudged by the court that the plaintiff's petition sets forth a good cause of action and the defendant's demurrer to the said

petition is overruled, and the defendant declined to plead further herein, and thereupon the plaintiff moved for judgment; and it is considered that the prayer of the plaintiff's petition be granted, and *that the defendant, R. H. Thompson, Judge of the Police Court of the City of Louisville, be and he is hereby prohibited from proceeding further with the warrant against the plaintiff, Third National Bank, mentioned in the petition, in the Police Court of the City of Louisville, or making any further order therein;* and it is further considered and adjudged that the plaintiff recover of the defendant its costs herein expended and may have execution therefor, and the parties are hence dismissed."

In the copies of the transcripts on the appeals to the Court of Appeals in these three cases it appears that the City of Louisville was joined with R. H. Thompson, Judge of the Police Court of the City of Louisville, as an appellant, in the appeal against the Bank of Kentucky, and that the City of Louisville was joined, as an appellee, with said Judge of the Police Court in the appeals of the Louisville Banking Company and Third National Bank. By what authority the city was made an appellant in the one case and an appallee in the other two, the records do not disclose. We submit that, as the city was not made a defendant by the petition in either of these three cases, and was not, therefore, a defendant or a party to the record in either case, the adjudication in the said cases do not conclude the city as to the thing adjudged.

This leads to the main question involved under the plea of *res judicata*. What was, in fact, the thing adjudged in these three cases? Appellees, Bank of Kentucky, Louisville Banking Company, and Third National Bank, contend that the thing adjudged was that each of them had an irrepealable contract with the State by reason of their acceptance of, and compliance with, the provisions of the Hewitt Act, whereby they are exempted from all taxes, except as provided in said act, during their respective corporate lives. This we deny, and insist that the thing adjudged in these cases was that the license tax imposed by said ordinance of January 29, 1894, of four per cent. on the annual gross earnings of banks doing business in the City of Louisville was invalid and not collectible by law, and by their doing a banking business without paying said license tax, said three banks did not become liable in the prosecution of the warrants issued against them for the fine or penalty fixed in said ordinance.

It is a well settled principle of law that courts, in order to ascertain what has been adjudicated, will look to the *judgment* itself, and not to the reasons given by the court in its opinion. The question on a plea of *res judicata* is, what was *decided?* Not what were the the *reasons* of the court for so deciding. This rule is laid down by *Herman on Estoppel, sec.* 402, as follows:

"In determining what has been adjudged, courts will regard the *decree*, and in case of *ambiguity*, but *not otherwise*, be governed by an accompanying *opinion;* where it is *free from ambiguity*, it speaks for *itself*, and can not be *qualified by the opinion* by which it may have been preceded."

The question of irrepealable contract is not mentioned in the final judgment in either of these three cases. In neither of these judg-

ments is it adjudged that the plaintiff bank has an irrepealable contract with the State, whereby it is exempted from all municipal taxation during its corporate existence. The vital and only thing adjudged, was simply this, and nothing more, to-wit:

"The defendant, R. H. Thompson, Judge of the Police Court of the City of Louisville, be and he is hereby prohibited from proceeding further with the warrant against the plaintiff mentioned in the petition in the Police Court of the City of Louisville, or making any further order therein."

This ordinance, the act under which it was passed, and the system of license taxation adopted by the City of Louisville on certain callings, occupations, and professions, in so far as they undertook to impose a license tax in lieu of *ad valorem* taxation, were unconstitutional and void. It may be, therefore, that each of these petitions in that respect "*did* set forth a good cause of action." This license fee against banks and trust companies of four per cent. on their gross earnings in lieu of an *ad valorem* tax was in conflict with the State Constitution, and the Court of Appeals so decided on May 5, 1895, in the case of *Levi* v. *City of Louisville*, 97 *Ky.*, 394, nearly a month before its decision of June 1, 1895, in the cases of said three banks and others (97 *Ky.*, 590).

In the *Levi* case, the Court of Appeals held (*Ib.*, 401):

"There is but one general system of assessment as to all property under the present Constitution for the purpose of government, whether State or municipal, and in addition taxation may be based on income, on license, and on franchises, and a head or poll-tax. The *ad valorem* system relates to the assessment and taxation of all *property*; the income tax to the *product* or *income* from property and from business pursuits. The license tax is one imposed on the *privilege* of exercising certain callings, professions, or vocations, that when collected, goes into the State treasury, and when applied to municipal taxation is termed *license fees*. A license based on franchises includes the ascertainment of its value, and the mode of determining that value. The power to impose an income tax, a license, or franchise tax, is expressly given by the Constitution to the legislature, and the exercise of such powers by the municipal governments must be derived from legislative enactments; but there is no authority, express or implied, conferred by the Constitution on either the State or municipal legislature to *substitute a license tax in lieu of the ad valorem system.*"

It will be observed by an examination of that case that the court held that the ordinance for the assessment of personal property as of September 1, 1893, in such manner as to omit therefrom such as was used or employed in a business or occupation from which a license fee was required, the omission of like property from the levy for the fiscal year ending August 31, 1894, and the ordinance of January 29, 1894, so far as it fixed a license tax on certain enumerated things and occupations in lieu of an *ad valorem* tax on the personal property used or employed therein, were all illegal, and this system of municipal taxation was condemned as in conflict with the present State Constitution. It was not, therefore, *neces-*

sary, on June 1, 1895, after the decision in the *Levi* case, rendered May 5, 1895, for the Court of Appeals to pass on the claim to an irrepealable contract in said suits of the Bank of Kentucky, Louisville Banking Company, and Third National Bank. The license ordinance under which the warrants in the police court were issued against said three banks being unconstitutional and void, on the ground mentioned, not only against said three banks, but all banks, State and National, old and new, in the city of Louisville, all that was stated in the opinion of June 1, 1895, with respect to the question of contract under the provisions of the Hewitt Act in the cases of said three banks for a writ of prohibition was merely *dicta*. The license tax sought to be imposed was an *occupation* tax—not a *property* tax. As the court states in the *Levi* case (*Ib.*, 406):

"The words 'license tax' imply a burden on that which is *not* property, but results from its enjoyment, or the conduct of the business or calling."

The subject-matter, as well as the parties to the said suits for a writ of prohibition, were not the same as they are in these suits brought in the court below by the Bank of Kentucky, Louisville Banking Company, and Third National Bank against the City of Louisville, and those against the members of the State Board of Valuation and Assessment, and the City of Louisville. In the former suits, the validity of a license or *occupation* tax of four per cent. on the gross earnings of all the banks and trust companies in the City of Louisville, imposed in lieu of an *ad valorem* tax on their property, was involved, while in these suits a *property* tax alone on said three banks respectively is involved. The former proceeding was against a *court* of inferior jurisdiction—the Police Court of the City of Louisville—under sections 474 and 479 of the Civil Code of Kentucky, to prohibit said court from proceeding in a matter out of its jurisdiction, or to enforce penalties in a prosecution against the plaintiff banks prescribed by an unconstitutional and void ordinance. These sections of said Civil Code are as follows:

"Sec. 474. Writs of mandamus, except those used by a court for enforcing its judgments or orders, and writs of prohibition, shall be obtained by motion, and prosecuted in the manner provided in title ten, chapter five, except that the applicant shall file a petition, wherein he shall state the cause and ground of his application before giving notice of his motion; to which the party against whom the mandamus or prohibition is sought shall file a demurrer or an answer, at or before the time fixed for making the motion.

"Sec. 479. The writ of prohibition is an order of the circuit court *to an inferior court* of limited jurisdiction, prohibiting *it* from proceeding in a matter out of its jurisdiction."

Said prohibition suits were not instituted under *sec.* 2022, *Kentucky Statutes*, which only applies to an ordinance where the fine is fixed at twenty dollars or less. Here, in the license ordinance of January 29, 1894, the fine was fixed at not less than five dollars nor more than one hundred dollars for each offense.

The prosecution of said warrants in the police court was in the nature of a criminal proceeding, while these injunction suits are civil proceedings.

In defining the nature of a prohibition proceeding, and the difference between it and an injunction, *Spelling on Extraordinary Relief, sec.* 1717, states:

"Injunction never questions the jurisdiction, nor is addressed to the *court;* it only lies against the *parties.* Prohibition, on the contrary, *takes no notice of the parties,* ignoring for the most part any interest they may have in the matter forming the subject-matter of the grievance, and goes direct against the *court.*"

The right of the City of Louisville to assess and collect ad valorem taxes from said three banks, or banks and trust companies generally, on their *property,* or the *shares of stock* therein, was not in issue or involved at all in said prohibition suits.

In *Cromwell* v. *County of Sac,* 94 *U. S.,* 351, it appeared that in a suit on certain coupons originally attached to bonds issued by the county for the erection of a court-house, it was decided that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value, and inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover; but it was held that the judgment did not estop the plaintiff, holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing in a second action against the county that he acquired such other bonds and coupons for value before maturity.

In *Davis* v. *Brown,* 94 *U. S.,* 423, it was held that when a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action.

In *Packet Co.* v. *Sickles,* 72 *U. S.,* 580, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading an estoppel, or is relied upon as evidence, was stated to be substantially this: That, to render the judgment conclusive, "it must appear by the record of the prior suit that the *particular matter sought to be concluded was necessarily tried or determined;* that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; * * but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and *judgment necessarily involved its consideration and determination, it will not be concluded.*"

Tested by this rule the City of Louisville can not be concluded or estopped in these injunction suits from claiming the right to collect ad valorem taxes from said three banks on their property, because, as already shown, the judgment rendered in said prohibition suits did not "necessarily involve the consideration and determination" of such right or the claim to an irrepealable contract under the Hewitt Act by said banks. Exemption from property taxes not being involved in said suits, it was not *necessarily* determined. The same judgments

would necessarily have been rendered if the prohibition suits had been brought by banks which made no pretense of having an irrevocable contract, because the license ordinance was (as had been previously decided by the Court of Appeals on May 5, 1895) unconstitutional and void on another and totally different ground, as against *all* banks and trust companies doing business in the City of Louisville, regardless of whether or not they were even in existence when the Hewitt Act was enacted or had complied with its provisions.

In *United States* v. *The Haytien Republic*, 154 *U. S.*, 118–29, this court (Justice White delivering the opinion) stated:

"The elementary principle which governs the availability of the plea of 'other suit pending' was thus stated in *Watson* v. *Jones*, 80 *U. S.*, 715:

"'When the pendency of such suit is set up to defeat another, the *case* must be the *same*. There must be the *same rights* asserted and the *same relief* prayed for; the relief must be founded upon the *same facts*, and the title, or essential basis of the relief sought must be the *same*.'

"In the case first cited it was said that the true test of the sufficiency of the plea of 'other suit pending' in another forum was the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit. (*Dick* v. *Gilmer*, 4 *La. Ann.*, 520; *Bischoff* v. *Theurer*, 8 *La. Ann.*, 15.)

"The efficiency of the test, thus applied, results from the fact that the elements constituting 'the thing adjudged,' and those necessary for the plea of 'other suit pending' are *identical*."

In the case of *County of Shelby* v. *Union & Planters Bank*, 161 *U. S.*, 149–61, this court held that when construing the meaning of a State statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, it was not bound by the previous decisions of the State court, except when they have been so long and so firmly established as to constitute a rule of property, but will decide independently whether there is a contract and whether its obligation is impaired. It was decided in that case that a provision in a bank charter that a certain tax on the shares of stock should be "in lieu of all other taxes," exempted such shares in the hands of shareholders from further taxation, but did not exempt the corporation from taxation on its capital stock, or surplus, or accumulated profits. This decision, too, was rendered, notwithstanding a long line of decisions by the Supreme Court of Tennessee holding that (1) the charter rate of taxation was laid upon the corporate capital stock, and that stock was exempted from any further tax, and (2) subsequent to the decision in *Farrington* v. *Tennessee*, 95 *U. S.*, 697, and in *Bank of Commerce* v. *Tennessee*, 104 *U. S.*, 493, that under such a clause in a bank charter the tax was on the shares, and the exemption covered both the capital stock and the shares thereof.

In the case of *Phenix Fire & Marine Insurance Co. of Memphis* v. *State of Tennessee*, 161 *U. S.*, 174–86, which we have already cited on the question of jurisdiction, this court held that a well founded doubt is equivalent to a denial of the claim to an exemption from tax-

ation; the universal rule in regard to taxation is that the power and the right to tax are always presumed; the exemption from taxation must be clearly granted; and mere silence is the same as a denial of emption. In that case the stockholders of the corporation claiming the exemption relied on a plea of *res judicata*. The Supreme Court of Tennessee disregarded the former adjudication, and this court held that the decision of the highest court of a State on the question of whether or not a judgment by a court of the same State constituted an estoppel would not be reviewed, because no Federal question was raised thereby.

It can not be claimed, in these cases, that this court is bound by previous decisions of the State court in Kentucky so long and so firmly established as to constitute a rule of property. There have been only two decisions of the Court of Appeals as to the claim to an irrevocable contract under the Hewitt Act, both rendered within two years before the filing of complainants' bills in these actions, one on June 1, 1895, upholding the said claim, and the other on March 24, 1897, rejecting it and expressly overruling the former decision.

In the case of the *Commonwealth* v. *Douglass*, 100 *Ky.*, 116; *S. C.*, 168 *U. S.*, 488, Douglass claimed to be the owner of certain lottery privileges, which he had purchased for value under a sale authorized by the legislature of Kentucky, before the adoption of the present State Constitution, and the Commonwealth sought to prevent the operation of lotteries by Douglass under these legislative grants. An inviolable contract was insisted upon and the plea of *res judicata* was urged, consisting of adjudications of the Court of Appeals, some of which sustained the validity of one or more of the privileges owned by Douglass. The court on this plea stated (*Ib.*, 126):

"It is contended that the subject of the appellee's right is *res adjudicata* in this court. It is sufficient to say that the State had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right of the State to repeal it. *And the decisions of this court that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been virtually overruled by the Supreme Court of the United States, destroys the contention of the res adjudicata.*"

Applying the doctrine here announced, the former adjudication construing the Hewitt Act in the bank tax cases of June 1, 1895, having been expressly overruled in similar cases by the same court March 24, 1897, the lower court should not have given greater effect to the plea of *res judicata* based on the opinion of June 1, 1895, than the Court of Appeals itself would (in the light of its decision in the Douglass case) have given thereto after it had been overruled.

★ In the case of *Peck* v. *State*, 137 *N. Y.*, 372, it was held that a certificate issued to a contractor by a board of managers of an insane asylum, by virtue of a writ of mandamus, showing the amount due him from the State, does not bind it as *res judicata* in a suit for the debt before the board of claims. The court said:

"The important question to be determined upon this appeal is whether or not the judgment in the mandamus proceeding against

* There is no conflict between the decision of this court in the case last cited (*Douglass* v. *Kentucky*, 168 *U. S.*, 488) and that in *Phœnix Fire and Marine Insurance Co.* v. *Tennessee*, *supra*. In the *Douglass* case it was decided that a lottery grant was not a contract within the meaning of the Constitution of the United States, but simply a gratuity or license which the State, under its police power and for the protection of public morals, might at any time revoke. The plea of *res judicata* in that case (after the vital Federal question had been reviewed and decided adversely to the plaintiff in error) was discussed by this court, and held not to constitute an estoppel against the State. The State court, as we have seen, had so decided, and this court might very well have treated that plea as presenting only a non-Federal question, and declined to give it any consideration, as it had done in the case of *Insurance Co.* v. *Tennessee*, *supra*. The importance attached by the lower court, in these cases, to the consideration of the plea of *res judicata* by this court in the *Douglass* case, does not seem to be warranted by the facts. (88 *Fed. Rep.*, 397–8.)

the board of managers is binding upon, and estops, the State. The learned counsel for the claimant, upon his argument in this court, has called our attention to no authority which sustains his claim that that judgment is *res judicata* against the State; and we know of no principle of law that gives it such force. The State was not a party to that proceeding, and the asylum managers did not represent it. The proceeding was one to compel them to discharge what was claimed to be a duty resting upon them under the law of their creation and the contracts into which they had entered. While they represented the State in making the contracts, they did not stand in the place of the State in any suit brought against them either for misfeasance or nonfeasance in the discharge of the duties devolved upon them by law. No provision is found in any statute giving them authority to represent the State in any litigation, or giving the consent of the State to be bound by any adjudication to be made against them. A State can not be sued in its own courts, except by its consent; and this rule is founded upon public policy of great importance, and it would be greatly impaired, and could be largely nullified, if the State could be bound by judgments rendered against its agents or officers. Such judgments may bind the officers, and compel them to discharge their duties, and thus frequently they enable claimants to obtain payment of their claims against the State and other rights to which they are entitled by law. But the adjudication in such actions never estops the State on the principle of *res judicata;* and so it has been frequently held."

On this principle the City of Louisville is not estopped from the collection of *ad valorem* taxes by civil action by a judgment in the prohibition proceedings instituted by the three banks mentioned against the Judge of the Police Court of the city. The judgment prohibiting the police court from proceeding further with the prosecution against said banks could have no greater weight or effect, under a plea of *res judicata*, than a judgment of acquittal had the guilt or innocence of the accused banks been determined upon a trial by the police court. Such a judgment might have been a good plea of *res judicata* in another prosecution on the same charge, viz: carrying on the business of banking without first paying a license fee of four per cent. on gross earnings, under the same ordinance, but it would not have been a good plea of *res judicata* in a civil action brought by the the city against the bank, so acquitted, to recover the amount of *ad valorem* taxes due the city for the same or a different period on the assessed value of its franchise or intangible property. Indeed, it is well established that an acquittal of a criminal or penal charge is no defense in a civil suit for the same matter.

In the case of *Mills* v. *City of Hopkinsville*, 11 *Ky. L. Rep.*, 164, cited by appellees' counsel, the Court of Appeals did not decide that the tax claim for 1887 was *res judicata*, but affirmed the judgment therefor in favor of the city because the domicile of the ward, whose personal estate had been assessed for taxes, was still in Hopkinsville, with her testamentary guardian, who was given the custody of her person. The court states that the parties were the same in the

first suit as in the last, the identical question was presented, the relief sought was the same in both suits, and on the same state of facts.

In *Keokuk & Western R. R. Co.* v. *Missouri*, 152 *U. S.*, 315, it was distinctly decided that "a suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action."

Again, in the same case, the court adhered to the principle announced in *Cromwell* v. *County of Sac*, 94 *U. S.*, 351; *Nesbit* v. *Independent Dist. of Riverside*, 144 *U. S.*, 610; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 *U. S.* 279, 302, and quoted with approval the decision of the Supreme Court of Iowa in *Davenport* v. *Chicago R. I. & P. R. Co.*, 38 *Iowa*, 633, which held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action, using the following language:

"'The cases,' said the court, 'are unlike those where two causes of action (as two prommisory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. *It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision.*'"

But for the recent decision in *City of New Orleans, &c.*, v. *Citizens Bank*, 167 *U. S.*, 371, decided May 24, 1897, the case of *Koekuk & Western R. R. Co.* v. *Missouri*, *supra*, would apear to be conclusive of the proposition that a judgment against the validity of a tax for one year is not a bar to a suit for the tax for a subsequent year. Much reliance is placed by appellees' counsel on this recent decision. But we insist that it does not sustain the claim of *res judicata* in these cases. On the contrary, it fully supports the contention we make for the City of Louisville, against the efficacy of the judgments in the prohibition cases brought by the Bank of Kentucky, Louisville Banking Company, and Third National Bank as *res judicata*. It is stated in substance in the opinion in that case, that the Citizens Bank's working capital was procured at its organization in 1833 by a loan from the State of Louisiana of its bonds amounting to seven millions of dollars, which were endorsed by the bank, and sold in open market. To secure the payment of these bonds the bank pledged all the notes furnished by its stockholders for the amount of their subscriptions, secured by mortgages on real estate and slaves. The State had an interest in the profits of the bank to a stated amount, and its affairs were conducted by a board partly appointed by the State and partly elected by the stockholders. The bank was, therefore, in a certain sense, a public or State institution. No attempt in a period of forty-

four years, or until 1877, was made by the State or any of its sub-divisions to tax it on its capital, shares of stock, or real estate and furniture actually used for carrying on its business. By an amended charter, passed in 1836, it was provided that the "capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter." The original charter expired in 1884. Its corporate existence was extended in 1874 to the year 1911. In 1886, the term of the original charter having expired, the Board of Assessors assessed the bank for State and city taxes for that year on its banking-house and on its shares of stock in the name of the shareholders to be paid by the bank.

In October, 1886, the bank filed its petition in the Civil District Court of the parish of Orleans, praying the annulment of this assessment, and making the Board of Assessors, the State Auditor, the City of New Orleans, and the State Tax Collector, parties defendant. The petition set out the charter of the bank, its non-liability to taxation thereunder, and the judgment of the Supreme Court of the State in the case of *Citizens Bank* v. *Bouny*, 32 *La. Ann.*, 239, was pleaded as *res judicata*. "Although there was a general averment in the petition that the tax was excessive, besides being illegal, there was no allegation contained therein adequate to justify or support the prayer that the assessment be annulled, *except the assertion that the property of the bank was exempt from taxation.*"

Of this suit this court states:

"After answer by the parties defendant, there was judgment on March 10, 1887, decreeing the assessment for the year 1886, standing against the banking-house on real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, assessed at seventy-five thousand dollars, and on 10,500 shares of the capital stock at $42.75 per share, aggregating an assessment of $448,875, null and void, and of no effect, and that the same be canceled and erased from the books of their respective offices, and that any inscription of the same in the mortgage office be canceled and erased, and costs of suit.

"This judgment was not appealed from, and on its becoming final an entry on the assessment roll was made canceling the assessment."

This court further states with reference to a second suit:

"On the 21st of March, 1887, a few days after the decision in the cause just stated, the Citizens Bank filed its petition in division A of the Civil District Court of the parish of Orleans against the Board of Assessors. In this petition, after averring that under its charter the bank was not liable to assessment and that it could not be taxed without impairing the obligations of the contract created by the charter and in violation of the Constitution of the State and of the United States, the petitioner proceeded to aver the previous judicial recognition of the effect of the charter, and alleged that, notwithstanding these facts, the Board of Assessors were about to assess the bank for the taxes of 1887 upon its shares of stock, upon its banking building, and upon the furniture therein used by petitioner for conducting its said banking business and upon other property possessed by peti-

tioner, that said proposed assessments were without warrant of law, and the bank was entitled to enjoin the making of the same. A preliminary injunction having been issued as prayed for, the case was put at issue, and resulted in a judgment, on the third of May, 1887, perpetuating the preliminary injunction, and enjoining the Board from 'assessing the Citizens Bank for taxes, State or city, for the year 1887, upon its capital stock, on the shares thereof, or its property, and that said assessment, if made, be canceled from the books of the Assessor for the year 1887, and that the Recorder of Mortgages for the parish of Orleans be and he is hereby enjoined from recording said assessments upon the books of his office.' This judgment was also not appealed from, and upon its becoming final was executed by proper entry on the books of the Recorder of Mortgages."

The prayer in the petition in this last action was as follows:

"Wherefore petitioner prays that said board of assessors for the parish of Orleans and the City of New Orleans be duly cited to answer this petition; that, considering the bond and affidavit herewith filed, a writ of injunction issue, directed to said board, enjoining them and prohibiting them and each member thereof from assessing the Citizens Bank for taxes, city or State, for 1887, *or for any subsequent year*, upon the capital stock of the Citizens Bank or the shares thereof, or upon the banking building of petitioner or upon the furniture used therein, *or upon any other property of petitioner;* that said injunction be made perpetual, and that said board and the recorder of mortgages be prohibited and enjoined from recording any such assessments in the office of the recorder of mortgages and for general relief."

After this second judgment no further assessment was made or attempted until 1892, when the bank filed its bill in the United States Circuit Court for the Eastern District of Louisiana against the City of New Orleans, the Board of State Assessors for the parish of Orleans, and the State tax collectors for the various collection districts in said parish, and its supplemental bill against the sheriffs of thirteen other parishes, praying for an injunction enjoining the board of assessors from assessing the bank for the years 1889, 1890, 1891, and 1892, and the collectors from collecting any taxes thereunder. The bill alleged that the bank was contractually exempt from State and municipal taxation under its charter. This court states:

"Besides alleging the contractual exemption resulting from the charter, the bill averred that the fact of such exemption was conclusively determined by the presumption of the thing adjudged resulting from judgments previously rendered between the parties. The bill also averred that an attempt to enforce the assessment and tax would impair the obligations of a contract protected by the Constitution of the United States, the rights asserted by the bank under the Federal Constitution being specially set up and claimed in the complaint."

Notwithstanding the petitions in the State court alleged an exemption from all forms of taxation, State or city, on said bank, its capital stock, shares of stock, real estate, and *other property;* and the judgments in that court, particularly that in the second suit, specifically

adjudged such exemption existed in as broad terms as was claimed by said bank, this court gave only partial effect to said judgments, under the plea of *res judicata*, and rejected the same as conclusive on the question of exemption from State or city taxes as claimed and adjudged in the Circuit Court of the United States. The latter court had followed the allegations and prayers of the petitions, and the terms of the judgments, holding that "the thing adjudged" in the State court was total exemption on all of said bank's property. This court held that was error, and that nothing was exempt except the subjects of taxation actually involved and specifically mentioned in said suits in the State court, which had been or were about to be assessed when said suits were instituted. That is all we ask here for the City of Louisville; and if that is done, the exemption will be confined to a license tax, or occupation tax, the only subject of taxation involved in the prohibition suits.

After quoting from the language of the final decree of the Circuit Court in favor of the bank, this court gives a summary of the objects of taxation on which that decree adjudged the bank was entitled to exemption as follows:

"The exemptions to which the decree below held the bank to be entitled, related therefore to distinct objects of taxation, one not necessarily connected with or dependent upon the other, and may be summarized as follows: First. That the bank was not subject to taxation on its capital, shares of stock, or real estate and furniture actually used for the carrying on of its banking business, and that the bank could not be lawfully obliged to pay the sum of any tax assessed on its shareholders. Second. That the stockholders of the bank were not liable for assessment on their shares of stock. Third. That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions and had become the property of the bank under foreclosure proceedings, because property so acquired became, by virtue of the purchase, a part of its capital stock. Fourth. That the non-liability of the bank to taxation embraced also immunity from the payment of a *license* tax to either the State of Louisiana or the city of New Orleans."

Then this court proceeds to state the contentions of the parties on the appeal as follows:

"The contentions which arise between the parties on this appeal from the decree below rendered are as follows: First. The bank asserts that by the effect of its charter it was contractually exempt from taxation on all the foregoing objects of taxation; that this exemption existed not only during the terms of the original charter, but during the term for which the charter was extended. The contract being asserted to result, not only from the express terms of exemption in the original act, but from the fact that the very nature of the contract between the bank and the State carried this exemption into the period of the extended charter, as the bank and its capital was dedicated to the payment of the bonds, outstanding obligations of the State, and the bank was, therefore, in a measure, a *quasi* State institution. Second. That the contractual right to the exemption as

above stated is conclusively determined by the presumption of the thing adjudged, resulting from certain judgments relied upon.

"On the other hand, the contention of the defendants is that the exemption did not originally obtain, or, if it did, was not carried into the extended period of the charter, because it could not be so carried under the Constitutions of the State of Louisiana of 1868 and 1879, by which the bank was bound, and that the judgments relied on and which were offered in evidence do not constitute 'the thing adjudged.'"

After the decision in the Circuit Court, and pending the appeal, the bank brought suit in the State court to prevent the assessment and taxation of its real estate acquired by it under foreclosure of its stock mortgages, and this court speaks of that litigation as follows:

"Certain judgments rendered in favor of the bank (presumably those relied upon in this record) were set up as constituting *res judicata*. The court of last resort of the State said, in its opinion on the first hearing, that it was unnecessary to pass upon the plea of the thing adjudged, since the judgments relied upon did not embrace the question of whether property bought by the bank under foreclosure of its stock mortgages was included within its exemption. The court held, considering the terms of the charter, that such property was not included in the exemption. In that case both the act of 1880, above referred to, and the act of 1874, were set up as conclusively establishing that the bank was not exempt from taxation at all. In an opinion on a rehearing the court somewhat modified the grounds for its conclusions, and in the course of the opinion said:

"'We refrained from stating the effects as to the taxation of the bank's capital in consequence of act 79 of 1880. We now do the same, because we think it unnecessary to do so. We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered.'

"In concluding the opinion the court said:

"'We think the Citizens Bank has heretofore obtained all that it is entitled to, the exemption from taxation of its capital proper and the real estate necessary for carrying on its legitimate business or purposes.' (*State ex rel. Citizens Bank* v. *Board of Assessors*, 48 *La. Ann.*, 35.)"

It will be observed that this court, in said opinion, expressly passes the consideration of the correctness of the decisions of the State courts and the influence they should have upon this court "in interpreting a purely Louisiana contract," and proceeds to consider the case under the plea of *res judicata*. "In considering this question," this court states, "we at once eliminate all the judgments rendered prior to the period when the *amended charter* took effect, and therefore confine our examination to the two judgments rendered by the Civil District Court, the one as to the taxes of 1886, and the other as to those of 1887."

In commenting on these two judgments, the court lays stress on the *nature of the relief* sought by the bank and the *terms of the judgment* as of vital importance in ascertaining what was *the thing adjudged*.

We now approach the conclusion of the court as to the extent and effect given to the plea of *res judicata*, as follows:

"The only question then remaining to be determined is, to what *subjects of taxation* does the estoppel of the thing adjudged apply, for it extends only to the matters which are *necessarily* concluded by the judgment. It is clear upon the face of the records and judgments which are relied upon to constitute *res judicata* that the only questions therein presented and decided were the non-liability of the bank for taxation on its capital, its banking-house, and furniture acquired for the purposes of its banking business, and to a tax levied *eo nomine* on its shareholders, with obligation imposed by the taxing law on the bank to pay the tax. These items, however, embrace only the subjects of taxation mentioned in the *first* of the enumerations which we at the outset made, and do not include the objects embraced in the other three. The thing adjudged, therefore, on the face of the records and judgments does not conclude three of the general subjects of taxation as to which the court below decreed the bank not liable for taxation. The argument, however, is that although the objects embraced in the last three headings are not apparently within the estoppel resulting from the thing adjudged, they are nevertheless substantially so, for it is said that as the thing adjudged determined that *the bank under its contract can not be taxed*, the principle thus established carried the other items with it. The contention is *unsound*, and to demonstrate that it is we will examine briefly the three items referred to, which are embraced in the second, third, and fourth headings."

The court then excludes the following three objects of taxation as not embraced by the plea of *res judicata*, erroneously held to be exempt by the court below, to-wit:

1. The stockholders of the bank on their shares of stock.
2. The real estate held by the bank, which had been mortgaged to secure stock subscriptions or stock loans and had become the property of the bank under foreclosure proceedings.
3. A license tax either to the State of Louisiana, or the City of New Orleans.

On this last item and in conclusion the court states:

"We are at a loss to understand by what process of reasoning the decree was made to cover the question of the non-liability of the bank for license. It was not presented by the pleadings, and was entirely *de hors* the issues of the case.

"As we concluded that the decree below was in part erroneous we must reverse it. The decree below is therefore reversed, and the case remanded with the following directions: First, to enter a decree in favor of the Citizens Bank, recognizing and enforcing its non-liability to taxation, State, parochial, and municipal, on its capital stock, its banking house and furniture acquired and used for the purposes of its banking business, and on a tax on its shareholders *eo nomine*, accompanied with a legal obligation on the bank to pay the tax. Second, rejecting the claim of the bank to non-liability of its shareholders for taxation without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them

unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana. Third, rejecting the claim of the bank to non-liability to taxation on the property acquired by it under foreclosure of mortgages—the whole without prejudice to the right of the State and municipal authorities to claim a license tax, should such be imposed by law on the bank, and without prejudice to the right of the bank to assert any legal defenses which it may have to the payment of such license tax, and it is so ordered."

It will be observed that Justices Fuller, Brown, and Peckham dissented from this opinion (which was delivered by Justice White) on the ground that the judgments relied on by the appellee bank were not *res judicata*, although in other respects they concurred.

But we invite the court's attention to the fact that, although the language of the charter in that case provided in the most comprehensive manner that "the capital of said bank shall be exempt from *any* tax laid by the State, or by any parish, or body politic under the authority of the State, during the continuance of its charter;" and to the further fact, that notwithstanding the repeated decisions of the State courts upholding the exemption claimed from *all* taxation in various suits brought by the bank to prevent the collection of taxes from it on its capital stock and *other property*, and on the shares owned by its stockholders, as well as to cancel assessments made thereof from time to time, this court, when it comes to apply and give effect to the plea of *res judicata*, confines the same to *the narrowest limits possible*, and refuses to extend it beyond the *very letter of the judgments relied on, strictly construed.* The judgment of the court below was reversed because the exemption was carried too far. It was distinctly held that the exemption of the bank itself did not exempt from taxation the shareholders on their shares of stock, and that the bank could not champion the rights of its stockholders in a bill filed by the bank alone. Furthermore, the real estate acquired by the bank under foreclosure proceedings was decided to be not exempt as forming part of the capital stock. Only the real estate actually used for carrying on the business of the bank was adjudged to be exempt from taxation. In addition to these exclusions, the plea of *res judicata* based on judgments, wherein "the thing adjudged" was the bank's exemption from *ad valorem* or *property* taxes, was held to be no bar to a claim by the State or City of New Orleans to a *license* tax on its *occupation.*

So in these cases, the state of facts being reversed, it follows inevitably, it seems to us, that the plea of *res judicata* based on judgments, wherein "the thing adjudged" was the bank's exemption from, or, more aptly speaking, non-liability for, a *license* fee or *occupation* tax imposed by an ordinance of the city, passed under the act of July 1, 1893, must be held by this court to be no bar to the recovery by the city of *ad valorem* or *property* taxes against the same banks assessed for such taxes by the State board under the act of November 11, 1892.

The opinion in the case of *New Orleans* v. *Citizens Bank*, does

not sustain, but is authority against, the plea of *res judicata* as presented in the bills of the complainants in these cases.

In the petitions in the three suits brought by the Bank of Kentucky, Louisville Banking Company, and Third National Bank against R. H. Thompson, Judge of the Police Court of the City of Louisville, it will be observed on examination each of said banks, by reason of its acceptance of the provisions of the Hewitt Act of May 17, 1886, claimed that it and its shares of stock were exempt from municipal taxation, during its corporate existence, except on the real estate or building owned and used by it in conducting its business, and the relief prayed for is that further proceedings in the prosecution of the warrant issued from said police court against it for failing to pay a *license* tax be prohibited, and that (1) the license ordinance of January 29, 1894; and (2) the act of July 1, 1893, for the government of cities of the first class, in so far as they authorize a tax in any form to be levied against and collected from it, be declared unconstitutional and void. (*Record No.* 356, *Stone, et al.* v. *Bank of Kentucky*, 78–83; *Record No.* 360, *Stone, et al.* v. *Louisville Banking Company*, 16–20; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 27–21). The judgments in these three actions are all in the same form, and the only relief adjudged in each case is that said defendant, judge of the police court, be and he is prohibited from proceeding further with the warrant mentioned in the petition against the plaintiff bank in said police court, or making any further order therein. (*Record No.* 356, *Stone, et al.*, v. *Bank of Kentucky*, 88–9; *Record No.* 360 *Stone, et al.* v. *Louisville Banking Company*, 29–30; *Record No.* 404, *Third National Bank* v. *Stone, et al.*, 57.) It was not adjudged specifically in said three cases that the plaintiff bank had an exemption from all municipal taxes, ad valorem as well as license, on the bank itself, its capital stock, surplus, franchise, or property of every kind, except the real estate or building owned and used by it in conducting its business. The character or extent of the exemption was not determined or defined by the court in its judgment. The result is, when the judgment rendered is pleaded as an estoppel, it can not be held to be conclusive, except as to a *license* tax on the occupation or business of the plaintiff bank, because that was the only "subject of taxation," or subject-matter of the action in which said judgment was obtained. In other words, the rule established in *New Orleans* v. *Citizens Bank*, *supra*, will be followed.

But the court below in these cases (which were all, with others, heard together), while expressly holding that there was no irrevocable contract between the banks and the State by reason of the acceptance by the banks of the provisions of the Hewitt Act, and that the scheme of taxation in that act was repealed by the revenue act of November 11, 1892 (*Northern Bank v. Stone, &c.*, 88 *Fed. Rep.*, 413), in order to avoid the force of the argument founded on this court's decision in *New Orleans* v. *Citizens Bank*, *supra*, that a judgment pleaded as *res judicata*, adjudging that a bank was exempt from *ad valorem* taxes on its *property* did not preclude the imposition of a *license* tax on its *occupation*; and, therefore, a judgment pleaded as *res judicata*, that a bank was exempt from a *license* tax on its *occupation*

did not prevent the imposition of an *ad valorem* tax on its *property*, undertook to institute a comparison between the language used in the charter of the Citizens Bank of New Orleans and that used in the Hewitt Act, and to construe the scope and effect of the latter as an original question, so as to embrace both property and license taxes. On this point the following quotation is made from the opinion of the court below (*Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 395:

"The case of *City of New Orleans* v. *Citizens Bank of Louisiana*, 167 *U. S.*, 371, is relied on to support the contention that a judgment that a license tax violated the bank's contract of exemption can not be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the City of New Orleans case the language of the exemption was: 'The capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter.' It was held that a judgment holding this to be a valid exemption, and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders, or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract, so as to exempt capital and business property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock, and upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt Act is that 'such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.' If this exemption clause is irrevocable, it

certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable, and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, *a fortiori*, does it prevent a direct tax upon its property, tangible and intangible. The tax imposed by the revenue act of 1892 was called a 'franchise tax,' but it has been held, both by the Supreme Court of the United States and the Court of Appeals of Kentucky, to be in fact anything but an *ad valorem* property tax. *Henderson Bridge Co.* v. *Kentucky*, 166 *U. S.*, 150; *Adams Exp. Co.* v. *Kentucky*, 166 *U. S.*, 171; *Henderson Bridge Co.*, v. *Com.*, 99 *Ky.* 623."

We submit that when the lower court states: "If it (the exemption clause) prevents a license tax, *a fortiori*, does it prevent a direct tax upon its property, tangible and intangible," it is simply arguing the question of construction, or what the State court *might have decided*, in a case involving *property* taxes, not what it *had in fact decided* in a case involving a *license* tax only.

A brief filed at a hearing in this court by one interested in the question to be decided, does not make him a party to the suit, or bind him, or estop him, by the decree.

In *Stryker* v. *Goodnow*, 123 *U. S.*, 540, this court said:

"We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the railroad company to support the claim of Walcott that the title of that company was the best. Such a proceeding did not make the railroad company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own claims in any litigation that might thereafter arise in respect to its own property. It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided; and it has never been supposed that the judgment in such case would estop the intervener in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit."

In the case of *Northern Bank of Kentucky* v. *Stone, et al.*, 88 *Fed. Rep.*, 413, the lower court held that the fact that, in a suit to restrain a county from enforcing collection of a tax under a State law, the Attorney General of the State appeared and argued the case orally and by brief in the Court of Appeals in behalf of the State, which was not a nominal party to the record, did not make the adjudication *res judicata* as against the State, using this language:

"The Attorney General of the State in these cases, in appearing in the Court of Appeals of Kentucky, for the county of Bourbon, did not intend to waive any rights of the State, and, so far as appeared, he had no authority to do so;" and cited *Carr* v. *United States*, 81 *U. S.*, 433. So we insist here, the appearance by former City Attorney Barker in the Court of Appeals for the City of Louisville, which was not a party to the record in the prohibition suits in the court of original jurisdiction, did not intend to waive any of the rights of the city, and, so far as appeared, he had no authority to do so.

In *Richardson* v. *City of Boston*, 19 *How.*, 263, this court confined the operation of an estoppel to questions of *fact* and said:

"But estoppels, which preclude the party from showing the truth, are not favored. To give the verdict the effect of an estoppel, the *facts* must be distinctly *put in issue.*"

Now, the facts alleged in the prohibition suits concerning the acceptance by the plaintiff banks of the Hewitt Act, were not put in issue at all, but distinctly admitted by the demurrer of the defendant. The only question controverted was one of law, whether or not the Hewitt Act as to bank taxation had been repealed. The three banks in their petitions alleged that act had not been repealed, and that their contracts thereunder were irrepealable. The demurrers to said petitions put in issue that question of law only and rested on the affirmative proposition that said act had been repealed. The decision of the Court of Appeals of June 1, 1895, on this issue of law, holding that the Hewitt Act, with respect to the taxation of banks, had not been repealed, simply construed the provisions of that act. The construction then announced was subject to be overruled by the same court at any time thereafter. It was overruled March 24, 1897; but the former adjudication, having involved no question of fact, but only one of law, neither the State nor the City of Louisville is estopped thereby from claiming the right to an enforcement of the tax provisions with respect to banks of the general revenue law of 1892, against those banks that were parties to the cases first determined.

By Section 905 of the Revised Statutes of the United States, it is provided, with respect to the effect to be given to the judgments of a State court:

"And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State* from which they are taken."

Under this section the Federal courts are not required to give any greater effect to a State court judgment than is given to a like judgment by the highest court in such State.

In *Douglass* v. *Pike County*, 101 *U. S.*, 688, this court said:

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Here, however, the decision of June 1, 1895, of the Court of Appeals of Kentucky, construing the Hewitt Act, with respect to banks that had accepted its provisions, did not continue in force quite two years. If the change resulting from judicial construction, which came with the decision of said court, March 24, 1897, is to have the same effect "as an amendment of the law by means of legislative enactment," it becomes important to ascertain what effect a

change in the law has upon the judgment of a Kentucky court, when pleaded as *res judicata* by a party claiming a tax exemption, as declared by the highest court of that State.

Prior to the passing of the decrees appealed from in these cases, the Court of Appeals of Kentucky, May 13, 1898, in an opinion, which is to be officially reported (*City of Newport* v. *Masonic Temple Company*, 45 *S. W. Rep.*, 881), decided the question as to what effect is to be given to a judgment in that State in a suit for taxes for prior years, when pleaded as *res judicata* in a suit for taxes of subsequent years claimed by a municipality under a different statute, or change in the tax laws. In that case the City of Newport, in 1892, brought suit against the Masonic Temple Company for the taxes due for the years 1887 to 1891, to which said company pleaded its charter exemption, which the court sustained, and dismissed the petition. Subsequently the city brought suit against said company for the taxes of 1892 and 1893. The former judgment was pleaded as *res judicata*, and the lower court adjudged this plea good, and dismissed the action. On the city's appeal from the last judgment, the Court of Appeals held that after the accrual of the taxes involved in the first suit, the State Constitution of September 28, 1891, had repealed said company's charter exemption. In the opinion reversing the judgment of the court below, the Court of Appeals said (*Ib.*, 882):

"Two of the elements which were essential to make the matter *res judicata* are lacking in this case: (1) The identity of the subject-matter; (2) the identity of cause of action. The question for the consideration of the court in the former case was as to whether the provisions of the appellee's charter exempted it from taxation for the years stated in the petition. The cause of action was the taxes which were alleged to be due for those years. The cause of action alleged in the case under consideration is a claim for taxes for different years, and the matter to be adjudged is the question of appellee's liability therefor *under the law now in force* for certain other years."

We insist that when these cases were brought and decided, the laws of the State of Kentucky pertaining to the taxation of banks, as they were interpreted and understood June 1, 1895, had been changed by the judicial construction of the highest court in the State, March 24, 1897, and when the question of exemption from other demands, or the taxes of subsequent years, upon the plea of *res judicata*, was presented for decision in the court below, it was not "under identically the same facts and circumstances" as in the previous litigation. The former adjudication, therefore, did not constitute an estoppel.

The utmost extent to which the exemption claimed by the banks that were parties to the litigation determined June 1, 1895, could be carried (and we do not concede that) is from the taxes which accrued prior to March 24, 1897.

We suggest that the attitude of these institutions is not such as to incline this court to enlarge the scope of their plea of *res judicata*, in any event, beyond the limits indicated. Indeed, the same strictness of construction applies and should be observed in construing a judgment pleaded as *res judicata* to establish a tax exemption as is em-

ployed when this court is called on to construe a statute under which a like immunity is claimed. If there be a doubt as to whether the former adjudication constitutes an estoppel, or upholds the right to the tax exemption as claimed during the corporate lives of these institutions, we submit that such doubt ought to be resolved by this court against the existence of such an immunity, and in favor of the principle of equality in the imposition of public burdens by both city and State.

IV.

PLEA OF RES JUDICATA BY BANKS AND TRUST COMPANIES CLAIMING AS PRIVIES TO THE BANKS THAT BROUGHT PROHIBITION SUITS.

If our contention be sustained by this court that the three banks which actually instituted the prohibition suits against the Police Court of the City of Louisville to prohibit the prosecution against them for failing to pay a license tax under the ordinance of January 29, 1894, have no available plea of *res judicata* against the collection of *ad valorem* taxes by the State and City of Louisville, then it follows, as a matter of course, that none of the other banks and trust companies can rely on the plea of *res judicata*. But, even if the judgments rendered in the suits of the Bank of Kentucky, Louisville Banking Company, and Third Natioal Bank bar the right of the State or city to collect *ad valorem* taxes during the corporate existence of said three banks respectively, the facts alleged in the bills of the other banks and trust companies are not sufficient, if true, to constitute a good plea of *res judicata*, or to prevent the collection of *ad valorem* taxes from them by the State or city.

The warrants taken out by the Commissioners of the Sinking Fund for carrying on the banking business without paying the license tax therefor were against the three banks mentioned—not against all the banks and trust companies. There was no pending litigation against any but the said three banks, when it is alleged an agreement was made with respect to the liability of the banks to pay a license tax under said ordinance. The exhibit marked "A," and made part of complainants' bills, is in two parts. (*Record* 362, *Stone, et al.* v. *Bank of Commerce*, 12–15). The first is in the form of a motion adopted by the Commissioners of the Sinking Fund under date of February 13, 1894. The second consists of what purports to be a stipulation, *without date*, setting forth what is stated *to have been* agreed on in February, 1894, and is signed by counsel for the banks, trust, and title companies of the City of Louisville, and by the City Attorney, and approved by the President of the Commissioners of the Sinking Fund of the City of Louisville. *When* this stipulation was so signed, whether before or after the decision of the Court of Appeals of June 1, 1895, is not alleged or disclosed in any of the complainants' bills. It appears that the Mayor did not sign said stipulation, and it is not alleged that the General Council approved it. It was not filed or made part of the record in either of the three suits brought.

The copy of the proceedings of said Commissioners on February 13, 1894, attested by their secretary, constituting the first part of said exhibit "A," shows said proceedings related to nothing whatever except the validity of the license ordinance of January 29, 1894, and the liability of the banks, trust, and title companies to pay the license fee thereby imposed. No question of irrepealable contract with the State, or immunity from all municipal taxation is presented in these proceedings of February 13, 1894, from beginning to end. Pending the controversy over the payment of the license fee, the banks (with two or three exceptions), it appears from said proceedings, were willing to pay part of the license fee and loan the Sinking Fund the balance thereof, to be repaid with interest at 4 per cent. per annum, "if it was finally decided the banks were not liable to pay said license fee." So, said Commissioners authorized their their president to enter into an arrangement with the banks, trust, and title companies whereby the Sinking Fund was (1) to accept the difference between the amount they then paid to the State for State taxes (42½ cents on the $100), and the amount they would pay under the Hewitt Bill, which difference so paid (32½ cents on $100) was to be an actual payment, not to be refunded under any circumstances; and (2) in addition to making this absolute payment, the banks and trust companies (except those selected to test the question involved) were to lend the Sinking Fund a sum which, when added to such absolute payment, would equal the amount of said license fee against them respectively, for which loan the Sinking Fund was to execute its notes bearing 4 per cent. interest per annum, due when said license fee should be decided to be invalid, or if it was decided to be valid, said notes were to be void. The banks selected to test the question involved (liability for said license fee) were each to lend the Sinking Fund a sum equal to the license fee against it, or 4 per cent. of its gross earnings for the year 1893, and receive therefor, the obligation of the Sinking Fund, as above described. Whether any written agreement was ever formally entered into between the Sinking Fund by its President and the banks, trust and title companies in pursuance of the authority conferred in the motion adopted February 13, 1894, by said Commissioners, does not appear from the records in these actions. If it be pretended that the undated agreement, or stipulation, of which a copy is made the second part of exhibit "A" with complainants' bills, was entered into as a compliance with the authority conferred as aforesaid, then we insist it far exceeds the authority undertaken to be granted by the Commissioners of the Sinking Fund, and bears on its face the ear-marks of an agreement whose covenants were framed in the light of the decision of the Court of Appeals of June 1, 1895, and in all probability to form the basis of a plea of *res judicata* in the event that decision was subsequently overruled. In other words, it is apparently the result of an *afterthought*. It only purports to be a recital of what is stated to have been theretofore agreed upon. It is not an agreement *in presenti*. When this agreement was reduced to writing is not made clear by the testimony taken by the banks. Its caption states that it is an agreement between "the City of Louisville, the Commissioners of the Sinking Fund,

represented by H. S. Barker, City Attorney, acting under the advice and by the authority of the Board of Sinking Fund Commissioners given at a regular meeting of said Board, and the Mayor of the City of Louisville, on the one part; and the various banks, trust, and title companies of the City of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, on the other part." Now, the City of Louisville had not, by its General Council or Mayor, authorized any agreement whatever, on the subject-matter embodied in said alleged stipulation, nor had the Sinking Fund Commissioners in their proceedings of February 13, 1894. Although the City of Louisville and the Mayor are both stated therein to be parties to said stipulation, it shows that neither executed it. The Mayor did not sign it for the city, and his name is not subscribed thereto at all. The City Attorney, in signing the same, only represented the Commissioners of the Sinking Fund, as is stated in the outset of said stipulation, "under authority given at a regular meeting of said board." But this is a mistake if it refers to the meeting of February 13, 1894, (and no other is alleged or proven to have been held on the subject), for in that meeting, the president—not the attorney—of the board was authorized to enter into an agreement, and that embraced only the question as to the validity of the *license fee* against banks, trust, and title companies, under the ordinance of January 29, 1894. But the undated stipulation, without authority from the Sinking Fund even (much less from the General Council), states "that in February, 1894, it *was* agreed between the City of Louisville and the Board of Sinking Fund Commissioners, acting together, in the interest of the said city; and the various banks, trust, and title companies, acting through their committee and counsel, that the question of the liability of said banks, trust, and title companies to pay *municipal taxes, either license, or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt Bill, should be tested by appropriate litigation looking to that end.*" We undertake to say, from the record, that no such general question was involved, nor was there any such agreement made by the city acting by itself or in conjunction with the Commissioners of the Sinking Fund. The bills must be construed most strongly against the complainants. Had there been any corporate act done by the city in the way of a resolution of the General Council, or otherwise, with respect to the question of the liability of the banks and trust companies "to pay municipal taxes, either license or *ad valorem*, otherwise than as provided in the Hewitt Bill," it would have been alleged specifically by complainants, and a copy of the record of such corporate action by the city would have been filed as an exhibit with the bills. But no such corporate action by the city was taken and no such record is in existence. Judge Barker so testifies. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 48, *Question and Answer on Cross-Ex. No.* 36.) The only step taken of record was by the Sinking Fund on February 13, 1894, and that did not pertain to or mention the question of the liability of the banks for municipal taxes generally, or for *ad valorem* taxes, under the Hewitt Act, or otherwise. Indeed, the Sinking Fund had no control over *ad valorem* taxes. Nothing it might do concerning such

taxes was of any binding force or effect upon the city. All *license* fees, however, were payable to the Sinking Fund. (*Secs.* 2980 *and* 3011, *Ky. Stats.*) After setting out the alleged agreed classification of the banks into three classes, this document called a "stipulation" contains the following remarkable clauses:

"It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt Bill, that all of that class should *thereafter regularly and promptly submit to the existing laws and pay their taxes.* And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt Bill that *that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt Bill.*" (*Record* 362, *Stone et al.* v. *Bank of Commerce*, 14.)

This alleged arrangement is unique, to say the least of it. If any bank in any class lost its suit, all of that class promised to "thereafter regularly and promptly submit to the existing laws and pay their taxes." This was indeed a great concession (?). The losing banks simply undertook to "submit" to the existing laws (when they were compelled to do so); and to pay their taxes thereafter "regularly and promptly," and thus wisely avoid the payment of interest and costs.

Again, according to this stipulation, it *was* agreed (*when* or by *whom* is not stated), that, if any bank of any class succeeded in establishing the validity of a contract under the Hewitt Bill, "*that* should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt Bill." How long this exemption (?) was to last, or what is meant by "except as provided in the Hewitt Bill," are matters left to conjecture. There is no provision for a judgment to be rendered fixing the right to or extent of such exemption, or that the non-suing banks should be entitled to the benefits and the judgments obtained by the suing banks. But had this so-called stipulation been executed in the most solemn manner possible by the Mayor, for and on behalf of the City of Louisville, under a resolution directing him to do so, adopted by the General Council, it would have been *ultra vires* and not binding on the city. The "act for the government of cities of the first class" grants no power to the City of Louisville to exempt any person or corporation from taxation. An attempt to do so by ordinance or resolution of the General Council, approved by the Mayor, would have been unconstitutional and void. The Sinking Fund Commissioners had no power to exempt any person or corporation from the payment of any kind of municipal taxes of the City of Louisville. The existence of any such power to exempt from taxation, in either the city or Sinking Fund, is not alleged in any of the bills.

It is alleged, however, that the banks and trust companies relied on this alleged agreement, and paid to the Sinking Fund the amounts of the license fees against them under the terms and conditions

named in the minutes of the Board of Sinking Fund Commissioners of February 13, 1894, and *at a later date* all of the banks and trust companies, except the three banks which brought suits, *paid* to the Sinking Fund the whole of said license fees, without reservation, until the final decision in the suits brought by said three banks. If these license fees were paid voluntarily and without reserve, as alleged, they can not be recovered from the city or Sinking Fund, but if paid involuntarily, or to avoid the fine fixed in said license ordinance, they can be recovered from the Sinking Fund, or the city will be required to give credit therefor on tax bills made out under the *ad valorem* system. (*Levi* v. *City of Louisville*, 97 *Ky.*, 394.) There is no legal or moral weight, therefore, to be attached to the allegation that the amounts thus paid to the Sinking Fund were over $150,000, and that no part of the same has been refunded by the city. It is not alleged that any demand has been made or suit brought by any bank or trust company therefor. But it appears from Judge Barker's testimony that four of the banks that paid license taxes for the years 1894 and 1895 brought suits against the Commissioners of the Sinking Fund, and that they were still pending when he gave his deposition. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 53, 60–63.) The city is solvent, and ready to abide by the law and the judgment of the court with respect to the license fees paid by the banks and trust companies. It would be an excellent bargain for the complainant banks and trust companies to obtain exemption from all municipal taxes during the remainder of their corporate lives by the payment to the Sinking Fund of $150,000, or the amount of said license fees for two years, under the ordinance of January 29, 1894. The city, however, instead of making a profit, as complainants' counsel intimate, would be greatly the loser.

This alleged stipulation, conceding for the sake of argument that it was duly made, does not establish the plea of *res judicata* in behalf of the complainants which brought no suits. It is not an agreement that the *judgment* in one suit shall be entered as the judgment in another or other suits. There were but three suits instituted. Hence the judgments in them could not be entered in others which had no existence in court At most this stipulation, if the facts attending the same, as alleged, were all conceded to be true, instead of constituting *res judicata*, would only be in the nature of an estoppel, or matter of defense, in a suit by the city. No Federal question is raised by the state of facts alleged connected with this stipulation. If it be true, as the court below decided, that no irrepealable contract was made with the State by the banks that accepted the provisions of the Hewitt Act, then such banks had no contract, the obligation of which was impaired by any *legislative* act of the State of Kentucky. A denial by the city of facts which, if true, would estop it from collecting municipal taxes from the complainants, can not be tortured into a contract. The State courts alone, as we have already seen, have jurisdiction of such a controversy. But even if this stipulation constitutes a contract between the city and the banks and trust companies, complainants do not allege that its obligation has been im-

paired since its execution by any State *legislation* violative of the Constitution of the United States.

The sections of the "act for the government of cities of the first class," with respect to the duties and powers of the Mayor and City Attorney, cited by complaidants' counsel, do not sustain the validity of the alleged agreement and stipulation. The Mayor is given no power, in causing the *ordinances* to be enforced, to bargain away the constitutional and statutory right of the city to collect its revenues from these moneyed institutions during their corporate existence; nor is it shown that ex-Mayor Tyler undertook to do so, or was a party to the alleged stipulation. Although he was alive when this document was executed, he did not, for some reason, sign it. He had ample opportunity to do so, for his death while Mayor did not occur until January, 1896. (*Record No.* 362, *Stone, et. al.* v. *Bank of Commerce, Barker's dep.*, 49–51).

While it is the duty of the City Attorney "to *prosecute* and *defend* all *suits* for and against the city," he has no power under section 2909, Kentucky Statutes, to compromise the corporate rights and powers of the city by agreeing that certain corporations (especially where there was no suit pending for or against them) should be thereafter *exempt from municipal taxes*, provided judgment was rendered in favor of similar corporations in actions pending between them and the city. (*Holbert* v. *Montgomery*, 5 *Dana*, 13; *Smith* v. *Dixon*, 3 *Met.*, 442; *Forbes* v. *Hamilton, Sneed* (*Ky.*) 90; *Lexington & Carter Mining Co.* v. *Welburn*, 11 *Ky. L. Rep.*, 307; *Holker* v. *Parker*, 7 *Cranch* (11 *U. S.*), 36).

The section referred to (2909, *Ky. Stats.*) constitutes the only statutory authority vested in the City Attorney to represent the City of Louisville in litigation for or against it. That section is as follows:

"There shall be elected by the General Council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the Mayor and members of the General Council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the General Council. His salary and term shall be fixed by the General Council, not to exceed four years."

We agree with the court below that "the foregoing section makes this officer the retained attorney of the city in every *suit* brought against it;" but we can not assent to the proposition that his authority to represent the city extended to the making of an arrangement with "intended litigants" that they should have the benefit of judgments in the suits brought by others. Had the suits been actually instituted, we concede he had authority to enter into an arrangement to save costs and unnecessary expense by which the judgment in one suit against the city should be entered in others involving the same question or subject-matter. This management of the litigation comes under the general authority of an attorney retained in a num-

ber of suits actually pending, and such a stipulation has frequently been upheld and carried into execution by the courts. The authorities cited by the lower court on this point, all of which we have examined, go to this extent, but no further. (*North Missouri R. Co.* v. *Stephens*, 36 *Mo.*, 150; *Ohlquest* v. *Farwell*, 71 *Iowa*, 231; *Eidem* v. *Finnegan*, 48 *Minn.*, 53; *Gilmore* v. *Insurance Co.*, 67 *Cal.*, 366; *Patton* v. *Caldwell*, 1 *Dall.*, 419; *Thompson on Trials*, *vol.* 1, *sec.* 195.)

We do not dispute the proposition that a binding agreement of the character mentioned may be made by the parties affected themselves, or by their retained attorneys acting under a special authority. In such case others who join in such an agreement may become privies to those who are parties to the record in the suit, and be bound by or entitled to the benefit of the final judgment therein.

"Those dealing with the corporation (the City of Louisville) through its officials are bound to take the same notice of its laws and ordinances that a citizen of the State is with reference to legislative enactments. * * The fact that the writing was not presented to or approved by the council is conclusive that no contract was made." (*Murphy* v. *City of Louisville*, 9 *Bush*, 189)

The alleged stipulation, made part of complainants' bills, shows there were no warrants taken out by the Sinking Fund Commissioners for a violation of the license ordinance of January 29, 1894, except against the Bank of Kentucky, Louisville Banking Company, and Third National Bank. There was, therefore, never any pending litigation in court against the other banks and trust companies that are claiming the benefit of said stipulation.

Speaking of the doctrine of estoppel as applied to municipal corporatious, Herman, in his work on *Estoppel and Res Judicata* (*vol.* 2, *p.* 1365), states:

"The true principle in such cases is well settled. That one can not do indirectly, what can not be done directly, and where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel."

Any agreement by a municipality, although properly executed, whereby a portion of its tax-payers are given immunity from taxation (as this stipulation in effect does, if carried out), would violate the provisions of the present State Constitution and the Kentucky Statutes, pertaining to revenue and taxation. (*Appendix to this brief*, *secs.* 3, 170 *to* 175, *and* 181, *State Constitution*; *secs.* 2980, 4020, *Ky. Stats.*) The stipulation made by the former City Attorney, which provides for immunity from municipal taxes in favor of certain banks and trust companies, in a certain contingency, is absolutely null and void. We do not question his motives or good faith in entering into this alleged stipulation. We simply claim he acted without authority of law, of which complainants were bound to take notice.

Section 162, of the State Constitution, is as follows:

"No county, city, town, or other municapility shall ever be authorized or permitted to pay any claim created against it, under any agreement or contract made without *express* authority of law, and *all such unauthorized agreements or contracts shall be null and void.*"

There are some features of this agreement which should prevent the court from making it a precedent or upholding it as within the scope of the statutory authority of the City Attorney of the City of Louisville.

It has no date. Why, no explanation is given or even offered. Judge Barker fails to fix definitely or positively when it was prepared and signed, but thinks it was about December, 1894, which was six months after the prohibition suits had been brought and decided in the Jefferson Circuit Court. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 51.) It must have been several months later, however, because the fourth clause recites that "all said banks and companies, except those actually involved in the test cases, *paid* the whole of the amount of taxes claimed as against them by the City of Louisville, without reservation until the question thus raised should be finally disposed of" (*Ib.*, 15.) Exhibit No. 6, with Terry's deposition, shows all the payments for license taxes by said institutions were not made until April 15, 1895. (*Ib.*, 77.) Is it not probable, therefore, that this retrospective agreement was not reduced to writing and signed until after the decision of the Court of Appeals of June 1, 1895? There is nothing in it to show it was executed at an earlier date. Thus this important stipulation appears to have been carried in the memory of counsel until that decision, and then it was formulated for the first time.

The names of the banks, trust, and title companies that were to be the beneficiaries of this agreement are not given therein. Only the names of the three banks that brought suits are stated. The counsel signed their own names "for the banks, trust, and title companies of the City of Louisville," thus leaving the question open and uncertain as to what institutions were represented by them, and making it necessary to resort to oral proof to ascertain the number and names of the corporations of these three classes which were doing business in the city when said document was entered into. Thus, it was all the more important to fix the date of its execution, for the record shows several of such institutions went out of business between February 13, 1894, and April 15, 1895. Besides the resolution of the Commissioners of the Sinking Fund of the former date states there were "two or three exceptions" that were unwilling to go into the proposed arrangement concerning the payment of the license tax; and Judge Barker testifies, after his memory is refreshed, that one of these was the Fourth National Bank, which paid no license tax in 1894 or 1895, and was not in fact represented by the counsel who signed said agreement. (*Ib.*, 57.)

This agreement, which was to tie the city's hands in the matter of taxation during the corporate existence of these institutions (in some cases for twenty years), was not executed in duplicate. No copy was filed with any official of the City of Louisville, or the Commissioners of the Sinking Fund; nor was it filed or made a matter of record in either of the prohibition suits. The original, when this litigation was commenced, April 17, 1897, was held by some representative of the banks, and the present authorities of the city were in total ignorance of its existence or contents.

In this agreement it is assumed that the trust and title companies, having no privilege to do a banking business, were on the same footing with State banks, chartered after February 14, 1856; and the City Attorney undertook that such companies should be exempted from municipal taxation if the Louisville Banking Company was adjudged to be.

The court below refers to the fact that these institutions claiming to be privies to the litigation in the prohibition suits, paid considerable sums to the Commissioners of the Sinking Fund on the faith of the verbal agreement made with said Commissioners and the City Attorney. These payments of the license tax, imposed for the years 1894 and 1895, do not estop the city from collecting its *ad valorem* taxes on the franchises or intangible property of said institutions, which amounted to more than the sums paid. Besides, when Judge Barker was cross-examined on this subject, he stated the banks, that did not sue, in December, 1894, agreed to pay their license taxes absolutely, without reserve, and gratuitously, and neither the city nor the Commissioners of the Sinking Fund, made any concession or gave any promise or consideration therefor. (*Record No.* 362, *Stone, et al.* v. *Bank of Commerce*, 52, *questions and answers*, 62–3–4.) Further on, he refers to the answer filed by him for the Commissioners of the Sinking Fund in the suit of one of the banks to recover back the license taxes paid, as the correct statement of the facts and circumstances under which the license taxes were paid by these complainant banks absolutely, and shows clearly they were paid for a totally different reason than that pretended in these actions. After stating the arrangement with said Commissioners as to the payment of license taxes under said resolution of February 13, 1894, he quotes from the said answer and makes it part of his testimony, taken by complainants, as follows (*Ib.*, 62):

"The defendants state that afterwards there was instituted and was pending in the Jefferson Circuit Court, Common Pleas Division, several actions by tax payers, styled, 'George W. Levi against the City of Louisville,' and 'J. Duff Reed against the City of Louisville,' wherein it was claimed that under and by virtue of the present Constitution of the State of Kentucky there was bound to be a uniform rate of *ad valorem* taxation upon all property, whether real or personal, for city, county, and State purposes; that said last named actions came on for trial before the Judge of the Common Pleas Division of the Circuit Court, who rendered an opinion and judgment therein, wherein it was adjudged that all property in the city of Louisville under the Constitution must be taxed at a uniform *ad valorem* rate of taxation, and that any attempt on the part of the City of Louisville to substitute a license system of taxation in lieu of the *ad valorem* system was void. After this judgment was rendered during the fiscal year of 1895, which said fiscal year began on the first day of September, 1894, the subject of what the city should do in regard to taxing the banks and trust companies of the City of Louisville again came up between the Board of Sinking Fund Commissioners and the counsel for the plaintiff and the other banks and trust companies. *The counsel for said banks and trust companies were extremely*

anxious that the City of Louisville and the Sinking Fund Commissioners should still continue the license system of taxation, and, above all things, feared and dreaded the ad valorem system of taxation as applied to the banks and trust companies, and the plaintiff and the other banks and trust companies of the City of Louisville entered into a *new* agreement and contract with the City of Louisville, by which it was then and there agreed that if the City of Louisville should continue the license system as to the banks and trust companies of the City of Louisville in lieu of the *ad valorem* system of taxation until the Levi and Reed cases against the city and the cases of the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank against R. H. Thompson, judge, and the City of Louisville, should be all finally determined and ended in the Court of Appeals, where they were all then pending, that the plaintiff and the other banks and trust companies, except the three litigating banks, would all surrender the notes that they had received for the loans made under the first agreement heretofore set out, and would, pending the termination of said actions in the Court of Appeals, pay year by year the license required by the ordinance in question, absolutely and without recourse."

Thus it will be observed that these institutions, claiming to be privies to the parties plaintiff in the prohibition suits, did not pay their license taxes on the promise of the city that they should be entitled to the benefit of the judgments in that litigation, but they were made, and said Commissioners' notes for prior payments were surrendered, upon a totally different consideration, viz.: that, after the decision of the Jefferson Circuit Court in the Levi case, the city was to "continue the license system as to the banks and trust companies of the City of Louisville in lieu of the *ad valorem* system of taxation (which was feared and dreaded) until the Levi case" and others were determined in the Court of Appeals. Who made such an agreement for the city is not stated, and while it was, of course, invalid, the fact is made plain by Judge Barker, these complainants' own witness, that these payments for license taxes of four per cent. on gross earnings in 1894 and 1895 were made voluntarily, absolutely, and gladly for the sole purpose of escaping the payment of *ad valorem* taxes for the same years; and not upon the faith of an agreement by the City of Louisville that these non-suing banks should have the benefit of the judgments that might be obtained by those that had sued, as the court below supposed in its opinion on the demurrers to the bill (88 *Federal Reporter*, 406–7). The complainants' proof does not [illegible]ain the allegations of their bills in this respect. Judge Barker [illegible]rob-orated on this point by the resolution adopted by the Louisville Clearing House Association December 17, 1894 (*Exhibit No.* 5, *with Leathers' deposition, Ib.*, 92), as follows:

"That it was expedient that all the banks except the Bank of Kentucky, Bank of Louisville, Third National Bank, and the Louisville Banking Company, should surrender the notes given them by the Sinking Fund in 1894, and that all the banks, except the Bank of Kentucky and the Bank of Louisville, should, for the year 1895, pay the four per cent. license tax without reservation, provided,

always that the General Council shall pass a levy ordinance that does not include in its terms tax on capital stock, surplus of banks and trust companies."

But, as conclusive evidence that the City of Louisville was not a party to any of these void agreements referred to by its City Attorney, the General Council did not follow them nor the Leathers resolution, but ignored the same in the levy ordinance approved by the Mayor December 22, 1894, for the fiscal year ending August 31, 1895, in which the *ad valorem* tax rate was levied "on lands, improvements, and on all personal property in the City of Louisville, as is held or owned by every person, firm, or corporation, subject to taxation for city purposes under the laws of Kentucky (this includes the revenue act of November 11, 1892), and under 'an act for the government of cities of the first class,' approved July 1, 1893, and in each case on each one hundred dollars in value." (*Appendix, Ordinance No.* 4). It will be seen by the terms of this ordinance the city was not a party to any alleged agreement to "continue the license system as applied to the banks in lieu of the *ad valorem* system of taxation," but proceeded by its General Council and Mayor to levy *ad valorem* taxes on all property, "subject to city taxation," under the general laws of the State, as well as the act for the government of the city, or upon all property, including franchises or intangible property, owned by every person or corporation, assessed by the Board of Valuation and Assessment or the City Assessor.

But as further showing that these institutions, claiming to be privies to said litigation, have not been prejudiced in any manner by paying their license taxes, and that equity does not require the enforcement of this arrangement with the former City Attorney, we call the court's attention to another ordinance read in evidence by the City of Louisville on the final hearing of these cases. In order to give these banks aud trust companies, as well as all others, the benefit of the amounts paid in lieu of *ad valorem* taxes in 1894 and 1895, an ordinance was passed August 6, 1895, after the decision in the Levi case (97 *Ky.*, 394), allowing all persons or corporations credit on their *ad valorem* tax bills on personalty by the amount of license taxes paid in the same year on their business or occupation in which such personalty was used or employed. (*Appendix, Ordinance No.* 5.)

Under the facts shown by the records, the City of Louisville is neither legally nor morally bound by such an agreement.

In *People and Taylor* v. *Mayor*, 11 *Abb. Prac.*, 66, the question involved was whether the corporation counsel of the City of New York had the power to enter into certain stipulations, which a private attorney could not have lawfully made without the consent of his client. The court held distinctly that no such authority existed and said:

"In neither the charter nor ordinances is this power given (*i. e.* to the corporation counsel) other than the charge and conducting of actions.

"They give him no right to assume the control of the property or interests of the city *beyond that which belongs to any attorney or counsel in the ordinary management of suits.*

"The permanency of the office makes no addition to his powers as attorney or counsel. * * *

"If the head of the law department can, by his act, make the corporation a party to suits, and when a large recovery is had against the city, can stipulate that the city shall not have any means of review or redress, *he would possess an absolute control over the city property far beyond that possessed even by the Common Council.* It appears to me that he possesses no such power."

An attorney can not, under his general authority, accept service for his client of the original process by which the action is begun; for by such service the jurisdiction of the court over his client is established, and until that be done, the relation of attorney and client can not begin. (1 *Wait's A. & D.*, 439; *Bayley* v. *Buckland*, 1 *Exch.* (*W. H. & G.*); *Masterson* v. *LeClaire*, 4 *Minn.*, 108; *Starr* v. *Hall*, 87 *N. Car.*, 381; *Reed* v. *Reed*, 19 *S. Car.*, 548.)

So in these cases, under the statute, the relation of attorney and client between the City Attorney and the City of Louisville can not begin unless suit is brought. On this principle, the authority of an attorney to submit his client's cause of action to arbitration is limited to cases where there is a suit pending, which he has been employed to manage. (*Nagle* v. *Ingersoll*, 7 *Pa. St.*, 185.)

In *Starr* v. *Hall*, *supra*, 383, the court states:

"The principle upon which these authorities rest is, that it is no part of the duty of an attorney, nor within the scope of his authority to admit of service for his client of the original process by which the jurisdiction of the court over the person of the client is first established, for until that be done the relation of client and attorney can not begin; nor can it be created by the act of the attorney alone. To exercise such a power would be to act rather as an agent or attorney in fact, than as an attorney of the court, and to give effect to it there must needs be a special authority for it; and as the law is plain that the summons must be personally served upon the defendant, if a party will take upon himself the responsibility of discarding the mode prescribed by law, and admit of a waiver of such service by an attorney, he is bound to see to it that the latter has the authority to act, or else the inconvenience must be on himself."

If an attorney has no power under his general authority to accept service of original process or to enter the appearance of his client to an action commenced by his adversary, he certainly has none to do that which is more material and important, viz.: to stipulate that the judgment in a pending suit, to which his client is not a party to the record, shall settle and determine the rights of his client with respect to causes of action not sued on at all, or to enter the appearance of his client or make his client a party to an appeal from the judgment in such suit.

The wisdom of the rule which confines the authority of an attorney to the management of *cases in court* must be apparent in view of what was attempted to be done by the former City Attorney by signing this retroactive agreement. If various suits are brought, involving the same issues, and the interest of his client is of the same character in all, by virtue of his retainer, an attorney has authority to

stipulate that the trial of one case shall determine the like issues in all the others. Thus, the same judgment may be entered in all the cases in court, and the matter becomes adjudicated. Counsel for these institutions ask: Was it proper to subject the city to the cost of twenty-five suits when every phase of the question could be determined in three? We answer that this court is not dealing with a question of propriety, but one of legal authority. Again, the same counsel ask: Was it right for the City Attorney to insist upon all of the cases being brought, when the result would be that the city would collect no taxes at all from the banks for a year or two? We answer, the City Attorney's statutory authority extended only to the defense of suits; and it was a question for the counsel of these institutions to decide for themselves, whether they would bring a suit for each of their clients. If said counsel have made the mistake of not instituting a suit for each institution, and obtaining an agreement with the City Attorney, after they all became pending cases in court, that the trial and judgment in one of them should determine all others on the same footing, and involving the same issues, and in not having such judgments entered accordingly, the legal consequences of such mistake must be borne by their clients. The City of Louisville can not be deprived of its lawful rights in the collection of its public revenues, by either the mistake of counsel representing those who should pay the same, or the unauthorized acts of its own officials. Had suits been brought for all of these institutions, the cost and labor of preparing and trying all but a few of them might have been avoided by a stipulation between counsel for the plaintiffs and the attorney for the defendant that the judgment in one or more should determine the same issues in others, which would have been within the scope of their general authority in the management of the cases pending in court, and then there would have been an adjudication in fact and according to law upon the subject-matter involved in each case. No precedent was cited in the opinion by the court below, and none has been cited in the brief of counsel for these institutions, upholding an agreement like the one under consideration as coming within the general authority of an attorney. We venture the assertion that opposing counsel can not produce a decision of this court, or of the highest court of any State, which sustains a stipulation like the one presented in these cases, as being within the general authority of an attorney. In all the cases cited, or that can be cited on this point, it will be found the stipulation in question by the attorney under his general authority was upheld or enforced with respect to pending cases in court only.

We, therefore, insist that the banks and trust companies claiming as privies to the plaintiff banks in the prohibition suits have no available plea of *res judicata*, and their bills should have been dismissed.

V.

THE NATIONAL BANKS.

1. Of the banks organized and doing business on May 17, 1886, which seek an injunction from this court, one, the appellant, First National Bank, failed or refused to accept the proposition of the State, and filed no agreement with the Governor within the specified period. This is conceded by said bank's counsel, and there is no allegation in the bill of said complainant that it complied with the provisions of the Hewitt Act. It is alleged, however, in the two bills of said bank that while it was not bound by the National Banking acts to submit to taxation under the Hewitt Act, it nevertheless had paid its State taxes in accordance therewith, which taxes the State, through its proper officers, received and appropriated, and that, in this manner, it accepted the provisions of the Hewitt Act. Whether the taxes paid by this bank to the State from 1887 to 1892, inclusive, were paid under section 1, or section 7 of article 2 of the Hewitt Act is not disclosed by either of its bills. (*See Hewitt Act in Appendix to this brief.*) But, assuming that the rate of taxes paid was that fixed in section 1, the mere acceptance of the same by the State cannot constitute an irrevocable contract between said bank and the State, or the City of Louisville. Under section 7 said bank has been liable to municipal taxation since the passage of the Hewitt Act. It certainly has no cause of complaint against the revenue law of November 11, 1892, when it has been gratuitously allowed to escape the payment of taxes to the City of Louisville for so many years. The rights of the State and city are not lost by delay merely, nor can they be waived by its executive officers. (*State* v. *Minn. Cent. R. R. Co.*, 36 *Minn.*, 246.)

As to the First National Bank, there was no discrimination against it in the Hewitt Act. It was afforded the same opportunity as was extended to other banks to accept the scheme of taxation therein provided for, and it failed to embrace it, and thereby became liable, under section 7, to pay the same rate of taxes, State and municipal, as individuals. But it seems plain that this bank has no cause of complaint against the general revenue law of November 11, 1892, which places all banks, State and National, old and new, on precisely the same footing, with respect to taxation, State, county, and municipal. A number of new State banks, as well as new National banks, were organized between December 30, 1887 (the date the period in which the Hewitt Act had to be accepted, expired), and the adoption of the present Constitution of the State, September 28, 1891. Other new State and National banks have been organized in the State since the latter date.

It is insisted, however, by counsel for this National bank, that the State can not discriminate between it and the banks in existence prior to December 30, 1887, and which accepted the terms of the Hewitt Act. In other words, that the State Legislature is, and has been since the passage of the Hewitt Act, powerless to place new National banks or those that did not accept the Hewitt Act on the same footing as to taxation with the new State banks, which do not

and can not question their liability for State, county, and municipal taxes under the general revenue law of November 11, 1892.

But the Court of Appeals of Kentucky has expressly decided that all banks, State and National, chartered or organized since the enactment of the Hewitt Act, have no contract with the State, much less an irrevocable one. (*Bath County* v. *Farmers' Bank*, 39 *S. W. Rep.*, 1115; *Citizens' Bank of Shelbyville* v. *City of Shelbyville, and other bank tax cases*, *Ib.*, 1116.)

In *Lionberger* v. *Rouse*, 9 *Wall.*, 468, (decided in 1870), the facts were substantially as follows:

Lionberger, the plaintiff in error, in 1867 owned two hundred shares of stock in the Third National Bank of St. Louis, which were taxed $1.70 on the $100 for State, county, and school purposes, under a statute of the State of Missouri enacted in 1865, which required said taxes to be paid by the corporation for its stockholders. There were two State banks incorporated under a law enacted in 1857, which had the privilege of paying to the State one per cent. on the amount of its capital stock in full of all other taxes. Lionberger brought suit against the tax collector and resisted the collection of the taxes assessed against the said National bank on the ground that his shares therein could not be taxed higher than the capital stock in the said two State banks, and that said statute of 1865 violated section 41 of the National banking act of June 3, 1864, which prohibited a State (1) from taxing shares in a National bank higher than it taxed other moneyed capital in the hands of its own citizens, and (2) from imposing on them a tax exceeding the rate imposed upon the shares in any of the banks organized under State authority. It was conceded the taxes exacted on the shares of stock in said National bank were not greater than were assessed on other moneyed capital belonging to individuals or other corporations, but Lionberger's sole claim was that they were higher than the rate paid by the said two State banks The court, in sustaining the Supreme Court of Missouri, which upheld the validity of the taxes assessed under the said law of 1865, said:

"It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the National banks. The measure itself had reference to prospective legislation by the States and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act which it had obliged itself not to do. It was known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised."

Again, the court states:

"Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the

proviso to the forty-first section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of *issue* of its own creation."

It will be observed that the court construed the second limitation in section 41 of the act of June 3, 1864, as having reference to the tax assessed by a State upon banks of *issue* of its own creation.

The State banks in Kentucky are not banks of issue. Those that brought suits in the court below are not alleged to be banks of issue. Besides, since the act of February 10, 1868 (15 *Stat. at L., p.* 34), there has been no express statutory restriction on the power of a State to tax the shares of National banking associations at a rate not exceeding that imposed upon the shares in any of the banks organized under State authority. The power of a State to tax the shares of National banking associations located within the State, under the present statute, is subject only to two restrictions, viz.: (1) "The taxation shall not be at a greater rate than is assessed upon other *moneyed capital* in the hands of *individual* citizens of such State; and (2) the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere." (*Sec.* 5219, *Rev. Stats. U. S., edition* 1878, *p.* 1009).

In none of these bills of the National banks is there an allegation that the State, by the law of November 11, 1892, taxes the shares of National banking associations "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." To show a conflict between the State and Federal statutes, it is alleged in the several bills of the National banks that the State revenue law of November 11, 1892, does not provide for taxing the shares of National banks, but attempts to subject to taxation their franchises granted by the Congress of the United States, and its other intangible property, such as their surplus, undivided profits, and investments.

The Supreme Court has repeatedly held that the tax on the shares in National banks may be collected from such corporations instead of from the shareholders. (*First National Bank of Louisville* v. *Com. of Kentucky*, 9 *Wall.*, 353; *Lionberger* v. *Rouse*, *Ib.*, 468.) In the case of non-resident shareholders, the only mode in which the State could reach their shares for taxation is to collect the taxes from the bank.

It has also been held that the State is not confined to the *par* value of shares in such institutions; but may tax them upon their *market* value. (*Hepburn* v. *School Directors*, 23 *Wall.*, 480; *People* v. *Commissioners of Taxes*, 94 *U. S.*, 415).

The revenue law of November 11, 1892, for the assessment by the Board of Valuation and Assessment of what is termed the "franchise," of certain corporations has been recently passed on by the Supreme Court of the United States and held to be not in violation of either the State or Federal constitutions. (*Adams Express Co.* v. *Kentucky*, 166 *U. S.*, 171; *Henderson Bridge Co.* v. *Commonwealth of Kentucky*, *Ib.*, 150). In the former case the court states:

"Taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080, and 4081, we agree with the Circuit Court, that it is evident that the word 'franchise' was not employed in a technical sense. * * * * As pointed out by the Circuit Court, the mode of assessment of the intangible property of companies, corporations, and associations mentioned in section 4077, and that of individual tax-payers, is different, and the intangible property of such corporations, companies, and associations, may, in some respects, differ from the intangible property belonging to individual tax-payers; but there is nothing in the statute which exempts any intangible property owned by any corporation, company, or individual tax-payer from taxation, or *discriminates* between them." (*See Act of November* 11, 1892, *Appendix to this brief.*)

The "franchise" of a National bank, which is granted by Congress, according to this decision, is not taxed by the State revenue law as alleged in the bills of the National banks. It is furthermore decided that there is nothing in the State revenue law which *discriminates* between corporations, companies, and individuals.

As was said in *Mercantile National Bank* v. *New York*, 121 *U. S.*, 138–62:

"The main purpose of Congress in fixing limits to State taxation on investments in shares of National banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of like character. * * * The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of National banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens."

It appeared in that case that the capital stock of the trust companies under the laws of New York was required to be assessed at its actual value, to be ascertained, among other standards, by reference to the market price of its shares, so that the aggregate value of the entire capital might be the market price of one multiplied by the whole number of shares. It was stipulated also in that case that the deposits in savings banks amounted to over $505,000,000, all of which were exempted from taxation.

Of these deposits the court said:

"It can not be denied that these deposits constitute 'moneyed capital in the hands of individuals' within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in National banks must thereby also be exempted from taxation."

The method of assessment provided by the revenue law of Kentucky with respect to National banks produces no inequality or unjust discrimination. The aggregate of the assessed value of the capital stock of a National bank constitutes no more nor less than the market or actual value of all the shares of stock owned by the stock-

holders in such bank. This value may be taxed under the provisions of the Federal statute at a rate not greater than is assessed upon other moneyed capital in the hands of individual citizens. The bank is required to pay taxes on no more than all the shares of stock in it are worth, and the taxes paid by it are paid for its stockholders. The character of the information in the report required by the statute of November 11, 1892, shows the value to be ascertained therefrom, is that of all the shares of stock in the corporation, less the tangible property of the corporation otherwise assessed, which is to be deducted, but the value of the "franchise," so-called, and the value of the tangible property taken together, constitute the assessed value of all of the shares of stock in the corporation.

The courts, in construing section 5219 of the U. S. Revised Statutes, hold that it simply prohibits taxation at a greater rate than like property similary situated. (*Mercantile National Bank* v. *New York*, 121 *U. S.*, 138; *Davenport National Bank* v. *Davenport Board of Equalization*, 123 *U. S.*, 83; *National Bank of Redemption* v. *Boston*, 125 *U. S.*, 60; *Palmer* v. *McMahon*, 133 *U. S.*, 660; *Talbott* v. *Silver Bow County Commissioners*, 139 *U. S.*, 438.)

In the case of *Davenport National Bank* v. *Board of Equalization*, *supra*, it was claimed that the National banks located in the State of Iowa were taxed at a rate in excess of the taxes levied on other moneyed capital of the State. The State law taxed savings banks on the amount of their paid-up capital, and did not tax the shares of the banks held by the individual shareholders. It was urged that in no other mode than by taxing the stockholders of each and all the banks could a perfect equality of taxation be obtained. The court, through Justice Miller, said:

"The argument is not conclusive, if the proposition were sound; for the act of Congress does not require a perfect equalization of taxation between State and National banks but only that the shares of the National banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that, if the capital of the National banks were taxed at a much lower rate than other moneyed capital in the State, the banks would have no right to complain, and the law in that respect would not violate the provisions of the act of Congress for the protection of National banks.

"It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the National banks upon the shares of their stock in the hands of their owners. All that has been held to be necessary is that the system of State taxation of its own citizens, of its own banks, and of its own corporations, shall not work a *discrimination unfavorable* to the holders of the shares of the National banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits the manner

of *assessing* and *collecting* all taxes by the States is uncontrolled by the act of Congress.

"In the case before us the same rate per cent. is assessed upon the capital of the savings banks as upon the shares of the National banks. It does not satisfactorily appear from anything found in this record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the National banks. It is not a necessary nor a probable inference from any thing in this system of taxation that it should be so. If, then, neither the necessary, usual, or probable effect of the system of assessment *discriminates in favor* of the savings banks against the National banks upon the face of the statute, nor any evidence is given of the intention of the legislature to make such a *discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional.*"

There is no allegation here in any of the bills of the National banks that the State statute of November 11, 1892, works an actual or material discrimination in the matter of taxation against such banks. Therefore, "it is not a case for this court to hold the statute unconstitutional," or in violation of the Federal laws. There being no injury alleged or shown on the face of the State statute, no relief is needed, nor will this court interfere, by injunction, and require the State to abandon its "system of taxation of its own citizens, of its own banks, and of its own corporations." This court will certainly not hold that it owes these National banks any duty to entertain jurisdiction of their actions and grant their applications for injunctions unless they have alleged and proven to its satisfaction that the State law complained of "works an *actual* and *material discrimination unfavorable to the holders of the shares in such National banks.*"

In *First National Bank of Aberdeen* v. *Chehalis County*, 166 *U. S.*, 440, the statute of the State of Washington concerning taxation of banks was involved. The statute there construed was very similar to the statute in this State (*Ib.*, 443). The bank was required to furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserved fund, and the amount of undivided profits of such bank or banking association. The statute further provided: "The aggregate amount of capital, surplus, and undivided profits shall be assessed and taxed as other like property in the State is assessed and taxed: *Provided*, at the time of listing the capital stock the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus, and undivided profits, and the remainder then taxed as above provided."

It is true the court in that case said:

"If this section stood alone there might be ground for the contention that it contemplates taxation of the capital of the bank. But section 23 of the statute provided that 'each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners, or owner under the pro-

visions of this act, and may pay the same out of their individual profit account, or charge the same to their expense account, or to the accounts of such shareholders, owners, or owner in proportion to their ownership.'"

The Supreme Court of Washington had held in said case that these two sections were to be read together, and that, so read, their provisions were not inconsistent with those of the Federal Statute. The Supreme Court of the United States concurred in this opinion, and upheld said statute as contemplating taxation on the shares of capital stock after the value of real estate had been deducted therefrom.

So the Kentucky Statute (*sec.* 4078) provides for the statement, under oath, from each bank of the amount of capital stock, preferred and common, the number of shares of each, the amount of stock paid up, the par and real value thereof, the highest price at which such stock was sold at a *bona fide* sale within twelve months, the amount of surplus fund and undivided profits, etc.

Section 4088, of the same statute, provides:

"The individual stockholders of the corporation, which are by this article required to report and pay taxes upon the corporate franchise, shall not be required to list their *shares* in such companies, *so long as the corporation pays the taxes* on the corporate property and franchises as herein provided."

We insist that this section, taken in connection with the other cited, shows clearly that the corporation is treated merely as the agent of the stockholders in paying the taxes on the value of all the *shares* of stock after the value of the tangible property constituting a part thereof has been deducted. This section, in other words, is equivalent to the qualifying section found in the statute of the State of Washington, construed in the case of *Aberdeen Bank* v. *Chehalis County, supra.* In other words, if the bank pays the taxes on the value of the shares of stock, then the shareholders shall not be required to list the value of their shares and pay taxes thereon; but if the bank fails or refuses to pay taxes on the same, then the shareholders will be required to list their shares and pay taxes on the value thereof. Thus double taxation is avoided in either case.

In passing on the contentions of counsel for the National banks, the court below in *First National Bank* v. *Stone, et al.*, 88 *Fed. Rep.* 411–12, said:

"It is contended, however, that the definition given to the term 'capital stock,' used in the revenue act of 1892, includes more than the sum of the value of the shares of the capital stock of a corporation. It is true that in the case referred to (*Henderson Bridge Co.* v. *Com.*, 31 *S. W.*, 486) the Court of Appeals of Kentucky held that it was proper for the Board of Valuation and Assessment to fix a valuation of the capital stock of the Henderson Bridge Company at more than the market value of the sum of the shares of the capital stock. In that company the shares of capital stock aggregated $1,000,000, the market value of which was 90 cents on the dollar. It had a mortgage upon its property to secure a bonded indebtedness of $2,000,000. In reaching the amount of the capital stock of the bridge company, the board added the market value of the shares

of the capital stock to the market value of the mortgage bonds, taking it for granted that that would show the real amount of property, tangible and intangible, owned by the company. This mode of assessing the capital stock was held to be proper under the law. In such a case, of course, the assessment for taxation would be more than the value of the shares of the capital stock. There could be no such result, however, in the application of the law to National banks, because they are not permitted to issue bonds, and do not hold property under mortgage. It is not averred in the bill, and it does not appear, that the assessment of valuation for taxation against these complainant banks *exceeds the market value of their shares of capital stock*. However the law may operate, therefore, upon that class of corporations which have bonded indebtedness, it certainly does not in the case of the National banks tax anything more *than the equivalent in value of the shares of the capital stock*. If it does so, there ought to be some averment to show this. *Supervisors* v. *Stanley*, 105 *U. S.*, 311. The bill contains no such statement.

"Another objection to the operation of the revenue act upon the complainants is that certain of the State banks and National banks are now, by reason of the *previous litigation*, enabled to escape all taxation except that provided under the Hewitt Act, and that this is a discrimination against them, in violation of section 5219, above quoted. * * *

"In the former litigation certain banks have been declared to be free from taxation by reason of a contract of exemption. By subsequent decisions in the same court, if that be a material question in that court, the former ruling was declared erroneous. But, by the doctrine of *res judicata*, the particular banks engaged in the prior litigation are able to rely upon it as a bar to the enforcement of the law of 1892. That law, by its terms, applied to all banks equally. In so far as the State has had the power to do so, therefore, it has made the taxation of all banks equal. We do not think that the exceptions to the operation of the law, produced by the accident of litigation, can make the discrimination arising between the parties to the litigation and those who were not parties,—a discrimination within the inhibition of section 5219 of the National banking act. The motions for preliminary injunction will be denied, the demurrers to the bill will be sustained, and the bills dismissed."

The First National Bank pleaded that it was a privy, by agreement, to the Third National Bank in the latter's prohibition suit, and entitled to the former adjudication in that suit, but the court below was of the opinion that the status of these two banks was not the same, because the Third National Bank had accepted the Hewitt Act; whereas, the First National Bank had not; and the agreement relied on showed on its face that it embraced only the institutions which had accepted said act. The bills of the First National Bank were, therefore, in any event, properly dismissed.

2 But the Third National Bank and Citizens National Bank by their appeals (Nos. 404 and 405), present another question for review by this court, viz.: whether the corporate existence, contemplated by the provisions of the Hewitt Act, as the period during which they

should be exempt from municipal taxation, was that which said two National banks had when said act was accepted, which expired in August, 1894, or, in addition, that which was obtained by an extension or renewal of their original corporate existence, by compliance with certain requisites of the National banking laws, for a second period of twenty years. The court below held that the corporate existence (during which immunity from municipal taxation should continue), intended by the Hewitt Act was that which National banks had at the date they accepted said act, and if they chose thereafter to take the steps necessary to obtain a renewal or extension of their corporate existence for another period of twenty years, they occupied, during such extended period, the same or a similar attitude as that of a State bank whose charter had been amended so as to extend the corporate existence of such bank.

The language of section 1, of the Act of Congress of July 12, 1882 (1 *Sup. R. S.*, 353), confirms this view. There it is provided that any National banking association "may at any time within two years next previous to the date of the *expiration of its corporate existence* under the present law, and (1) with the approval of the Comptroller of the Currency, to be granted as hereinafter provided, *extend* its period of succession, by (2) *amending its articles of association*, for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period."

Here it will be seen that unless the original articles of association are (1) amended, and (2) such action meets the approval of the Comptroller, the corporate existence of the association will expire.

The only difference between such an extension and that of a State bank consists in the means provided by law for obtaining it. By section two of said act of Congress (1 *Sup R. S. U. S.*, 353), it is provided that such amendment to the articles of association "shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association." Section three provides for a special examination of the condition of the association, and, if it is satisfactory, the Comptroller shall grant his certificate of approval, and, if not satisfactory, he shall withhold such certificate. Section six requires the redemption of all the circulating notes of any association within a certain period after "the date of the extension of the corporate existence" of the association, and provides for issuing others bearing a new device to be approved by the Secretary of the Treasury, so they can be "readily distinguished from the circulating notes" theretofore issued.

The cases cited by counsel for the National banks only decide that such banks, by taking the legal steps to extend their corporate existence under said act of July 12, 1882, do not lose their identity. Liabilities due to the bank before belong to the bank after the extension, and may be collected by suit; and liabilities of the bank existing before the extension remain so afterward, and the bank may be sued thereon. (*First Presbyterian Church* v. *National State Bank*, 57 *N. J. Law*, 27; *National Exchange Bank* v. *Gay*, 57 *Conn.*, 224; *City National Bank* v. *Phelps*, 97 *N. Y.*, 44; *People* v. *Backus*, 117 *N. Y.*,

196). The same rule would undoubtedly apply to a State bank, whose charter life had been extended by legislative enactment. So, where a State bank has been transformed into a National bank, the latter may be sued and required to pay the debts of the former. (*Metropolitan National Bank* v. *Clagget*, 141 *U. S.*, 520); and likewise after such transformation, liabilities incurred to the bank while a State bank may be sued on and a recovery had in the name of the corporation which it had as a State bank, though properly such suit should be brought in the name of the corporation which it has assumed as a National bank. (*Michigan Insurance Bank* v. *Eldred*, 143 *U. S.*, 293).

The court below held in the *Northern Bank* case (88 *Fed. Rep.*, 421), that the act of the legislature of 1884 extending the charter life of said bank was a grant to a corporation, or an act of incorporation—a new charter. The court in that connection remarked, "it is our duty to give effect to this act (meaning the reservation act of 1856) so as to avoid the evil aimed at by the legislature, and no refined reasoning as to the question whether the extension is the lengthening of an old life, or the granting of a new one, ought to blind us to the palpable intention of the legislature to prevent, except by express words, the future granting of irrevocable powers, privileges, or exceptions."

It would be unjust and inconsistent to hold that the Northern Bank, or either of the State banks, which have obtained extensions of their original corporate existence, or have obtained their charters since 1887, are subject to pay municipal taxes under the act of November 11, 1892, and at the same time hold that National banks, which have obtained an extension of their original corporate existence under the provisions of said act of Congress since 1887, are not subject to such taxes. We insist that all State and National banks in Kentucky, which have obtained either extensions of their original corporate existence or new charters since 1887, (or the expiration of the period in which all of the banks of the State then in existence were afforded the privilege of accepting the provisions of the Hewitt Act), are now bound to pay municipal taxes under the provisions of the act of November 11, 1892, from the date of their several extensions, or of their new charters. This establishes uniformity and equality between State and National banks.

Section 4. of the Hewitt Act, provided that the banks accepting the provisions of said act in the manner and within the period prescribed "shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." What corporate existence is there meant by the legislature? Certainly the corporate existence which the accepting banks then enjoyed. If, after the expiration of the period prescribed by the Hewitt Act, a State bank has obtained an extension of its corporate existence by an act of the legislature, or a National bank has obtained the extension of its corporate existence by compliance with the act of Congress of July 12, 1882, there is no immunity from municipal taxation under the provisions of the Hewitt Act *after such extension.* All State and National banks, outside of the City of Louisville, except

the Bank of Kentucky, Farmers Bank of Kentucky, and Deposit Bank of Frankfort, are now required to pay county and municipal taxes, under the repeated decisions of the Court of Appeals and the opinions of the lower court in these cases.

The judgment in the prohibition suit of the Third National Bank, which was instituted on June 18, 1894, prior to the extension of its corporate existence, can in no event operate as *res judicata* against the City of Louisville, except for the years 1893 and 1894. Under the opinion of the court therein that bank had a good cause of action against the City of Louisville to enjoin the collection of its taxes against said bank for said two years, but the suit of said bank against S. H. Stone, *et al.* (No. 404) was properly dismissed, because it sought to enjoin the assessment of said bank for municipal taxes for years subsequent to 1894.

As to the Citizens National Bank, it stands exactly on the same footing with the Third National Bank in this respect. The lower court held its suit against the City of Louisville presented a good cause of action for the years 1894 and 1895, but said bank's suit against S. H. Stone, *et al.* (No. 405) sought to enjoin the assessment of said bank for municipal taxes for years subsequent to 1894, and, therefore, it was also properly dismissed.

VI.

THE TRUST COMPANIES.

In the bills of the appellees, Fidelity Trust & Safety Vault Company and Louisville Trust Company, it is alleged that by the charters of said companies, respectively, they are empowered to do such banking business as is usually granted such corporations, and that since their organization they have engaged in the banking business in the City of Louisville. These allegations are denied by the answer.

The following is the concluding clause of section 8 of the original charter of the Fidelity Trust & Safety Vault Company, approved April 22, 1882 (*Session Acts* 1881, *vol.* 2, 900–905):

"But nothing herein shall be construed to permit said company to discount paper or to engage in the business of banking."

The following clause is part of section 9 of the original charter of the Louisville Trust Company, approved April 22, 1884 (*Session Acts* 1883–4, *vol.* 2, 276–87):

"But nothing herein shall be construed to permit such company to discount paper or engage in the business of banking."

After the expiration of the period in which the Hewitt Act had to be accepted, by amendments approved April 12, 1888, and May 15, 1890, spectively, to the charter of the former company, promissory notes payable and negotiable to any person or corporation at the office of said company, which shall be endorsed to and discounted by any bank incorporated under any law of the Commonwealth of Kentucky, or organized therein under any law of the United States, and all

promissory notes secured by lien on real estate or collateral, made negotiable and payable at the office of said company, shall be placed on the same footing as foreign bills of exchange. (*Session Acts* 1887–8, *vol.* 2, 1194; *Session Acts* 1889–90, *vol.* 3, 778–9.)

By an amendment to the charter of the latter company, approved May 15, 1886, said company was empowered to buy and sell notes secured by lien on real estate, also to loan money and take such notes in pledge as security for such loans, and all such notes bought by or pledged to said company as would be placed on the same footing as foreign bills of exchange, if discounted by any of the banks of the State of Kentucky, shall be placed on the same footing as foreign bills of exchange, provided said notes are given in fulfillment of contracts that have been fully executed at the time of such purchase or pledge. In the same amendment said company is given power to establish a savings department in connection with its business, and carry on business in such department as a savings bank.

No amendment, however, has been enacted to the charter of either of said companies permitting it to engage in the business of regular or general banking. The power to qualify and act in various trust or fiduciary capacities constituted the chief object in the organization of these companies. It is claimed by their counsel that they are both within the description of the corporations named in the Hewitt Act, and that having accepted and complied with its provisions like the banks, they are entitled to the same alleged immunity from municipal taxation. In other words, these trust companies insist because they are "institutions of loan," in the meaning of section 1 of the Hewitt Act, that they were and are exempt from municipal taxation and on the same footing as the regular banks. Section 5 of the amended charter of the Louisville Trust Company, last referred to, is as follows:

"For purposes of taxation, this company shall be classed and treated as one of the banks of this State, and shall be subject to and pay the same rate of taxes, to same parties, at the same time, in same manner, and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this State."

This section clearly refers to the "law from time to time" that may be adopted for the taxation of banks generally without reference to banks then having peculiar privileges, or the right to any particular rate or method of assessment and collection. Thus, this company, by a provision of its own charter, is brought within the general revenue law of November 11, 1892.

There is no provision in the charter of the Fidelity Trust and Safety Vault Company, or the amendments thereto, on the subject of taxation.

In the case of *Louisville Trust Company* v. *City of Louisville*, 30 *S. W. Rep.*, 991, decided May 3, 1895, (about thirty days before the bank tax decision of June 1, 1895.), it was distinctly announced by the Court of Appeals, there being no dissent by any member of the court thereto, that said trust company was not entitled to any exemption from taxation by reason of any *public service* to either the State or the city. That was a case where the City of Louisville

recovered judgment for the *ad valorem* taxes assessed against said company for the year 1892, upon its real estate, whereon was erected a seven-story office building, in the first story and basement of which the business of said company was carried on. The assessment was made as of September 1, 1891, prior to the adoption of the present State Constitution on September 28, 1891. The case was therefore decided with reference to the State Constitution of 1850 and the statutes thereunder. The contention of said company was that its said real estate was not taxable for municipal purposes under the provisions of the Hewitt Act, except to the limited extent the same was used for carrying on its business. The lower court held that all of said real estate was subject to the said taxes sued for, and the judgment therefor in favor of the city was affirmed by the Court of Appeals. The opinion in that case, delivered by Judge Grace, is especially interesting and noteworthy in view of the fact that he concurred in the majority opinion delivered by Judge Pryor in the bank tax cases a few weeks afterward. We make the following pertinent extract from this very able opinion bearing on the question of said company's liability for municipal taxes to the same extent as other tax-payers (*Ib.*, 993–94):

"Appellant enjoys all the advantages of being situated in the chief commercial metropolis of the State, and this location is the chief reason of its success and prosperity; and, being so located, it enjoys all the advantages, and receives all the protection, that is possible to be conferred by the municipal government. It enjoys every advantage that is enjoyed by other citizen tax-payers within the city limits. *It certainly is not entitled to any exemption from taxation by reason of any public service to either the State or the city, which is the only service that could excuse it from taxation under the old Constitution.* We are unable to see why, in this modified form, at least, it should not be required to contribute its proportion to the public burdens. We are speaking of this case as it arose under the old Constitution of the State, and under the revenue law of the State passed prior to the adoption of the present Constitution, and without any reference to what may be the liability of appellant to taxation, State, county, and municipal, under the new Constitution, and under the new revenue law, nor under the new charter of the City of Louisville. And this decision should be so understood. *We are not impressed with the equity of the act of the legislature in declaring that this corporation should be classed as one of the banks of the State, for the purposes of taxation. It is not a bank*, and it was, by the express provisions of its charter, declared that nothing contained in it should authorize it to do a banking business, *and this restriction has never been removed.* Whatever may have been the considerations of public policy that induced the legislature ever, in Kentucky, to adopt a different rate of taxation for banks to that applied to private individuals and to other corporations (which has always been of questionable propriety), *they did not apply to appellant, in any just and fair sense. But as the City of Louisville is not complaining of any restriction of this right of taxation, but is only attempting to tax as authorized under the Hewitt law, there is no question*

raised by the city claiming any other right. Of course, the issues made in this case do not affect the State."

It is clear that had the City of Louisville's claim for municipal taxes in that case been against all of the property of said company, real and personal, the Court of Appeals would have held said company was not entitled to any exemption whatever under the Hewitt Act, or otherwise. Certainly no exemption from municipal taxes can be maintained in its behalf now, since the taking effect of the present State Constitution, and the enactment of the general revenue law of November 11, 1892, and the "act for the government of cities of the first class" of July 1, 1893.

Nor does the complainant, Fidelity Trust & Safety Vault Company, stand in any better attitude with respect to municipal taxation. As to both of these trust companies, *they are purely business corporations* which render *no public service to the State or city* (as stated in said opinion of Judge Grace), and the attempted exemption from municipal taxation in favor of such companies, which were and are, aside from their trust business, mere "institutions of loan," was in violation of the State Constitution of 1850, and therefore void. (*Bill of Rights, art. xiii, sec.* 1)

The Court of Appeals of Kentucky has repeatedly decided, under the State Constitution of 1850 (which remained in force until September 28, 1891), that there can be no exemption from taxation, either State, county, or municipal, except in consideration of public services.

In *Louisville Water Co.* v. *Hamilton*, 81 *Ky.*, 517, it was held that although the Water Company rendered public service to the City of Louisville, its property was not exempt from State or county taxes by reason of such public service.

In *Barbour* v. *Louisville Board of Trade*, 82 *Ky.*, 645, it was held that an act of the legislature which provided that "any real estate held by the Louisville Board of Trade in the City of Louisville shall be exempt from taxation," was unconstitutional, being in violation of the first section of the 13th article of the State Constitution (of 1850), which provided that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services." It was further held in said case that in disseminating information in the City of Louisville, or even through the State of Kentucky, said Board of Trade did not render any such public service to the Commonwealth as was contemplated by said State Constitution. The court, in commenting on this clause of the State Constitution (*Ib.*, 651), said: "There can be no doubt that this provision is a restriction upon the exercise of the taxing power. It is certainly a 'public privilege' to be exempt from taxation. The exercise of such power is purely an act of sovereignty. Independently of any constitutional provision, the surrender of such an element of sovereignty is never to be presumed. Every intendment is against it so strongly that a reasonable doubt of the legislative intention to surrender or limit must be solved against such intention. Uniformity and equality of taxation is of the essence of the power, and an exception in one case is the increase of the burden

of taxation upon others not thus favored. * * * * The Constitution provides that the grant of an exclusive or separate privilege must be supported by the 'consideration of public service.' That consideration must be either past, present, or future. There is no pretense of a past or present consideration. If it is future, it must be prescribed in the act of incorporation. We find no duties prescribed there that could support a contract. The powers granted are mere gratuities, to be exercised at the pleasure of the company, and if they were imperative they are not public in their nature. * * * * As a general rule, the test of the right to exempt property is the existence of the right to levy a tax to foster such property. The levy of a direct tax upon the whole people of the State, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation had been conferred upon a designated individual, it would strike any one as palpably beyond legislative authority. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one, there is nnquestionably the power to exempt the other. It is not every enterprise that is incidentally beneficial to the public that will authorize the State to foster it at the expense of the people at large. The object must appear upon the face of the legislation to be directly for the public good, and of such a character as to call for the aid of the State to forward it in the exercise of a governmental function. * * * * The exemption of charitable institutions and schools has always been recognized as valid, because done in the exercise of a governmental function; but private undertakings, primarily for private gain or aggrandizement in any way, can not be protected individually and specifically by the government, but must come under general laws that operate alike upon all. We are of the opinion that the act of exemption is unconstitutional."

In the case of *Lancaster* v *Clayton*, 86 *Ky.*, 373, it was held that the legislature might confer the taxing power upon municipalities in such manner as it deemed expedient, but it could not confer any greater power than the State itself possessed, and must observe the restrictions and limitations of the organic law. In that case, Lancaster proposed to the City of Georgetown to erect at said place a fine hotel, if said city would exempt the property from the payment of municipal taxes for ten years. The offer was submitted to the voters of the city, and, the majority favoring it, the proposal was accepted by the city, and thereupon the hotel was built. The following year, however, the city had it assessed for city taxes, and Lancaster sought to enjoin their collection. In the charter of Georgetown, it was authorized to assess and levy a tax upon all the real estate in the city. No power to exempt property from taxation was attempted to be given in express words in the charter of the city. The Court of Appeals on this point observed: "We shall, however, waive the question whether this has been done by implication and proceed to a consideration of the power to do so, even with attempted legislative sanction, in a case like this one." After quoting the first section of

the bill of rights in the State Constitution of 1850, the court further observed: "It is a 'public privilege' to be exempted from taxation; and as the legislature can only authorize the imposition of the tax when it is for a public purpose, so, as a general rule, it also passes its constitutional limit when it attempts to confer exemption from taxation, save in consideration of public service. * * * The burden of taxation is justly a common one. Its object is to provide means for the protection and benefit of all; and, this being so, all should help to bear it. An exemption to one person is but additional burden to another. To take from one and give to another in a case of taxation, is, indeed, but robbery in a legalized form, and counter to the spirit and genius of our system of government. It is true the taxing power is a broad and liberal one and properly so. * * * It can not be used, however, to take from one person his property and give it to another one more favored, and this, too, although it may incidentally benefit the community. * * * Whatever directly promotes individual interest, although it may also tend incidentally to the public welfare, is essentially a private and not a public object. * * * Is the object of such a character that the municipality, in the exercise of a governmental function, can aid it? This is the true test of legislative power to exempt."

In the case of *City of Henderson* v. *McCullagh*, 89 *Ky.*, 448, the question raised was as to the exemption from city taxes of property belonging to a corporation, known as the "Henderson Female Seminary," which, however, belonged to one individual The court, in passing on the question, said (*Ib.* 452): "The legislature can not exempt property from taxation, save in consideration of public service, unless it be of a benevolent or charitable character. If the object directly promotes individual interest, and be essentially a private enterprise, then the exemption of its property from taxation by the legislature would be constitutional violation, and, as such, it would be the duty of the courts to declare it invalid."

In *Commonwealth* v. *Makibben*, 90 *Ky.*, 389, the court said: "If the legislature were to authorize the payment of a person's expenses in the performance of any enterprise, not a public service, there can be no doubt that such an act would be unhesitatingly declared unconstitutional, and to exempt a person's property from taxation in consideration of the same service, would be equally unconstitutional. To exempt a person's property from taxation, is to increase the burden of taxation upon all other taxpayers. The true test in such case is, has the legislature the constitutional power to authorize the direct payment for the services? If not, she can not exempt the person's property from taxation."

The Louisville Trust Company claims that by the amendment to its charter of May 15, 1886, it is given power to buy and sell notes secured by lien on real estate. This is not a general power to buy any kind of notes. Only real estate notes can be taken as security for a loan of money, and only such real estate notes can be bought by or pledged to said company, or placed on the footing of bills of exchange, and this power is coupled with the proviso that all such notes shall have been given in fulfillment of contracts fully executed

at the time of such purchase or pledge. These limited powers are not such as the general powers usually given to banks. It is urged, however, that by said amendment said company was authorized to establish a *savings department* in connection with its business, but it will be observed by the court that the business of this department is to be carried on "as a savings bank," the deposits are not to be less than one dollar, and the interest thereon is to be allowed at such rate as may be fixed by the by-laws, not exceeding four per cent. per annum. It is further provided that this "department" shall be kept distinct and separate from the other business of the company, and in a separate set of books.

In the case of *Bank of Redemption* v. *City of Boston*, 125 *U. S.*, 60–70, this court expressly held that savings banks, organized for the purpose of investing savings of small depositors, *are not banking institutions* in the commercial sense of that phrase.

The two amendments to the charter of the Fidelity Trust & Safety Vault Company of April 12, 1888, and May 15, 1890, under which said company claims it is placed practically on the same footing with banks, were both passed after the expiration of the period prescribed in the Hewitt Act for its acceptance. In other words, even if all that is claimed for this company in said two amendments be true, it occupies no better attitude than it would be in if chartered for the first time on April 12, 1888, or May 15, 1890, and no exemption under the provisions of the Hewitt Act growing out of these subsequent amendments can be sustained.

We insist that these two trust companies, which render no public service to the State or City of Louisville, have no immunity from State or municipal taxation under the Hewitt Act, or any provision of their charters. If either of the acts of the legislature on which they rely can be construed as intending to grant such exemption, it is in violation of the State Constitution of 1850. Nor are said trust companies entitled to the immunity claimed under their pleas of *res judicata*, that they are privies by agreement to the Louisville Banking Company in its prohibition suit.

On these points we can not do better than to quote from the opinion of the court below (*Louisville Trust Company* v. *Stone, et al.*, 88 *Fed. Rep.*, 407–9) as follows:

"In the case of *Louisville Trust Company* v. *City of Louisville* (*Ky.*), 30 *S. W.*, 991, Judge Grace, in the course of his opinion, expressed the view that this was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, and that this was the only ground upon which it could be excused from taxation under the old Constitution. It has been held by the Court of Appeals of Kentucky that it was competent to exempt banks, under that Constitution, because they did render public services. It is thus apparent that the question whether the trust companies had an irrevocable contract under the Hewitt Act (*Act Ky. May* 17, 1886), was not the same as that presented with respect to the banks. The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question can only exist where the two cases

involve the same questions of law and fact; otherwise, the attorney might conclude his client's rights by an event having no relevant relation to the merits of the controversy in which he is acting as attorney. Hence it follows that the contract of the City Attorney on behalf of the City of Louisville, in so far as it attempted to make the taxation of the trust companies depend upon the judgments in the three test cases of the banks, was beyond his authority, and that the trust companies can not rely on those judgments as *res judicata*. Indeed, the same conclusion may be reached irrespective of the City Attorney's authority. The point adjudged in the three cases was that *banks* accepting the Hewitt Act had an irrevocable tax exemption. The point at issue here concerns the tax exemption of the *trust companies*. This is a *different question*, as we have seen, and is not foreclosed, therefore, by the judgment in favor of the banks. The indispensible element in a successful plea of *res judicata* is that the point adjudged and the point at issue shall be the same. If the complainants can not rely on the bar of the prior adjudication, we must, of course, reach the same conclusion upon the question of irrevocable contract on its merits that we have reached in the case of the Northern Bank of Kentucky. The motion for preliminiminary injunction must therefore be denied, the demurrers to the bills sustained, and the bills dismissed."

There are other questions of subordinate importance, concerning which we might have presented our views, but realizing that this discussion on the main issues involved herein has been at greater length, perhaps, than was necessary, we now, in conclusion, ask, for the reasons urged in the foregoing brief, (1) that the decrees in cases Nos. 356, 357, 358, 359, 360, 361, 362, 363, 364, and 365 be reversed, with direction to the court below to dismiss the bills; and (2) that the decrees in cases Nos. 404, 405, 406, 407, 408, 409, 634, and 635 be affirmed.

All of which is respectfully submitted.

WILLIAM S. TAYLOR, *Attorney General,*
For Samuel H. Stone, Auditor, et al.

HENRY LANE STONE, *City Attorney,*
For City of Louisville.

APPENDIX.

AN ACT RESERVING POWER TO AMEND OR REPEAL CHARTERS AND OTHER LAWS.

[Statute of February 14, 1856.]

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: PROVIDED, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

SEC. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter, or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

SEC. 3. That the provisions of this act shall only apply to charters and acts of incorporations to be granted hereafter; and that this act shall take effect from its passage.

Approved February 14, 1856.

(*Session Acts* 1855–6, *vol.* 1, *chap.* 148, *p.* 15.)

HEWITT ACT.

ARTICLE II.

Stocks in Banks and Other Institutions.

SECTION 1. That shares of stock in State and National banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the Auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer

having in charge the affairs of such bank, institution, or corporation, who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

SEC. 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations, is invested, and pay into the Treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths:

"I . . . . . , swear (or affirm) that I am the . . . . . of . . . . . , and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits, or undivided accumulations of said . . . . . , and how or in what said surplus, undivided profits, or undivided accumulations is invested."

SEC. 3. If any such bank, institution, or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits, or undivided accumulations than an amount equal to ten per cent. of such capital stock, the excess of the amount so invested over the amount equal to ten per cent. of such capital stock shall be exempt from taxation for that year, and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

SEC. 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent

or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

SEC. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

SEC. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.

SEC. 7. If any bank, State or National, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

ARTICLE XII.

SEC. 5. Chapter 92 of the General Statutes, the act of March 28, 1872, entitled "An act to amend chapter 83 of the Revised Statutes, title 'Revenue and Taxation,'" the amendment to said act of March 28, 1872, entitled "An act to amend an act, approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax," approved April 19, 1873, the act approved April 2, 1878, title "An act to amend section 6, article 6, chapter 92, General Statutes," "An act to amend article 2 of chapter 92 of the General Statutes, title 'Revenue and Taxation,'" approved May 8, 1884, and all other acts, general and special, and parts of acts inconsistent herewith, or not in conformity herewith, are hereby repealed; but nothing in this act shall interfere with any existing local option, or any special or prohibition law in any county, nor with any local or general law for creating or collecting county levy, or with chapter 1315 of the acts of 1879–80, or with an act entitled "An act for the benefit of the Branch Penitentiary at Eddyville," approved April 7, 1886.

(*Session Acts* 1885–6, *vol.* 1, *pp.* 144–147; *Ib.*, 201.)

SECTION EIGHT (8), CHAPTER SIXTY-EIGHT (68), OF THE GENERAL STATUTES OF KENTUCKY.

To which, by section six (6) of the Hewitt Act, the provisions of the latter act concerning bank taxation are subject:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

(*General Statutes of Ky., Ed.* 1888, *pp.* 861–2.)

SECTIONS OF CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY.

[Adopted September 28, 1891.]

SEC. 3. "All men, when they form a social compact, are equal, and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege, or exemption shall remain subject to revocation, alteration, or amendment."

SEC. 170. "There shall be exempt from taxation public property used for public purposes; places actually used for religous worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusiveiy for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

SEC. 171. "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes

shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

SEC. 172. "All property not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

SEC. 174. "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses, or franchises."

SEC. 175. "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

SEC. 181. "The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions."

AN ACT RELATING TO REVENUE AND TAXATION.

[Approved November 11, 1892.]

ARTICLE I.

SEC. 2 (*Sec.* 4020, *Ky. Stats.*) "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

ARTICLE III.

Assessment of Certain Corporations.

SEC. 1. (*Sec.* 4077, *Ky. Stats.*) Every railway company or corporation, and every incorporated bank, trust company, guarantee or

security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation, or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district, where its franchises may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Auditor, Treasurer, and Secretary of State, who are hereby constituted a Board of Valuation and Assessment for said purpose.

SEC. 2. (*Sec.* 4078, *Ky. Stats.*) In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section sixteen of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred or common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

SEC. 3. (*Sec.* 4079, *Ky. Stats.*) Where the line or lines of any such corporation, company, or association, extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this State, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other

State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of the State, on business done in this State, and the entire gross receipts of the corporation, company, or association in this State and elswhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company, or association as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

SEC. 4. (*Sec.* 4080, *Ky. Stats.*) If the corporation, company, or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company, or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this State.

SEC. 5. (*Sec.* 4081, *Ky. Stats.*) If the corporation organized under the laws of this State, or of some other State or government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased, or controlled in this State, bears to the lines owned, leased, or controlled in this State and elsewhere, shall be the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which, such lines pass, or is operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town, or taxing district.

SEC. 6. (*Sec.* 4082, *Ky. Stats.*) Whenever any person or association of persons, not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the cerificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

SEC. 7. (*Sec.* 4083, *Ky. Stats.*) It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence the board may change the valuation as it may deem proper, and the action of the board shall be final.

SEC. 8. (*Sec.* 4084, *Ky. Stats.*) The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company, or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town, or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town, or taxing district for collection.

SEC. 9. (*Sec.* 4085, *Ky. Stats.*) The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.

SEC. 10. (*Sec.* 4086, *Ky. Stats.*) All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the State from them into the Treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

SEC. 11. (*Sec.* 4087, *Ky. Stats.*) Any corporation, or officer thereof, willfully failing or refusing to make reports as required by this chapter shall be deemed guilty of a misdemeanor, and for each offense shall be fined one thousand dollars, and fifty dollars for each day the same is not made after October first of each year.

SEC. 12. (*Sec.* 4088, *Ky. Stats.*) The individual stockholders of the corporations which are, by this article, required to report and pay taxes upon the corporate franchise shall not be required to list

their shares in such companies so long as the corporation pays the taxes on the corporate property and franchises as herein provided.

SEC. 13. (*Sec.* 4089, *Ky. Stats.*) Should any corporation required to make the report as hereinbefore provided be in the hands of, or under the control of, a receiver or other person, it shall be the duty of such receiver or other person to make the returns and valuations as hereinbefore required.

SEC. 14. (*Sec.* 4090, *Ky. Stats.*) Should any corporation fail to make the reports as required herein on or before the first day of October of each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the value of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

SEC. 15. (*Sec.* 4091, *Ky. Stats.*) All taxes assessed against any corporation, company, or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company, or association by the Auditor; and every such corporation, company, or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall shall bear interest at the rate of ten per cent. per annum; any such corporation, company, or association failing to pay its taxes, penalty, and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

SEC. 16. (*Sec.* 4092, *Ky. Stats.*) All banks and trust companies shall file the reports herein required by section two of this article, on or before the first day of March, 1893, and annually on or before March first thereafter. Said reports shall be made up to and including the thirty-first day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports or to pay said taxes as herein required, said banks and trust companies shall be subjected to the same fines and penalties as prescribed in section fifteen of this article.

ARTICLE XVI, CONCLUSION.

SEC. 1. All acts, and parts of acts, in conflict with this act are hereby repealed, except an act entitled, "An act to provide additional funds for the ordinary expenses of the State government," approved June four, one thousand eight hundred and ninety-two, and also except an act amendatory thereof, approved July six, one thousand eight hundred aud ninety-two.

(*Session Acts* 1891–2–3, *pp.* 277–366.)

MUNICIPAL TAXATION BY THE CITY OF LOUISVILLE.

SEC. 195. (*"Act for the government of cities of the first class," approved July* 1, 1893; *sec.* 2980, *Ky. Stats.*) "Each city shall raise a revenue from *ad valorem* taxes, and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for State purposes, and shall levy an *ad valorem* tax on same, not exceeding the rate and limits prescribed in the Constitution, and for school purposes not exceeding fifty cents on each one hundred dollars of taxable property therein, or such portion of poll tax or license fees as the council may designate; to levy a poll tax not exceeding one dollar and fifty cents on each adult male inhabitant thereof; and may impose license fees on stock used for breeding purposes, or franchises, trades, occupations, and professions, and provide for the collection thereof. All taxes and license fees shall be levied or imposed by ordinance, and the purpose or purposes for which the same are levied or imposed shall be specified therein, and the revenue therefrom shall be expended for no other purpose than that for which it was collected. The license taxes shall be collected by the commissioners of the sinking fund. All other taxes shall be collected by the tax receiver.

ORDINANCE No. 1.
(Part of Seetion One.)

AN ORDINANCE RELATING TO ASSESSMENTS.

Be it ordained by the General Council of the City of Louisville:

That, beginning with the first day of September, 1893, and on the same date in every year thereafter, the Assessor shall take the list of taxable property in the city of Louisville held or owned by every person in his or her own right, or as fiduciary, guardian, or agent, upon blanks in following form, substantially, to-wit.:

Statement and return of all lands and improvements, *and all personal property, not used or employed in some business or occupation from which a license tax is required*, subject to taxation in the city of Louisville.

Approved August 9, 1893.

ORDINANCE No. 2.
(Part of Section One.)
Levy or 1894.

AN ORDINANCE CONCERNING THE TAXES FOR THE FISCAL YEAR ENDING AUGUST 31, 1894.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That the following *ad valorem* tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements, *and on such personalty as is not used and employed in business paying a license tax for such business*, and in each case on each $100 in value, but shall not be levied upon any property exempt from taxation.

Approved December 21, 1893.

ORDINANCE No. 3.

AN ORDINANCE CONCERNING CERTAIN LICENSES IN THE CITY OF LOUISVILLE.

Be it ordained by the General Council of the City of Louisville:

That hereafter the following licenses shall be paid into the Sinking Fund of the City of Louisville:

Every manufacturer, distiller, brewer, merchant, or dealer, the owner or proprietor of every lithographing establishment, printing establishment, or bookbinding establishment, shall pay an annual license of five dollars, which shall be for the sale of not exceeding one thousand dollars of goods, wares, or merchandise; for the sale of more than one thousand dollars the tax shall be five dollars for the first thousand dollars of sales, and one dollar and fifty cents for each additional one thousand dollars, or fraction thereof, of yearly sales of all commodities. The person, firm, or corporation to whom the license has been granted shall, at the end of the year, pay the amount due for the license for the excess of sales over the estimate made at the time of the issuance of the license, under the same penalties as if the party had failed or refused to procure license.

SECOND. Every life, fire, or accident, or casualty and indemnity insurance company, title company, title insurance company, or abstract company doing business in the city shall, on or before the first day of February of each year, pay to the Sinking Fund the sum of two (2) dollars on every one hundred dollars of premiums received on business done in the city during the previous year.

THIRD. Each bank and trust company shall pay an annual license tax of 4 per cent. of its gross earnings, exclusive of rent from real estate paying taxes in the city of Louisville.

FOURTH. Each telephone company shall pay an annual license tax of 2 per cent. of its gross earnings. Each gas company, electric light company, or heating and lighting company, shall pay an annual license tax of 2 per cent. of its gross earnings, less the amount received for light and heat furnished the city at cost.

FIFTH. Each street car company shall pay an annual license tax of 2½ per cent. of its gross earnings.

SIXTH. Each person, firm, or corporation engaged in the business of retailing liquor in the city of Louisville shall pay an annual license of $150 therefor.

All licenses shall be paid in advance, and in every case where it is based upon a percentum of the earnings, or income of the person, firm, or corporation, the computation shall be made upon the earnings or income of said person, firm, or corporation for the year immediately preceding the time the license is to be dated, or is payable; and the person, firm, or corporation to whom the license shall be granted, shall, at the end of the year, pay the amount due for the excess over the estimates made at the time of issuing the license under the same penalty as if the party had failed or refused to procure a license.

Any person, firm, or corporation violating any of the provisions of this ordinance shall be fined not less than five dollars nor more than one hundred dollars for each offense; each day that the violation is continued shall constitute a separate offense.

SEVENTH. All annual liquor licenses shall be dated and begin from the first Monday in August of each year. Until the first Monday in August, 1894, applicants for liquor licenses, who have complied with the laws and regulations in such cases provided, may be granted license to expire on the first Monday of August, 1894, upon the payment of such proportion of the sum of $150 as the time said license has to run bears to one year. After the first Monday in August, 1894, persons proposing to begin the business of retailing liquor may be granted license until the next succeeding first Monday in August after said license is dated by paying their just proportion of the annual license tax as hereinbefore provided.

EIGHTH. All ordinances in conflict, or not in conformity with this ordinance, are hereby repealed. This ordinance shall take effect from and after its publication.

Approved January 29, 1894.

ORDINANCE No. 4.

(Part of Section One.)

Levy Ordinance for Fiscal Year Ending August 31, 1895.

AN ORDINANCE CONCERNING THE TAXES FOR THE FISCAL YEAR ENDING AUGUST 31, 1895.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That the following ad valorem tax is hereby levied for the fiscal year ending August 31, 1895, on lands and improvements, and on all personal property in the city of Louisville, as is held or owned by every person, firm, or *corporation* in its, her, or his own right, or as fiduciary, guardian, or agent, *subject to taxation for city purposes under the laws of Kentucky*, and under "An act for the government of cities of the first class," approved July 1, 1893, and in each case on each one hundred dollars in value, but shall not be levied upon any property exempt from taxation.

Approved December 22, 1894.

ORDINANCE No. 5.

Crediting Ad Valorem Tax Bills by Amount of License Paid.

AN ORDINANCE PROVIDING FOR CREDITING AD VALOREM TAX BILLS ON PERSONALTY BY THE AMOUNT PAID TO THE SINKING FUND AS LICENSE ON SAME.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That in collecting *ad valorem* tax bills on personalty for any year, it shall be the duty of the Tax Receiver of the City of Louisville to credit such tax bills by the amount of any license paid into the Sinking Fund of the City of Louisville by the tax-payer on the personalty represented by the tax bill.

SEC. 2. In giving such credits when the license has been paid for a period beyond the fiscal year for which the tax bill is made out, then the credit shall be given for the proportion only of said license

as is within the fiscal year of the tax bill, and the remainder, if any, shall be credited on the tax bills of the succeeding years in like proportion until the whole amount of the license is credited.

SEC. 3. In order to facilitate the crediting of the tax bills as herein provided for, it shall be the duty of the Secretary and Treasurer of the Sinking Fund of the City of Louisville, upon the demand of any person who has paid a license on personalty in lieu of *ad valorem* taxes, to issue to such person duplicate certificates showing the amount of license paid, by whom, and for what time, one of which said certificates shall be kept on file by the Tax Receiver and the other shall be by the Tax Receiver filed with the Controller of the City of Louisville.

SEC. 4. In making his settlements the Tax Receiver shall be allowed the credits so made in the tax bills, for money paid for license, in the same manner and to the same effect as if he had collected the tax bill entirely in money.

SEC. 5. Wherever a license was paid in any year in lieu of the *ad valorem* taxes, the Tax Receiver is directed to receive in payment the face of the tax bill for that year without interest.

SEC. 6. This ordinance shall take effect from and after its publication.

Approved August 6, 1895.

No. 356. and 357.

FILED
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JAMES H. McK

Nos. 356 and 357.

Brief of Humphrey & Davie, Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

Filed Feb. 17, 1899.

SAMUEL H. STONE, Auditor, &c., - *Appellants,*

VERSUS

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, - - *Appellee.* — No. 356.

CITY OF LOUISVILLE, - - - - *Appellant,*

VERSUS

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, - - *Appellee.* — No. 357.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
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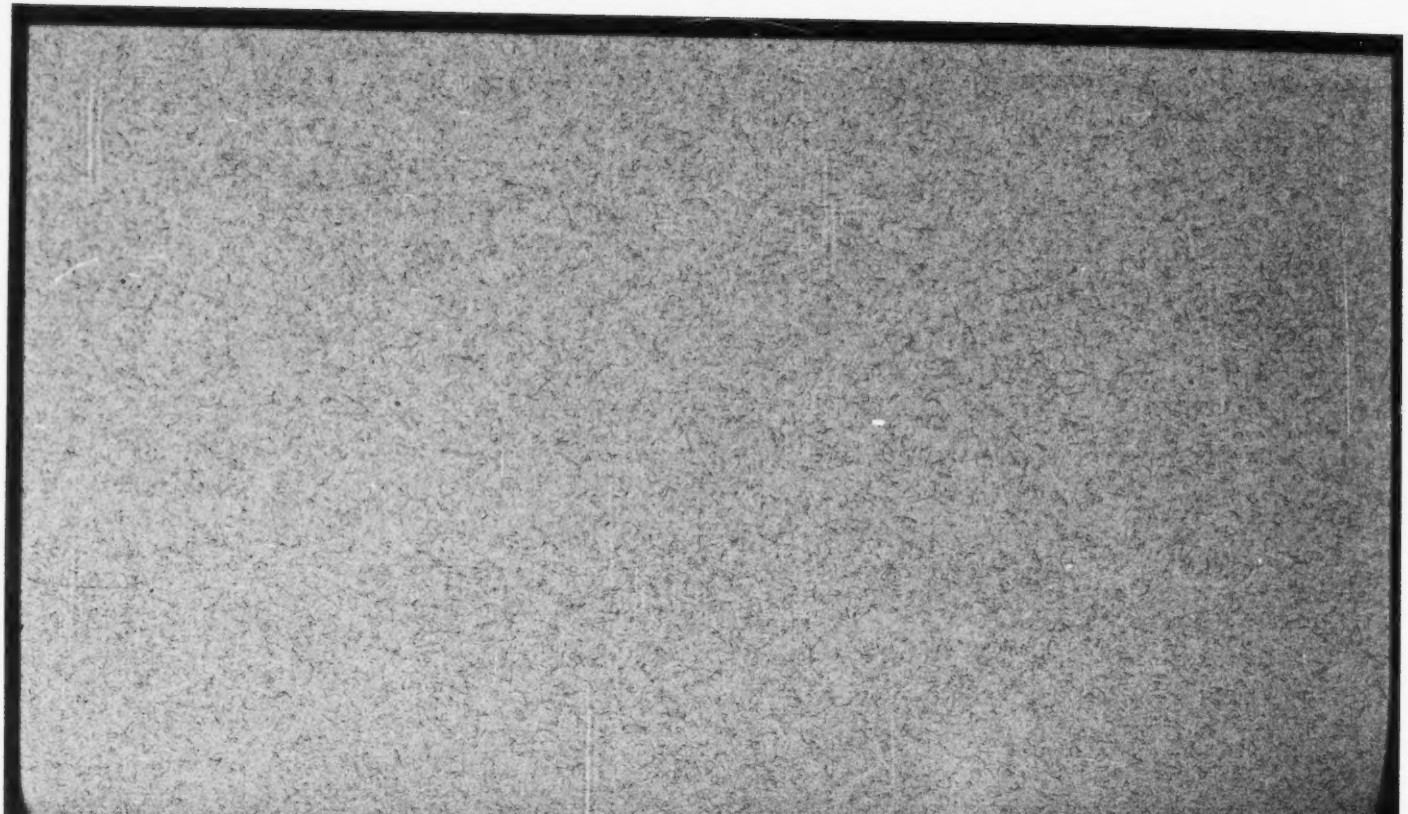
JOHN P. MORTON & COMPANY, LOUISVILLE, KY.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Nos. 356, 357.

SAMUEL H. STONE, AUDITOR, &c., - - - - - - *Appellants,*

356 *VERSUS*

PRESIDENT, DIRECTORS, AND COMPANY OF BANK OF KENTUCKY, - - - - - - - - - - - *Appellee.*

AND

CITY OF LOUISVILLE, - - - - - - - - - - *Appellant,*

357 *VERSUS*

PRESIDENT, DIRECTORS, AND COMPANY OF BANK OF KENTUCKY, - - - - - - - - - - - *Appellee.*

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

The appellee in these cases is a corporation duly incorporated under a certain act and amendments thereto of the Commonwealth of Kentucky, and will be styled in this brief "Bank of Kentucky."

The appellants are, in the first named case, No. 356, Samuel H. Stone, Auditor, Charles Finley, Secretary of State, and G. W. Long, Treasurer of the Commonwealth of Kentucky, constituting what is known as the Board of Valuation and Assessment under the Act of November 11, 1892, and the city of Louisville, the county of Franklin, and the city of Frankfort.

The appellant in the second case, No. 357, is the city of Louisville.

Each of these cases was heard upon its merits by the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Justice Harlan, Circuit Judge Taft, and Circuit Judge Lurton constituting the court.

The decree of the court in the first case (R. No. 356, page 143) is as follows:

> "And it is now adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley, and Geo. W. Long be and they are hereby perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Jefferson County, or to any officer of the city of Louisville, or to the county clerk of Franklin County, or to any officer of the board of councilmen of the city of Frankfort, or the county of Franklin; and the defendants, The City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuation; and the complainant by making payments in accordance with the Hewitt law is discharged in full from all taxes to be exacted from it under any form or by any authority.
>
> "It is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata* relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky under the provisions of Article 2 of the Act of the General Assembly of the State of Kentucky, entitled 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said

act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the Act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2, and 3 of Article II, of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"And it is further adjudged that the complainant recover of the defendants its costs in this action expended."

The decree in the other case (R. No. 357, page 21) is as follows:

"And it is now adjudged, ordered, and decreed that the defendant, the City of Louisville, is perpetually enjoined and restrained from proceeding to collect the taxes for the years 1893 and 1894 upon the franchises of the complainant under the act of November 11, 1892.

"And it is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata* relied on by the complainant in its bill and as shown by the exhibit therewith, the said complainant has an established contract with the Commonwealth of Kentucky under the provisions of Article 2 of the Act of the General Assembly of the State of Kentucky, entitled 'An Act to amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of complainant; that by the terms of said contract the complainant and its shares of stock can not during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the

complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2, and 3 of Article 2 of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"It is further adjudged that the complainant recover of the defendant its costs in this action expended."

The opinion of the court in the first case may be found, R. 356, at pages 146, etc.; and in the second case, R. 357, page 24.

Statement.

The Bank of Kentucky was originally chartered by an act of the Legislature of Kentucky, approved February 23, 1834. It was therein provided that the bank should continue in existence until October 1, 1864. By an act approved February 15, 1858, it was provided that the charter should continue for twenty years from October 1, 1864. By an act approved February 1, 1872, it was provided that the charter should be extended an additional twenty-five years. It will thus appear that the charter of the Bank of Kentucky will not expire until October 1, 1909.

Neither the original charter nor any of the acts extending it reserved any right in the legislature to alter, amend or repeal. It was not until the year 1856 that the Legislature of Kentucky passed a general law reserving the right to repeal acts of incorporation.

It will thus appear that the Bank of Kentucky was chartered prior to this general act of 1856, but that its charter has been twice extended by acts passed since the year 1856.

The matter in contest is as to how the bank shall be taxed; what contracts it has in this respect; how these contract rights have been construed by the Kentucky courts; what has been the history and result of prior litigation between the bank and the

State and such municipalities as were concerned in the matter, and what is the present state of the law on the subject of the taxation of banks in general and as applied to this bank in particular.

Provision of Charter as to Taxation.

The 15th section of the original charter of the Bank of Kentucky is as follows:

> "Section 15. It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1836, and on the 1st day of July in each succeeding year, during the continuance of its charter, to pay to the treasurer of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank; which shall be in full of all tax and bonus; provided that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

The 15th section of the original charter of the Northern Bank of Kentucky, passed February 20, 1835, is as follows:

> "Section 15. It shall be the duty of the cashier of the principal bank, on the 1st day of July, 1836, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank; which shall be in full of all tax or bonus; provided that the legislature may increase or diminish the same; but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

Taking advantage of this right to increase the rate, the legislature, by an act approved February 12, 1836, imposed a tax of fifty cents on each share of stock in all banks.

Judicial Construction of these Charters.

The meaning of these clauses has been the subject of consideration by the Court of Appeals of Kentucky from a time very shortly after they went into effect.

In the case of Johnson v. Commonwealth, 7 Dana, 339, decided November 1, 1838, Chief Justice Robertson delivering the opinion, it appeared that Madison C. Johnson failed to fix on oath his property for *ad valorem* taxation, and one of the questions that arose for determination was, whether Mr. Johnson's stock in the Northern Bank of Kentucky was subject to taxation in his hands. Upon this subject the court said:

> "Nor do we believe that Johnson's stock in the Northern Bank is subject to be taxed in virtue of the Act of 1837. That act would embrace it if the legislature had the power to tax individual stockholders. But, in our opinion, there was no such power, and, therefore, we would not presume that the Act of 1837 was intended to embrace it, but, if it did, it is so far inoperative. The fifteenth section of the charter of the Northern Bank, Session Acts of 1834, page 173, is as follows: 'That it shall be the duty of the cashier of the principal bank, on the first day of July, 1836, and on the first day of July in each succeeding year, during the continuance of this charter, to pay to the treasury of this Commonwealth 25 cents on each $100 of stock held and paid for in said bank, which shall be in full of all tax or bonus; *Provided*, That the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank.' The bonus of twenty-five cents on each share of stock, to be paid by the corporation, and the reserved right to increase that tax on the corporation to fifty cents on each share, were, we think, understood and intended to be a limitation on the legislative power to tax the stock. This was a contract between the stockholders and the State, and so far as it was intended to operate, it is inviolable. The power to augment the tax to as much as fifty cents is a power to tax the corporation only, whereby all stockholders, non-resident as well as resident, would be subjected to an equal burden. There is no power, re-

served or resulting, to tax an individual stockholder, though he may reside within this Commonwealth. Such a tax would be unequal and therefore unjust, and the power to impose it would be inconsistent with the object of the fifteenth section of the charter, which was to secure the stockholders against the consequences of unlimited and capricious taxation of their bank stock."

Another bank, the Farmers Bank of Kentucky, was incorporated in the year 1850, and had a clause in its charter exactly like those we have above given. An effort was made by Greenup County to tax land belonging to the Farmers Bank of Kentucky for county purposes. On the 24th of November, 1869, in the case of the Farmers Bank of Kentucky v. Commonwealth and Greenup County, 6 Bush, 127, the question was considered by the Court of Appeals as to the meaning of this tax provision, and as to whether it prevented the State, either for itself or for county purposes, taxing the real estate of the bank. The court said:

"By a compliance with the section last quoted, the bank was to be discharged from the payment of all and every other tax. From the amplitude of the language no other rational construction can be given to it. The property which is attempted to be here taxed was doubtless taken by the bank or purchased in satisfaction, or part satisfaction, of a debt, and represents the assets of the bank to its value, and is no more subject to taxation than the notes or bills held by the bank, or money in its vaults."

The question was again fully considered by the Court of Appeals of Kentucky in various cases heard together, the first in style of which is Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 370, the opinion of the court being delivered June 5, 1888. It was there held that the charter of the various banks involved in that litigation—one of which was the Bank of Kentucky—constituted contracts between such banks and the State; that these contracts exempted the corporation from the payment of city and county taxes as well as from the payment of any other tax to the State, the city and county being parts of

the State and having no power to levy and collect taxes without authority from the State; that the acts of the legislature continuing the charter privileges and rights of the corporation beyond the time fixed by the original acts of incorporation did not have the effect of creating a new charter, but merely extended the life of the one already in existence, and therefore that the Act of February 14, 1856, by which the legislature reserved the right to alter and amend at pleasure charters thereafter granted, did not apply to acts extending charters granted prior to the Act of 1856; that even if these acts extending the charters could be regarded as creating new charters, it was manifest from the terms of the acts of extension that it was the intention to continue in force an irrevocable contract, and that the Act of 1856 did not apply.

This decision affirmed a judgment which had been rendered by the Franklin Circuit Court in a suit brought by the Bank of Kentucky against the Franklin County Court to enjoin the collection of county taxes; and by the Bank of Kentucky against the City of Frankfort, to enjoin the collection of city taxes.

The Hewitt Act.

In the year 1886 the Legislature of Kentucky passed a revenue statute which is known, and will be frequently referred to in the course of the argument of these cases, as the Hewitt Act.

The question of the taxation of banks is dealt with in the second article. It is given in full in the appendix to this brief. The first section of this article provides that the shares of stock in State and national banks shall be taxed seventy-five cents on each share thereof equal to one hundred dollars; and that the banks shall, in addition, pay on each one hundred dollars of so much of their surplus and undivided profits as exceed an amount equal to ten per cent of their capital stock, the same rate of taxation that is assessed upon real estate, and that this shall be in full of all tax—State, county, and municipal. The section provides for the ascertainment of the amount of this stock and sur-

plus, and requires reports to the Auditor of Public Accounts, to whom such payments are to be made.

The second section provides how reports are to be made by the banks.

The third section deals with the case of banks holding bonds or funds of the United States which are exempt from taxation.

The fourth section provides that each of the banks, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of the tax, and agree to pay the same as provided, and "to waive and release all right under the acts of Congress or under the charters of the State bank to a different mode or smaller rate of taxation."

This consent or agreement to and with the State of Kentucky was to be evidenced by writing, under the seal of the bank, and delivered to the Governor of the Commonwealth, and "upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

The fifth section provides that the banks may take the proceeding authorized at any time until the meeting of the next General Assembly, paying, however, the tax from the passage of the act.

The sixth section declares that this act shall be subject to the provisions of Section 8, Chapter 68, of the General Statutes.

The seventh section provides how banks refusing or failing to pay the tax imposed by the act, or failing or refusing to make the consent and agreement, shall be taxed; and concludes the section and the article with the following proviso:

> "Provided that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The Bank of Kentucky duly accepted the provisions of this law. The bills filed by it in both of the cases now under review show that down to and including the year 1885 it paid the fifty cents per share of its capital stock, and from 1886 down to 1893 paid its taxes under the Hewitt law to the auditor, and the tax on its banking houses to the municipalities in which such banking houses were situated.

BOARD OF VALUATION AND ASSESSMENT LAW OF 1892.

In the year 1891 a new Constitution was adopted in Kentucky. This instrument provided against exemptions or commutations of taxes. On the 11th of November, 1892, the legislature adopted a new revenue law. It is sufficiently printed in the statement of the case of Adams Express Co. v. Kentucky, 166 U. S. 175. By the terms of this enactment the intangible property as well as the franchise of all banking institutions was required to be valued by a Board composed of the Auditor, Treasurer, and Secretary of State. Upon the valuation thus fixed the banks were required to pay to the auditor the current rate of State taxation; and this Board (called the Board of Valuation and Assessment) was required to certify the values found by it to the various municipalities where the banks were exercising their franchise, and if there were two such municipalities, to apportion the value among those municipalities in the proportion of user. Section 4092 provides that the banks shall file their reports on or before March 1st, and pay their taxes on or before July 1st of each year.

The Bank of Kentucky has its principal office at Louisville, and a branch at Frankfort.

Under the terms of this law the Board would make a return, in reference to the Bank of Kentucky, to the city of Louisville, county of Franklin, and city of Frankfort.

After the new law had gone into effect the Bank of Kentucky made tender to the auditor of the full amount of tax due by it

under the Hewitt law, as well as the amount of tax due by it under its charter; which was less than that under the Hewitt law. The auditor refused to receive either of these amounts, but accepted only the amount which would be due under the new system. Certain proceedings were taken to test the validity of this law, as will be hereafter more fully explained. The result of these proceedings was that the Court of Appeals of Kentucky, in an opinion delivered June 1, 1895 (97 Ky., page 590), after a most elaborate consideration of the question, held that the banks were entitled to the protection of the contract made by them under the Hewitt law, and in various forms of affirmance and reversal, of the many cases which were considered together, enjoined the municipal authorities from exacting any greater rate. The result was that the auditor accepted, in July, 1895, the rate of taxation from the bank calculated under the Hewitt law, and called on the bank to pay the difference between what had been paid by it to the State under the Valuation and Assessment law and the Hewitt law, for the years during which this litigation had been going on; and these payments were accordingly made.

In 1896 the taxes were paid under the Hewitt law.

The decision rendered June 1, 1895, was by a divided court, four judges holding that the Hewitt law was still in force, and the banks protected by their contracts under it; and three judges holding the contrary. Subsequently the Court of Appeals has, by a similar division—four to three—held to the contrary in certain other cases which had gone up to that tribunal. (Deposit Bank v. Daviess Co., 39 S. W. 1030.) The various municipalities, taking this to be a reversal of the former holding, began to press to have the taxes assessed and paid under the Valuation and Assessment law.

STATEMENT AS TO LITIGATION.

Under these circumstances the Bank of Kentucky, on April 17, 1897, filed two bills of complaint in the Circuit Court of the United States for the District of Kentucky. To the first of these bills it made parties defendant the three members of the Board of Valuation and Assessment, viz., the Auditor, Secretary of State, and Treasurer of the State of Kentucky; the City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort. To the second bill it made defendant the City of Louisville only.

After stating the character of the defendants and the incorporation of the complainant, the bill in case 356 sets forth literally the 15th section of the charter in reference to taxation, and alleged that the meaning of its provisions had been determined by a settled course of decision by the Court of Appeals of Kentucky, beginning with an adjudication November 1, 1838.

The bill then shows the passage of an act of March 18, 1876, and the effort under that law of the county of Franklin to tax the bank for county purposes, and an effort about the same time by the Board of Councilmen of the city of Frankfort to tax the complainant, and the steps taken in two suits filed by the bank—one against Franklin County and the other against the city of Frankfort—are given, and it is shown that in each of these suits the bank obtained a judgment upholding its charter right to commute its tax at 50 cents per share.

These judgments are pleaded and relied on as conclusive upon the defendants. Their terms and effect will be more fully explained hereafter.

The bill then gives an account of the passage of the Hewitt law and the acceptance of its provisions by the complainant, and its compliance with the taxing scheme therein provided for down to the time of filing the bill. It then states the passage of the Act of November 11, 1892; what is required thereby in the way

of reports, assessments by the board, and apportionment of such assessments among the several taxing jurisdictions entitled to a share of such tax from the complainant, if the complainant is subject to the terms of that law.

The complainant then shows what would be the difference between paying its taxes under the Hewitt law and under the new law, showing beyond controversy that more than $2,000 is involved in the litigation.

The complainant then relies upon the contract made between it and the State under the Hewitt law, and claims that this system is violative of such contract.

It is alleged that after this Act of November 11, 1892, went into effect certain litigation was begun by the Bank of Kentucky against the city of Frankfort and Franklin County, and also against the city of Louisville—one suit against each—the issue in each suit being the right of the bank to be protected under the Hewitt contract and to prevent any taxation except by virtue of the terms of the Hewitt law. And it is alleged that in all of these cases the bank was successful: in one of them, in the court of first instance and also in the Court of Appeals; and in the others, while unsuccessful in the court of first instance, yet it was successful in the Court of Appeals. And it is alleged that appropriate judgments had been entered in all of these cases, establishing the right of the Bank of Kentucky to commute its taxes according to the system prescribed by the Hewitt Law.

These cases just mentioned were those passed upon by the Court of Appeals in an opinion by Chief Justice Pryor, which will be more fully referred to hereafter. (97 Ky. 590.)

The bill alleges the compliance by the Bank of Kentucky with the provisions of the Hewitt law in the payment of taxes, but states that, notwithstanding the rights of the complainant as thus adjudicated, the defendants are threatening to assess the value of its property and franchise under the Act of November 11, 1892, and to certify such value to the three municipalities for

taxation. And the court is asked to enjoin the Board of Valuation and Assessment from either so assessing or so certifying for the years 1895, 1896, 1897, and 1898, and for all the other years until the charter of the bank shall expire.

The second suit was filed by the Bank, in which the City of Louisville alone is a party. In this case the allegations of the bill are substantially similar to those mentioned above, except that it appears that the Board of Valuation and Assessment had assessed the franchise of the bank for the years 1893 and 1894, and had certified such assessment to the City of Louisville; and the object of this suit is to enjoin the State from attempting to collect taxes under this assessment and certification.

All the defendants appeared to these bills, and the issues of law and fact were raised by demurrers, answers, and replications. The proof was entirely of a documentary character and put into the record by stipulation. Among other things it was expressly stipulated that the bank had accepted the provisions of the Hewitt law.

The defenses urged to the bill in the court of first instance, and which are still insisted upon here, must be examined in detail.

The Jurisdiction of the Circuit Court.

The defendants (now appellants) challenge the jurisdiction of the court.

That there is original jurisdiction in the Federal courts in such cases, without regard to citizenship, is almost too plain for argument. The Act of August 13, 1888 (Supplement R. S. 611), provides:

> "The Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States."

There can be no doubt that much more than $2,000 is involved in each of these cases. The bills of complaint state in each instance the contract between the Commonwealth of Kentucky and the Bank, both as contained in the charter of the Bank and as made in pursuance of the Hewitt law.

They further set forth the effort upon the part of the State, by the Constitution of 1891 and the revenue law of November 11, 1892, to abrogate this contract.

Under these circumstances there can be no doubt that we have a case which arises under the Constitution of the United States.

Two grounds of objection are made to the jurisdiction of the court. One of these is that this is a suit against the State of Kentucky. Many authorities are cited upon this point by the learned counsel for the appellant, the City of Louisville. It seems to us not necessary to review them, because they are considered in the case of Pennoyer v. McConnaughy, 140 U. S. 1. Indeed, so absolutely does this case seem to settle the law upon the subject that it can be no longer open to challenge. In Re Tyler, 149 U. S. 190.

The case of Adams Express Co. v. Ohio, 165 U. S. 196, was as much a suit against the State of Ohio as can possibly be predicated of the case at bar. Although the jurisdiction of the court of the action as an equitable one was fully considered by Judge Taft upon the original hearing (Western Union Telegraph Co. v. Poe, 61 Fed. Rep. 452) and by the Circuit Court of Appeals of the Sixth Circuit on appeal (Sanford v. Poe, 69 Fed. Rep. 546; S. C., 37 U. S. Appeals, 378), and the decree of both courts was here affirmed, no question was anywhere made as to this being a suit against the State of Ohio.

So, also, this court, in Adams Express Co. v. Kentucky, 166 U. S. 172, affirmed a decree rendered by Judge Barr, sitting in the United States Circuit Court for the District of Kentucky, and pronounced by him on the basis of his opinion as reported in Western Union Telegraph Co. v. Norman, 77 Fed. Rep. 20. In the opinion at the Circuit, Judge Barr discusses the question

of jurisdiction in equity, but neither before that learned judge nor before this court does the question seem to have been raised as to the suit being one against the State, and yet it was the case of bills in equity filed by the Western Union Telegraph Co. and the Adams Express against the very State Board of Valuation and Assessment, acting under the very law in controversy in these causes.

We believe it would be easy to cite a multitude of cases of this character in which the Federal courts of first instance and of final resort have taken jurisdiction and pronounced decrees for or against the complainants without even adverting to the proposition that the suit was really against the State.

The second ground of objection is that, as the court in this particular cause did not decide, as an original proposition, that there was a contract inviolable in its character between the Bank of Kentucky and the State, the terms of which the Bank of Kentucky was entitled to have enforced, but rested the right of the Bank of Kentucky to relief upon the ground that the existence and terms of this contract had been theretofore conclusively adjudicated, this deprived the court of jurisdiction to consider the cause. It is true that in another case submitted at the same time as this one to the court, it was decided that as an original proposition the contract made by the banks under the Hewitt law was subject to cancellation by the State of Kentucky. In the case now at bar this question as an original one was not decided, the one way or the other, because the court found that the contract insisted upon by the Bank of Kentucky had by previous adjudication been conclusively established. The complainant, the Bank of Kentucky, came into the Federal tribunal and alleged that it had a contract with the State by which it was entitled to commute its taxes on a certain basis; that this contract the State had, by certain legislation, attempted to avoid. As evidence of the existence of this contract and its terms the complainant presented certain final adjudications. This evidence the learned Circuit Court found conclusively established the

allegations of the Bank of Kentucky that the contract did exist and what were the terms of the contract. The argument now is that while it would have been competent for the Circuit Court to receive other evidence of the existence of the contract, yet it was not competent for that tribunal to receive this form of evidence. We find it difficult to take hold of such a proposition.

This court, in New Orleans v. Citizens Bank, 167 U. S. 371, did examine and put its decision upon exactly this character of evidence. The distinction is attempted to be made between the case at bar and that case, because it is said that in the Citizens Bank case the inimical legislation was passed after the Citizens Bank had obtained its judgments; whereas, in the case at bar, the inimical legislation was passed prior to the time that these bills were filed.

The proposition may be stated thus: If the State of Kentucky shall hereafter pass any laws violating the bank's contract under the Hewitt bill, the bank may have relief in the Federal court and may prove the existence and the terms of its contract by prior adjudications thereon. But it can not do so as to any legislation passed prior to the time when it obtained these adjudications, even though that legislation be the very legislation involved in the suit in which the bank obtained its adjudication. Here again we find a proposition difficult to argue.

We submit, therefore, that the court did have jurisdiction of the suit against the Board of Valuation and Assessment and the municipalities joined as defendants with them, and, *a fortiori*, had jurisdiction of the other cause in which the city of Louisville alone was sued. We hardly think it will be contended that the city of Louisville is the Commonwealth of Kentucky.

The Jurisdiction is in Equity.

The next question is as to whether there is a jurisdiction in equity.

The text-books state this jurisdiction with great plainness. The following is Section 530 of 1 High on Injunctions:

> "An important exception to the general doctrine of non-interference by injunction against the collection of the revenue because of illegality in the tax is recognized in that class of cases where the relief is sought against a tax assessed upon property which has been exempted by law from taxation. Indeed, the exception has been so uniformly recognized as to become of itself a governing rule in the class of cases now under consideration. And it may be laid down as the established doctrine of the courts that the attempted enforcement of a tax upon property which has been exempted by proper legislative authority from the burdens of taxation constitutes a grievance of so irreparable a nature as to merit preventive relief by injunction. And where an act of legislature, held by the court to be constitutional, exempts certain property from taxation, an injunction will be allowed against the enforcement of a tax upon such property. So an injunction may be granted against the assessment of the property of a corporation where, under the terms of its charter as construed by the court of last resort of the State, the property is exempt from taxation."

The following is Section 672, 1 Spelling on Extraordinary Relief:

> "Equity will enjoin the collection of a tax levied upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy."

We are aware that this court has settled, in the case of Shelton v. Platt (139 U. S. 591), that mere illegality will not be sufficient for an injunction against a tax; but it has never held, so far as we know, that the existence of a contract between the State and a citizen is not in itself sufficient to justify the interposition of a court of equity in enjoining its violation or by an injunction enforcing its specific performance. Jurisdiction in such a case as this seems to have been assumed as a matter of course in Shelby County v. Union Bank, 161 U. S. 156.

In Kentucky the jurisdiction of a court of equity, under the circumstances here set out, to enjoin a tax or an unauthorized assessment, is clear. (Gates v. Barnett, 79 Ky. 296; Baldwin v. Shine, 84 Ky. 510; Norman v. Boaz, 85 Ky. 560.)

In Western Union Telegraph Company v. Norman, 77 Fed. Rep. 21, Judge Barr maintained his equitable jurisdiction upon this ground, among others: that it was the uniform practice in Kentucky to allow an injunction to restrain either the assessment or collection of illegal taxes, and that the equity jurisdiction in such cases had been frequently sustained by the Court of Appeals.

In Covington Bank v. Covington, 21 F. R. 491 (another Kentucky case), Mr. Justice Matthews held that such remedy was clear.

In one of the cases under consideration the Bank of Kentucky is complainant and the Board of Valuation and Assessment, the City of Louisville, the County of Franklin, and the City of Frankfort are parties defendant.

This suit is brought to prevent the Board of Valuation and Assessment from making a return of the proportionate part of the franchise of the Bank of Kentucky to the city of Louisville and city of Frankfort and county of Franklin for taxation by the three municipalities. The other case is a suit to enjoin the city of Louisville from collecting taxes for the years 1893 and 1894.

The Supreme Court of the United States, in Cummins v. Bank, 101 U. S. 156, held that where a State statute allowed a suit to enjoin taxes, the Federal Court would administer the same relief. This case is commented on in Western Union Co. v. Poe, 61 F. R. 452, where the court does not apply it simply because the suit was not brought in such a way as to comply with the terms of the statute.

In other words, the municipality to whom would apply the tax if collected was not made a party defendant in the suit against the assessing board; whereas here not only the assessing board but the municipalities who would receive the tax are made parties.

The city of Louisville is a city of the first class.

Section 3008 (Kentucky Statutes), which is one of the pro-

visions contained in charters of cities of the first class, is as follows:

> "Any court of competent jurisdiction, not inferior to a circuit court, may, in the established modes of proceedings, and upon existing principles of law or equity, give redress against unlawful distraints or garnishments of rents that may be wrongfully made or threatened under color of this act; but no injunction shall be granted in such proceeding except by the court or its judge, nor otherwise than upon notice to said city, and after a hearing."

It would seem that the language, "in the established modes of proceedings and upon existing principles of law and equity," is susceptible of only one interpretation. As stated above, it has been long settled and was fully determined at the time this Section 3008 was enacted, that the proper mode of proceeding, and the principles of equity in reference to illegal taxation (whether against its assessment or collection), was by a suit in equity for an injunction. It would, therefore, seem to be plain that so far as any of these suits involved taxation by the city of Louisville, we have a statute which comes exactly within the decision of Cummins v. Bank, 101 U. S. 156.

This would seem to settle beyond any reasonable doubt the jurisdiction of the court in both of the cases under consideration.

Again, if the Board of Valuation and Assessment is allowed to proceed, it will, under the law, apportion taxation against the Bank of Kentucky to each of the three municipalities: City of Louisville, County of Franklin, and City of Frankfort. It would seem that we have here a clear jurisdiction on account of the multiplicity of suits in which necessarily the Bank of Kentucky would be involved if the assessment were made.

That this is ample ground of jurisdiction appears in Western Union Company v. Poe, 61 F. R. 452; Sanford v. Poe, 69 Federal Rep. 547; Western Union Telegraph Company v. Norman, 77 Federal Rep. 21; and the many cases from the Supreme Court cited in those cases.

It is to be observed that where the Federal courts have refused to entertain jurisdiction in equity, to enjoin an illegal tax, it has almost if not always appeared that the statutes of the State prohibited such suits, and pointed out another remedy.

In Kentucky we find not only no such statute, but we have no such policy. On the contrary, the State courts do interfere by injunction and have established it as the appropriate method of relief.

There can therefore be no ground of public policy which would induce this court to withhold its hand; and it would seem to us that if the Federal court would administer equitable relief in pursuance of a State statute, it would likewise and as readily do so in pursuance of a settled course of State adjudication and procedure.

These bills, however, have been careful to set out that there would be an irreparable injury committed if these assessments were allowed to be made, and the collecting officer were allowed to proceed to collect taxes under them.

These institutions are banks, and of course have the most of their capital invested in loans made to their customers. Any disturbance of this relation must necessarily be a source of irreparable injury to the bank. If the court declines an injunction, how, under the laws in reference to the collection of taxes, can the complainants be proceeded against?

In regard to the taxes which would be collected by the county of Franklin, we find, by Section 4129, Kentucky Statutes, that such taxes are collected by the sheriff; by Section 4148, that he is allowed to distrain personal property; by Section 4151, to sell the real estate of the bank; and by Section 4184, to serve process of garnishment upon any and all persons who may be indebted to it, and require them to answer as to the amount of such indebtedness, and to pay the same into court. We give these sections in the appendix.

The method of collection of taxes in cities of the first class is, under Section 3002, by distraint of goods; and by Section 3004,

by garnishments of rents. This only applies to the city of Louisville.

The city of Frankfort is a city of the third class. By Section 3390 the collector has the same power of distraint and garnishment as the sheriff has for State taxes.

It will thus be seen, from the review of the provisions in regard to the collection of taxes against the Bank of Kentucky, outside of Louisville, that unless an injunction shall go there is every danger not only of a multiplicity of suits but of irreparable injury.

We make the following extract from Judge Taft's opinion in this case:

> "If it were necessary, we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it? In Osborn v. Bank of United States, 9 Wheat. 738, 742, Chief Justice Marshall said: 'The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege.' See also Morris Canal and Banking Co. v. Jersey City, 1 Beasley, 227; High on Injunction, Section 530. In addition to the suits for future taxes there is also danger of harassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the Act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief."

The right of the Bank of Kentucky, under its original charter, to pay 50 cents per share in lieu of all other taxes, and the substituted right, under the Hewitt Bill, to pay 75 cents per share in lieu of all other taxes, may be called either a "privilege"

or a "franchise." Such a right is said to be a "franchise" in Given v. Wright, 117 U. S. 656. It is said to be a "privilege" in Humphrey v. Pegues, 16 Wall. 247, and Tennessee v. Whitworth, 117 U. S. 146.

In Osborne v. Bank of United States, 9 Wheaton, 742, Chief Justice Marshall shows that such a franchise or privilege, when subjected to continuous attack, will be protected by injunction.

We have been curious to look through the decisions of this court to see whether in any of them the right to go into a court of equity for an injunction for the protection of a contract relating to taxation has ever been denied. We find no case denying it. To the contrary we find a very large number of cases in which this very remedy has been sought, and in none of which the jurisdiction of the court has been doubted. We give a list of these cases in an appendix to this brief. We do not pretend that it is an exhaustive one, but we do believe that one sentence from an opinion of this court is applicable to all of these cases.

In County of Calhoun v. American Emigrant Co., 93 U. S. 124, it is said:

> "Power is vested in the Circuit Court to enjoin the collection of a municipal tax where it appears that the assessors acted without authority of law and in violation of a special contract between the municipality imposing the tax and the taxpayer."

Manifestly the right can not be less when the contract has been made with the State.

This court has declined to exercise jurisdiction in equity to enjoin the assessment and levy of a tax in various cases. These are, so far as we have found them, Dows v. Chicago, 11 Wallace, 108; Hannewinkle v. Georgetown, 15 Wallace, 547; Railroad Tax Cases, 92 U. S. 575; Milwaukee v. Koeffler, 116 U. S. 219; Shelton v. Platt, 139 U. S. 591; Allen v. Pullman Palace Car Co., 139 U. S. 659, and, possibly, P. C. C. & St. L. Co. v. Board of Public Works, 172 U. S., page — (S. C., 19 S. C. R. 92).

Without reviewing these cases it may be stated in reference to them that there was ground in each one of them for the imposition of some tax upon the property of the complainant, but that the allegations in the bill were to the effect that the tax sought to be imposed was illegally imposed or the method of ascertaining the value of the complainant's property for taxation unwarranted by law. In none of the cases was any such feature presented as a contract with the State under which the total taxes due by the complainant to the State and to the several municipalities in the State had been commuted into a gross sum to be paid to the State as in lieu of all other taxation.

We find no case in which this feature is presented where a court of equity has denied relief. The ground upon which the decisions above quoted have been rested is, we think, well showed by an extract made in the last case cited—P. C. C. & St. L. v. Board of Public Works—from the case of State Railroad Tax Cases, 92 U. S. 613. Mr. Justice Miller there says:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that in addition to the illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors of excess in valuation or hardship or injustice of the law or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to the said collection of the tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment or to direct another to be made by the proper officers of the State. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court when so acting. The levy of the taxes is not a judicial function. Its exercise by the constitutions of all the States and by the theory of our English origin is exclusively legislative. A court of equity is therefore hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of in

whole or in part, without any power of doing complete justice by making or causing to be made a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in a proper manner."

In the case at bar the sole question is as to whether the Bank of Kentucky, having paid in full its taxes under the Hewitt law to the State, is entitled, under its contract, to exemption from municipal taxation. There is no complaint here of an illegal assessment in the sense that there might have been a legal assessment. There is no complaint here of an excessive valuation or of any irregularity in the imposition of the tax. The whole case turns upon the right of the Bank of Kentucky to enforce its contract.

It will not be denied that one of the well-recognized heads of equity jurisdiction is the avoidance of a multiplicity of suits; and, further, where a party has established his right by litigation, this gives to a court of equity the authority to protect such a party from the harassment of new litigation. These particular suits are respectively the sixth and seventh suits brought by the Bank of Kentucky for the protection of its contract rights, in every one of which it had been successful.

As will be shown hereafter, in giving a history of this litigation, the bank brought two suits prior to the passage of the Hewitt law to protect the contract right contained in its charter, and the Court of Appeals decided in its favor in both these suits—one being against the City of Frankfort and the other against the County of Franklin. Since the passage of the Hewitt law and the passage of the act of November 11, 1892, it has brought three more suits—one against the County of Franklin; one against the City of Frankfort, and one against the City of Louisville; and in all these it has been likewise successful by the final judgment of the Court of Appeals of Kentucky.

The learned counsel for the city of Louisville holds out the

hope to us that if the court shall dismiss this cause on the ground that a court of equity has no jurisdiction, it will bring only one more suit against the Bank of Kentucky; but while no doubt he will be as good as his word, yet this will no more bind his successors than have the former attempts to invade the contract rights of the Bank of Kentucky bound him.

If, therefore, a case can be made where a litigant is entitled to have an end put to litigation, it would seem to us that this is the case.

It is, moreover, to be observed that these suits are not to enjoin the collection of State taxes, but to prevent the collection of municipal taxes in a case where the State has confessedly received more than it would have received if it had not determined upon the policy of taking the larger sum for itself and depriving the municipality of any right to tax in consequence of this arrangement.

In 1 High on Injunctions, Section 536, *et seq.*, the authorities are examined and show that a court of equity will take jurisdiction in a suit to restrain municipal taxation where it will not do so to restrain the collection of the State revenue; and this circumstance is adverted to by Mr. Justice Miller in his opinion in State Railroad Tax Cases, 92 U. S. 615. (See, however, Milwaukee v. Koeffler, 116 U. S. 224.)

As one of the grounds for relief we claimed in the Circuit Court that if we awaited a suit by the municipality, we might subject ourselves to heavy penalties. This was based upon the language of Section 4091 of the Kentucky Statutes, which is as follows:

> "All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the Auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and

> thereafter such tax shall bear interest at the rate of ten per cent per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

It is insisted in the brief for the city of Louisville that this section does not apply to suits for municipal taxes. It is fair, however, to say that the penalty of ten per cent, with the additional ten per cent per annum prescribed by this section, is claimed by the city of Louisville in suits now pending for taxes assessed by the Board of Valuation and Assessment; and while we have contested the right to recover these penalties, the question is yet an open one.

As another ground of equitable jurisdiction it was claimed by us in the Circuit Court that Section 3008 (being one of the provisions of the charter of the city of Louisville) recognized the right to enjoin an illegal tax. The language of that section we again quote, as follows:

> "Any court of competent jurisdiction not inferior to a Circuit Court, may, in the established modes of proceedings and upon existing principles of law or equity, give redress against unlawful distraints or garnishments of rents that may be wrongfully made or threatened under cover of this act, but no injunction shall be granted in such proceeding except by the court or its judge, nor otherwise than upon notice to the said city and after a hearing."

It is contended that this does not apply to the collection of tax bills made out upon assessments of the city assessor. It is difficult to understand or see the force of this argument.

The first clause of Section 181 of the Constitution of the State of Kentucky is as follows:

> "The General Assembly shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof respectively the power to assess and collect such taxes."

The Court of Appeals of Kentucky has recently held that it was constitutional for the legislature to provide a State Board of Valuation and Assessment which should value the franchises of corporations for purpose of city taxation, but no one has ever denied that the taxes imposed upon these valuations for the purposes of the local municipalities must be levied by their respective boards.

The city of Louisville has therefore no right to collect any taxes except as they are levied by the general council, and the whole right of the city to collect taxes upon valuations made by the Board of Valuation and Assessments comes from the general levy ordinance, which includes these values as well as those fixed by the city assessor.

Moreover, the city of Louisville has passed an ordinance requiring the city assessor to make out against all corporations the tax bills for each fiscal year on the amount of the assessments made by the State Board of Valuation and Assessment, and has required him to do so for the same fiscal year, at the same rate of *ad valorem* taxation, and for the same purposes levied by ordinance of the city for the representative fiscal years in and for which the assessments by the State Board of Valuation and Assessment have been or may be respectively made; and these bills are to be made out on the same forms and to be authenticated by the city assessor in the same manner as other tax bills, on assessments made by him, are required to be made by the levy ordinance for the same fiscal year; and these tax bills are required to be made out, authenticated by the city assessor, and listed by him as soon as practicable with the receiver of city taxes, for collection as provided by law.

What reason there is, therefore, to contend that there can be no distraint under these tax bills as well as under any other tax bills we are unable to perceive. If there is no right to distrain, there would be no right to sue; for the right to sue is no broader than the right to distrain.

The case of the L. & N. R. R. Co. v. City of Louisville, 166

U. S. 709, has no application whatsoever to this question. That case arose under an act passed prior to the present Constitution of the State of Kentucky; and, furthermore, the assessments against railroads and railroad property and how taxes thereon shall be collected is left to the general discretion of the Legislature of Kentucky by the express provision of Section 182 of the Constitution.

The case at bar, therefore, is brought squarely within those cited by the learned Circuit Court in its opinion in this case.

The cases cited by counsel to show that in Kentucky taxes voluntarily paid which are illegal can be recovered, do not so hold. These are all cases in which the payments were made in *ignorance* of the invalidity of the tax, and involve the question of when money paid under *mistake* of law can be recovered.

The Bank Has a Contract Commuting Taxation.

The first question upon the merits of these cases is, has this bank a contract with the State which can not be repealed? If so, what is that contract?

The State Had the Right to Make the Contract.

Our first proposition is that the provision of the charter originally constituted a contract, and this contract the State had the right to make and no right to retire from. We know of no stronger way of enforcing this proposition than by an extended quotation from the case of the Franklin County Court v. Deposit Bank of Frankfort. (87 Ky. 379.) The court is there speaking of the provision in the original charter of the Bank of Kentucky, which we have quoted literally in the statement of the case. It says:

> "The appellant's first contention is that the legislature had no constitutional power to exempt the appellee from the common burden of taxation except 'in consideration of

public services.' It contends that the exemption of the appellee from all taxation, except fifty cents on each one hundred dollars of its capital stock, was not 'in consideration of public services,' and therefore void.

"At the time the appellee was chartered, and for years afterwards, the Federal Government issued no paper currency. Banks and banking were creatures of the respective States. It was the policy of this Commonwealth to charter banks, with authority to issue paper currency, based upon a gold and silver redemption, upon the demand of the holder. The issue of these banks constituted, in the main, the circulating medium in the Commonwealth for individual, commercial, and public uses. While the aggregation of capital for banking purposes was, on the part of the projectors, for the purpose of individual gain, yet the Commonwealth accepted the overture as auspicious to the purpose of furnishing a currency as stable as, in the nature of things, it could be made, for the private, commercial, and public benefit of her citizens; also to aid her in the management of her fiscal affairs, which not only consisted in the providing of means to meet the ordinary administration of State affairs, but sometimes extended, at least might extend, to the borrowing of money to meet any extraordinary or unforeseen emergency. Therefore, we should hesitate to decide, were it material to decide the question, that the granting of the charter to the appellee, and the fixing of a specific tax of fifty cents on each share of its capital stock, was not in consideration of public services. But the right of the State to grant the charter to the appellee, and exempt it from the payment of all taxes, except fifty cents on each share of its capital stock, rests upon the power of the State to make, for a valuable consideration, a valid and irrevocable contract.

"The State of Kentucky, in the management and control of her affairs, in her relation to the other States, and in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States to the Federal Government, or are denied to the States, is sovereign by right. It is by virtue of her sovereignty that she has the power to contract. No binding contract can be entered into, except by virtue of sovereign power. It is by this power that the State makes contracts with individuals, that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign.

"Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contracting, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration coming to him from the other party to the contract, he surrenders something, and receives something in its stead which he deems an equivalent. Whether the one or the other has, in fact, received an intrinsic equivalent for that with which he has parted, is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevocably binding. In thus contracting, he does not surrender his sovereign power; he merely exercises it. Upon precisely the same principle the Commonwealth contracts. If her contract is without any valuable consideration, it is a *nudum pactum*; so is that of the citizen; but if there is a valuable consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State, possessing the power to make, for a valuable consideration, a binding contract, falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts, she stands upon precisely the same footing that individuals do in reference to their contracts—she shall pass no law impairing their obligation. In accordance with the foregoing views, the Supreme Court of the United States, ever since the Dartmouth College Case, 4 Wheaton, 518, have consistently held that the creation of a corporation, especially banks, by the legislature of a State, whereby it was agreed that the corporation, in consideration of paying to the State a specific tax or bonus, was to be released from the payment of all other taxes, constituted a binding contract, from which the State could not recede without the consent of the corporation; unless the State, in making the contract, expressly reserved the power to alter or amend it; or unless there was a general law in force, at the time of making the contract, which authorized the State, by subsequent legislation, to alter or amend it, and that there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. (State Bank of Ohio v. Knoop, 16 Howard, 369; New Jersey v. Yard, 95 U. S. 104; Farrington v. Tennessee, 95

U. S. 679.) This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recognized by the courts of last resort of all the States, that a decision by us holding the contrary would be regarded as eminently sporadic."

The Extent of This Contract.

Our second proposition is that this provision in the charter of this bank protected it and its stockholders from any other taxation — State, county, or municipal. That this has been the uniform construction of this language we have already shown by a reference to the case of Johnson v. Commonwealth, 7 Dana, 338. (Farmers Bank of Kentucky v. Commonwealth, 6 Bush, 127; Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382; Covington National Bank v. Covington, 21 F. R. 487; City National Bank v. Paducah, 10 Ky. L. R. 221.)

A somewhat detailed review of these cases seems to be necessary in view of the decision of the Supreme Court of the United States so much relied on by the other side. (Shelby County v. Union Bank, 161 U. S. 149.) We quote the first clause in the syllabus of that case:

> "A clause in the charter by a State of a banking corporation requiring it to 'pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes,' while it limits the amount of tax on each share of stock in the hands of the shareholders, does not apply to or cover the case of the capital stock of the corporation or its surplus, and accumulated profits, but such capital stock, surplus and accumulated profits are liable to be taxed as the State may determine."

We also quote the following sentence from the opinion (page 151):

> "In such a case as this, where we are to construe the meaning of the clause of the statute so as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the pre-

> vious decisions of the State courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves, independently of the decisions of the State courts, whether there is a contract and whether its obligation is impaired."

In a former part of this brief we have quoted extensively from the case of Johnson v. Commonwealth, 7 Dana, 338. This case, we repeat, was decided in 1838, and held that under the language of the fifteenth section of the charter of the Northern Bank the payment by the bank of the fifty cents a share was in full of all tax, not only against the bank, but also against the shareholder. Since then—a period of almost sixty years—so far as we know, no effort has been made to disturb this decision, and the tax paid by the bank has been taken as in full of all tax.

An effort has been made from time to time to lay additional taxes upon the bank. We have called attention to such an effort, involving the real estate of the bank, dealt with in Farmers Bank of Kentucky v. Commonwealth, 6 Bush, 127, the opinion in which was delivered in the year 1869, and from which we have heretofore quoted quite extensively.

In Covington National Bank v. City of Covington, 21 Fed. Rep. 485, decided in 1884, Mr. Justice Matthews delivered the opinion of the court. That was an effort by the city of Covington to tax the real estate and surplus of certain national banks located in that city. The opinion resulted in a judgment enjoining the city of Covington and its tax collector from any effort to collect these taxes. In the course of the opinion Mr. Justice Matthews said:

> "It also appears that nearly all the banks of this State are specifically taxed upon their stock at fifty cents upon each share of one hundred dollars; and that in the charters of most of them this tax is declared to be in lieu of all other taxes. And in construing and applying a provision to this effect in the charter of the Farmers Bank of Kentucky, the Court of Appeals of the State, in Farmers Bank v. Commonwealth, etc., 6 Bush, 127, said: 'By a compli-

ance with the section last quoted, the bank was to be discharged from the payment of all and any every other tax. From the amplitude of the language no other rational construction can be given to it.' It was accordingly decided in the case that the bank was not liable to be assessed for taxation for State or county purposes upon real estate taken by it or purchased by it in satisfaction of a debt, because 'it represents the assets of the bank to its value, and is no more subject to taxation than the notes or bills held by the bank, or the money in its vaults.' This seems to be the established and accepted law of the State."

The matter was very fully and carefully considered in Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382, decided in the year 1888. We make a very full extract from that opinion upon this subject:

"Does the provision in the appellee's charter and amendments, declaring that the payment of fifty cents on each one hundred dollars of its capital stock 'shall be in full of all tax or bonus,' exempt the appellee from the payment of county or city taxes? The appellant contends that it does not.

"It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank, and the means of conducting its operations. The bank can not increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee: first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations, for the benefit of its stockholders. The shares of the capital stock are represented by certificates. Each holder is a beneficiary to the extent of his ownership. But he can not control or withdraw a dollar of the principal; that must remain as the basis of the appellee's business operations. The shareholder is entitled only to share in the profits. So, the capital stock and the shares of the capital stock are distinct things, and both may be taxed. So, also, the franchise, the right of the bank to exercise its powers in the prosecution of its business as a

distinct right from its capital stock, may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, only its earnings, which are not a part of its capital stock, may be taxed. (Angell and Ames on Corporations, Section 556, 557; Bradley v. The People, 4 Wall. 459; National Bank v. Commonwealth, 9 Wall. 353.)

"If, when the State granted to the appellee its charter, she had been silent as to her right to tax it, she would have the absolute right to tax it, under the foregoing heads, without being amenable to the objection of being guilty of imposing double taxation. Nor could it be successfully maintained that the appellee would not be liable to be taxed by the appellant, the county court, under the Act of the 17th of March, 1876, and by the appellant, the city of Frankfort, under its charter. But the State did not choose to be silent. It did speak. It said that, in consideration of the appellee paying into the treasury fifty cents on each one hundred dollars of its capital stock paid in, without reference to its real value, such payment should be 'in full of all tax or bonus.' To say that this language has reference to the capital stock of the appellee, and not to the shares of its stockholders, or *vice versa*, or that it has no reference to the real estate of the appellee, acquired and used in its legitimate business, would be to torture the meaning of language. The State agrees that, in consideration of receiving fifty cents on each one hundred dollars of the appellee's capital stock paid in, the same shall be in full of all tax or bonus. It is conceded that this language binds the State to make no other assessment. And well may the concession be made; because, regarding the fifty cents in the light of a payment on the stock as capital stock proper, or as the stockholders' shares, yet the contract says that the payment 'shall be in full of all tax or bonus.' Also, regarding the appellee's real estate as a separate subject of taxation (and so is the capital stock on the shares), yet the contract says that the payment of the fifty cents shall be in full of all taxation. If any part of the appellee's property, its franchise, its capital stock, or the shares of its capital stock, or its real property used in the operation of its business, is to be taxed in addition to the fifty cents, then it can not be truthfully said that the payment of the fifty cents is 'in full of all tax or bonus.' As before said, it is conceded that the terms of the contract bar the State from imposing any additional taxation. But it is

contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they can not levy and collect taxes without the authority of the State conferring that right upon them. So the absurdity is presented that the State contracts with the appellee in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of 'all tax or bonus' —this is the meaning of the language—and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee, but may, notwithstanding, authorize all of its subdivisions, if the appellee's property and business were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract. 'Under such a contract between individuals a doubt could not exist.' The State, when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing."

In City National Bank of Paducah v. City of Paducah, 10 Ky. Law Rep. 221, decided June 9, 1888, it was held that the City of Paducah could not tax the banking house of a national bank. This was put distinctly upon the ground that the case from which we have just made the extract had held that such taxation could not be imposed on the State banks, and, therefore, under the authority of Covington City National Bank v. City of Covington, could not be imposed upon national banks.

The prevailing opinion of the Court of Appeals in the cases reported in 97 Ky. 591, simply assumed that the old banks had, at the time the Hewitt law was passed, the rights above indicated as belonging to them. The recent opinion delivered March 24, 1897, Deposit Bank v. Daviess County, 39 Southwestern, 1031, does indeed overrule the case of Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 370; but aside from the fact this was a pure dictum, as no banks whose charters were granted

prior to 1856 were involved in these new cases, the court, in overruling Judge Bennett's opinion, does so, not upon the ground that he has mistaken the scope and extent of the contract made by the old banks in regard to taxation, but that by reason of the fact that the charters had been extended since 1856 they had come within the purview of the act of that year.

We therefore submit that it is quite clear from this review of the cases in Kentucky, extending from 1838 to 1897, no case can be found in which the contracts made by the old banks have been construed in any other way than as a commuting of taxes payable by the banks, upon their capital stock, surplus, or other property, as well as the liability of the shareholder, to a payment of a fixed sum calculated according, not to the value, but to the number of shares, and payable by the banks to the State, and thereby excluding not only all further taxation by the State, but any taxation by the local municipalities.

We respectfully submit that this establishes, as clearly and as strongly as one can well conceive, that rule of property which the courts will not disturb after so long a period of reliance upon it and acquiescence in it.

Effect of Extending Charters.

The next question that we are here met with arises from the fact that the Bank of Kentucky has had its charter extended since the passage of what is known in Kentucky as the act of 1856. This act provides as follows:

> "Section 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.
>
> "Section 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

As we have set out in our statement, the Bank of Kentucky was originally chartered February 22, 1834, and it was provided that it should continue a body politic and corporate until October 1, 1864.

By an act approved February 15, 1858, its charter was extended as therein set out. We give the act in full in the appendix.

The charter of the Bank of Kentucky was further extended by an act approved February 1, 1872. We give it in full in the appendix.

The important question arises as to what is the effect of the Act of 1856 upon the right of the legislature to repeal or alter any clause (especially the taxing clause) in the original charter, growing out of the circumstance that the life of the charter has been extended twice by acts passed since the passage of the Act of 1856.

This question also was before the Court of Appeals of Kentucky in the case of Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 387, and was very fully considered and distinctly passed upon. On this subject the court said:

> "The appellant's next contention is that if the appellee's charter exempted it from all taxation, except that therein provided for, the same expired on the 1st day of October, 1864, and the Act of the 15th of February, 1858, extending the charter for twenty years, created a new corporation, which the legislature, under the Act of February 14th, 1856, reserved the right to amend at pleasure; and that the Act of the 17th of February, 1876, authorizing counties that levied and collected *ad valorem* taxes to assess banks and other corporations within said counties, operated as a valid amendment of the appellee's charter, to the extent of authorizing the collection of said taxes. . . . There is a broad distinction between the extension of a charter and the grant of a new one. An act which continues the life of a charter to a period beyond the time fixed in the charter for its expiration, and reserves the corporate organization, privileges, powers, duties, and rights, is an extension of the charter. Thus extended it is the same charter, with a con-

tinued lease of life under which the organization must be kept up; to which the company must look for its powers, privileges, and rights; by which it is to be governed and controlled. The act of extension relates back to the date of the charter. The legislature and the company are presumed to have contracted for the extension with reference to that period of time, when the respective rights of the contracting parties were agreed on; which agreement, in consideration of the continuous discharge of the obligations therein expressed, is to be continued beyond the time first agreed on. (Angell and Ames on Corporations, Section 780; People v. Marshall, 1 Gilman, Ill. Rep. 672; Exeter Bank v. Rogers, &c., 7 N. H. 32; Kennebec Bank v. Richardson, 1 Greenleaf, 72.)

"Here the legislature, by the Act of 15th of February, 1858, continued the chartered privileges and rights of the appellee twenty years from the 1st day of October, 1864. This extension did not have the effect of creating a new charter, but merely extended the life of the one which was already in existence. Therefore the Act of the 14th of February, 1856, does not apply; for the third section expressly provides that the act shall only apply to 'charters and acts of incorporations to be granted' thereafter.

"Conceding, however, that the Act of 15th of February 1858, creates a new charter, was it not the intention of the legislature, 'plainly expressed,' not in so many words, it is true, that the first section of the act of 1856 should not apply to it? Let us see. The act of 1858, as an additional consideration for the extension, provides that the appellee should establish a branch at Columbus, Kentucky; that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share on its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions, and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension. In addition to this, the Act of the 1st of March, 1872, authorized the appellee to purchase the stock that the State held in its bank; upon which it was to pay annually fifty cents on each one hundred dollars, which was to 'be in full of all tax or bonus' on such increased stock; also, her charter was 'extended twenty-five years.' That the appellee, in addition to its former obligation, agreed to pay annually fifty cents on each one hundred dollars of its

> contingent fund and increased capital stock, for the period of twenty-five years; that it was to be exempt from all other taxation thereon during that period; that it was to establish another branch at Columbus, Kentucky; that it was to restrict its circulation; that its business involved a large capital, the profits of which were limited to six per cent interest; that well defined and permanent rules were essential to its successful management; that changes in its chartered privileges might hazard its success and safety, and render uncertain and precarious a business whose success depended upon a steady adherence on the part of the State to its plighted faith. These considerations induce the belief that the Acts of 1858 and 1872 were intended to continue in force an irrevocable contract."

It will be observed that Judge Bennett considers the application of the Act of 1856 from two standpoints: first, he considers the question as to whether it is applicable at all; second, he considers the question as to whether these acts do not express the contrary intent, so as to exclude them from the operation of the Act of 1856. It is for this reason that we have quoted these acts in full, so that the court might examine them in connection with the Act of 1856, and determine from an inspection of them whether they are in any respect within the terms of that act, and whether they are not so drawn as to exhibit the intention of the legislature not to apply the Act of 1856 to them.

In National Exchange Bank v. Gay, 57 Connecticut, 224 (same case, 17 Atlantic, 555), the question arose, What was the effect upon the continuing contracts of a corporation of an act extending the existence of a corporation? The court said:

> "The power which created the plaintiff put a limit to its existence. Before that limit had been reached, while the plaintiff was in full corporate life, the creating power moved that limit further into the future. The power which can create can prolong. It was not the substitution of one legal entity for another; it was not the changing of a State into a national corporation; it was not even the restoration of a spent corporate life. The identical corporation which received the breath of life in 1863 has been in uninterrupted, unchanged existence to this present, having the same rights, bearing the same obligation."

So, in the case at bar, this is the same bank which was created in 1834. The extension of the charters has merely extended the existence of the corporate life. It has not either added to nor taken away from the powers, franchises, or privileges of the corporation.

Undoubtedly there is a distinction between the right to be a corporation and the powers and privileges vested in the corporation. The franchise to be a corporation belongs not to the corporation, but to the incorporators. The franchise to do, to act, to exercise privileges and franchises, to enjoy whatever grants may be made by legislatures or individuals, belongs to the corporation. This distinction is brought out in the case of Fietsam v. Hay, 122 Ill. 293 (S. C., 3 Am. State Rep. 494). We quote:

> "Now it is clear from these definitions, and from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation, and not in the corporation itself. This fact, we think, is not without significance in reaching a conclusion upon the main question to be determined, outside of the numerous authorities bearing directly on the subject. It will be kept in mind that the corporate body, for purposes of ownership, and indeed for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell, or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the State. All these propositions are familiar to the courts and the profession, and are well sustained by authority. If, then, the franchise is vested in and belongs to the corporators, and not to the corporation itself, how could the latter transfer or assign it to another? On the plainest of principles this could not be done without legislative authority for that purpose, and we

> find nothing, either in the statute or the company's charter, conferring such authority. While it is conceded the legislature might confer on the artificial body the power to sell or assign the franchise to strangers, yet this would be in effect to authorize it to commit a species of suicide, for it is manifest the corporation could not exist a moment after the franchise conferred upon its members had been transferred to others."

The Supreme Court of the United States, in Memphis Railroad Company v. Commissioners, 112 U. S. 619, makes the same distinction. It is there stated:

> "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the corporation. The latter has no power to dispose of the franchise of its members which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises."

Under the act of 1856 the right is reserved to the legislature to amend or repeal all charters or grants of or to corporations, or amendments thereof, unless a contrary intent be therein plainly expressed. But here is no grant to a corporation nor any amendment of any grant to a corporation. Here is simply the prolongation of the right in the corporators to continue to be a corporation. It is not worth while to consider, if every thing else was out of the way, what right the legislature might have to limit the existence of these corporations; to take away from the corporators the right to longer act as a corporation. We think we could show that such a right could not be exercised by the legislature. All that we have now to consider is the question as to whether the contract made between the State and the bank in 1834, when its charter was granted, is now subject to modification or repeal, simply because since then the legislature has lengthened the term of the franchise vested in the corporators to be a corporation.

It has never been claimed that where a corporation was created prior to 1856, the mere fact that it accepted an amendment passed subsequent to 1856 makes its charter or any part of it subject to amendment by the legislature. The only reservation made by the Act of 1856 is as to grants or charters or amendments passed after 1856.

It appearing, therefore, that the contract which is here being insisted upon is a franchise or privilege of the corporation, and that the amendment made since 1856 is simply a lengthening of the franchise to be a corporation, which belongs to the corporators, it would seem that, taking the terms of the Act of 1856, and its intendment, in the broadest way, it can not include such a case as that which we now have at the bar.

At the same time that the case now under argument was heard by the learned Circuit Court it also had under consideration a similar bill filed by the Northern Bank of Kentucky against the Board of Valuation and Assessment. In that case the Court found no presumption from the thing adjudged, and therefore examined the question as to whether the Northern Bank had an irrepealable contract with the State under the Hewitt law.

This bank was also chartered prior to the year 1856, and had its charter life extended by two acts passed since 1856. These acts are so similar to the one extending the charter life of the Bank of Kentucky that we do not contend that we can distinguish them.

The learned Circuit Court held that the act of 1856 applied to the tax provision in the charter of the Northern Bank, also similar to that of the Bank of Kentucky, and that when it surrendered that provision by making its contract under the Hewitt law it simply surrendered that which the legislature might at its pleasure have taken away.

The learned Court disregarded the opinion of the Court of Appeals in the case of Franklin County Court v. Deposit Bank of Frankfort, 87 Ky. 382, and held that as the case of Deposit

Bank of Owensboro v. Daviess County, 39 Southwestern Reporter 1030, overruled the former case, the matter was at large, and the Circuit Court had the duty of considering the question as an original one.

So considering it, it held against the contention of the Northern Bank.

What we have said above has been in answer to the argument contained in this opinion in the Northern Bank case, which is reported, Northern Bank of Kentucky v. Samuel H. Stone, &c., 88 F. R. 413.

The Franklin County case was certainly thoroughly considered by the Court of Appeals of Kentucky. The effect of the extension of these old charters was one of the main points under advisement, for unless these extensions continued the protection of the banks, notwithstanding the act of 1856, the judgment of the Court must have been the other way.

The banks under special consideration in the opinion of Judge Bennett were those chartered prior to 1856, particularly the present appellee, the Bank of Kentucky. In the later case the opinion of a bare majority overrules this opinion in a sentence, and that, too, in cases of banks chartered since the year 1856. Notwithstanding what is said in the opinion in the case of Northern Bank v. Stone, 88 F. R. 413, we fail to perceive how the question of what should be considered the legal effect of extending a charter granted prior to 1856 could have upon a consideration of the rights of a bank whose charter was granted since 1856, and with due deference we still submit that what is said on this subject in the later case is pure dictum.

Judge Bennett's opinion, delivered in 1888, is a careful consideration of the effect of the act of 1856 in a case where that was the very question involved. And aside from its argument, which we have given above, it seems to us that great weight is due to it as a decision that stood unchallenged for almost ten years, and upon the faith of which millions of property represented by the stock of these old banks has been dealt with upon the market.

We submit, therefore, that the court will follow the earlier rather than the later decision, and hold that when the Hewitt law was passed in 1886 this bank had a clear contract right under which it was to be taxed fifty cents a share, in lieu of all other taxation—State, county, or municipal.

The Contracts Under the Hewitt Act.

What change was then made? In a previous part of this brief we have stated the Hewitt law, and printed it *in extenso* in the appendix. We have stated that the Bank of Kentucky accepted it in accordance with its terms, and according to the manner pointed out. What the bank did was to give its consent to the levying of that tax; to agree to pay the same as therein provided, and to "waive and release all rights under the charters of the State banks *to a different mode or smaller rate of taxation.*"

This consent and agreement to and with the State of Kentucky was to be and was evidenced by writing under the seal of the bank, and delivered to the Governor of the Commonwealth, and the law provided that upon such agreement and consent being delivered, and in consideration thereof, the bank and its shares of stock should be exempt from all other taxation whatsoever, so long as said tax should be paid during the corporate existence of such bank.

The act further provided, in Section 6, as follows:

> "This act shall be subject to the provisions of Section 8, Chapter 68, General Statutes."

Section 8, Chapter 68, General Statutes, is the modern form of the Act of 1856:

> "All charters and grants of or to corporations, or amendments therof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

What effect did this contract have upon the respective rights of the banks and the State? All that the banks purported to do was to agree to pay the rate of taxation prescribed by the Hewitt law, and to waive and release all rights under their charters "to a different mode or smaller rate of taxation." The agreement did not entirely release the contract between the State and the banks as embodied in their charters. It was not asked to be nor intended to be an absolute dissolution of contractual relations, but, upon the one side, an agreement upon the part of the bank to pay this new rate of taxation; to release its right to a "different mode" or "smaller rate of taxation"; and, upon the other side, an agreement that the bank and its shares of stock should be exempt from all other taxation whatsoever, so long as the new tax was paid during the corporate existence of the bank.

A most instructive case upon this subject is that of State v. Commissioner of Railroad Taxation, 37 N. J. Law, 241. This case must be read in connection with that of State v. Commissioner of Railroad Taxation, 37 N. J. Law, 229. Reading these two cases together, it appears that there were certain railroads in New Jersey which had irrepealable contracts with the State on the subject of taxation, and certain others which had contracts subject to repeal. The legislature passed a law for the taxation of railroad corporations, providing, in certain sections, for those which had repealable contracts, and in certain other sections for those which had irrepealable contracts. Among the latter was the United Railroad and Canal Company. This Company was taxable in a certain way upon its stock, and in a certain other way upon its passengers and freight. In the year 1846 the legislature passed a law providing for a different method of taxation upon the passengers. This act, as was declared by its terms, was not to go into effect until the acceptance of its provisions by the company as part of its charter should be certified; and "the power of the legislature to alter, modify, or repeal *this* act whenever in their opinion the public good requires it, was expressly reserved."

In regard to this part of the case the learned court said:

> "This act simply modified the 18th section of the company's charter in one particular—with respect to the transit duty on passengers, leaving the provisions of that section as to tax on capital stock and transit duty on merchandise, and the exemption from general taxation, unaffected; and the power of alteration and repeal is expressly limited to alteration or repeal of the provisions of this new act. If that power should be exercised the effect should be merely to recall the privileges therein conferred, and remit the company to its rights under its original charter."

Another act was passed in 1869, by which provision was made for superseding special contracts with corporations paying transit duties whose charters were irrepealable, by substituting another mode of taxation, by mutual consent (page 247). This act was accepted by the United Railroad and Canal Company. As to the effect of its acceptance, the court said:

> "Upon the acceptance by the prosecutors (Railroad Company) of the provisions of this act, their former contracts on that subject were superseded, and a new contract embodying the provisions of this act became the contract between them and the State."

Again, the court said:

> "But the chief argument on this part of the case, in support of this assessment, was that contracts which oust the State of the sovereign power of taxation were to be strictly construed, and that when once departed from by the consent of the privileged party, they ceased to have any binding force. This argument was applied not only to the Act of 1869, but more especially to the prior Acts of 1846 and 1864 in relation to the New Jersey Railroad Company. The first of these propositions is conceded, but the existence of a contract of this nature with these prosecutors, in their original acts of incorporation, is too firmly established to be a debatable question (citing authorities). If by the second of these propositions be meant that an exemption from general taxation once surrendered can not be resumed, it is also conceded. But if it be meant that a corporation having

such exemption by an irrepealable charter can not contract with the State for a modification of the special taxation therein imposed, and yield part and accept other terms in lieu thereof without surrendering the whole, the argument is without legal foundation.

"A contract with a corporation once made is the same as a contract with an individual. Both are equally within the protection of the constitutional provision. Neither can be impaired except by compact and agreement of the parties, founded on a sufficient consideration, and the original obligation remains intact, except so far as altered by mutual consent.

"The contract, the prosecutors rely on in an agreement on their part to pay a per cent on capital stock, together with certain transit duties, and an agreement on the part of the State that no other tax or impost shall be levied or assessed upon them; in other words, that they should not be subject to general taxation in any form at the will of the legislature. Corporations having contracts of this character with the State may consent to other taxation, or to a different mode of assessment from that specified in their charters, by the acceptance of subsequent legislalative acts, without imparing the general exemption in their charters. In such event the new taxation or new mode of assessment becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force."

This case is in its facts and its reasoning so apposite to the case at bar that we submit it should be controlling. Admitting to the farthest the claim that the State had the right to repeal the Hewitt law, and retire from the contract made thereunder, the only result would be that the banks would be remitted to their former charter rights. Admitting that the banks, by coming under the Hewitt law, have consented to pay the rate of taxation therein prescribed, this does not abrogate all contractual relations between the banks and the State, but simply substitutes the new contract for the old contract. Admitting that the banks can no longer pay fifty cents a share in full of all tax or bonus, yet the State can not exact any thing beyond this except to the extent prescribed by the Hewitt act.

Therefore, the State can, if the argument upon the other side is sound, have no greater right than that of retiring from the contract made in the Hewitt law; and the result follows that there immediately revive to the banks their rights to their old contract.

This is further illustrated by the opinion of this court in Louisville Water Company v. Clark, 143 U. S. 16. That was a case where, in consideration of the Water Company waiving all right to charge for water furnished to the city for public fire cisterns, fire plugs, or hydrants, the Water Company was to be exempt from taxation.

This court held that as this amendment to the charter of the Water Company was made subsequent to the Act of 1856, it was subject to legislative repeal; but the court said that the obligation to remit the charge for these services remained only so long as the exemption continued in force; and the court proceeded thus:

> "This view is in harmony with the Act of 1856, which expressly declares that while privileges and franchises granted to corporations after its passage could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the Act of 1882, in respect to its right to charge for water furnished for public fire cisterns, fire plugs, or hydrants."

It does not seem to us necessary to extend this brief so as to consider the question so ably debated in the opinion of Chief Justice Pryor in the Bank Cases, 97 Ky. 599, that under the authority of New Jersey v. Yard, 95 U. S. 110, the Hewitt law can not be construed as authorizing the State to withdraw from a contract made with the solemnity and the form with which contracts under the Hewitt law were clothed, and that the right reserved in the Hewitt law to repeal its provisions could not apply to contracts made prior to a repealing statute. These questions will be considered in the brief and argument of

counsel having cases for banks whose charters were granted since 1856, and here on writ of error to Court of Appeals of Kentucky.

We believe that we have shown that as to the bank whose rights are being considered in this argument, one result or the other must follow—either that the Commonwealth of Kentucky can not retire from the contract made in the Hewitt law at all, or if it does so, the bank is remitted to its original charter rights, and in no event and by no construction can its release of such charter rights be made broader than the terms of the Hewitt law, by which it was confined simply to a release from a right to a different mode or smaller rate of taxation than is fixed by that revenue system.

Therefore this bank has, ever since the Hewitt law was passed, and notwithstanding any effort upon the part of the State, by the Constitution of 1891, or the revenue law of 1892, to retire from it, consistently performed its duties under it, without endeavoring to claim the right to fall back upon the smaller rate of taxation fixed by the original contract.

The Effect of Former Judgments.

The next proposition is that the questions at issue here between the complainant and defendants are *res adjudicata*. We hope to be able to show that in proceedings regularly instituted and conducted, and wherein the Bank and the appellants assumed adversary positions, all of the vital questions now to be determined by the court have been set at rest by judgments duly entered.

Suits Involving Bank of Kentucky.

The suits in which the Bank of Kentucky has been heretofore engaged as a litigant are five in number, and the records and full proceedings in each of these cases were filed as exhibits with its bills of complaint. We will state them in their chronological order:

BANK OF KENTUCKY v. CITY OF FRANKFORT, 1882–1888.

On November 21, 1882 (No. 356, R. 29), the Bank of Kentucky filed its petition in the Franklin Circuit Court against the city of Frankfort, alleging that the municipality was endeavoring to levy a tax on the real estate of the bank situated within the city limits. The petition shows that this real estate consisted of two parcels: one, the banking house, and the other, certain real estate purchased for debt. The petition alleges the incorporation of the bank, the various statutes extending its corporate life, the contract contained in the fifteenth section of its charter in regard to taxation, and its full compliance with that contract, and insists that the effort upon the part of the city of Frankfort to collect taxes upon the real estate is illegal, and any authority which had been given to it by the State so to do is in violation of the contract between the State and the plaintiff. To this petition the city of Frankfort filed an answer (No. 356, R. 34-35), claiming the right to collect the tax in question under an act passed to reduce into one the several laws in relation to the city of Frankfort, and which was approved March 16, 1869. (2 Acts 1869, 485.) By Section 13 of that act it was provided as follows:

> "That the Board of Councilmen shall have power and authority to assess annually, levy and collect a tax not exceeding two dollars and fifty cents on the hundred dollars' worth of property, exclusive of the school tax and tax authorized to pay principal and interest of the bonds of the city issued for school purposes, on all real estate within the limits of said city."

This cause having been regularly submitted, resulted in a judgment in favor of the Bank of Kentucky, entered May 17, 1884, enjoining and restraining the defendants "from selling the property mentioned and described in the petition, or any part thereof, for delinquent taxes claimed to be due by the plaintiff to the Board of Councilmen of the city of Frankfort." (No. 356, R.

36.) From this judgment the city of Frankfort took an appeal to the Court of Appeals of Kentucky, and in that court this judgment was in 1888 affirmed, the opinion being one of those reported under the style of "Franklin County Court v. Deposit Bank of Frankfort," 87 Ky. 375.

BANK OF KENTUCKY V. FRANKLIN CO., 1883–1888.

On September 6, 1883 (No. 356, R. 16), the Bank of Kentucky filed a suit in the Franklin Circuit Court against the Sheriff of Franklin County and the Franklin County Court. (The latter is the fiscal authority of the county.) In this petition it was alleged that the county court had made an assessment of the personal estate of the plaintiff for each of a number of years stated in the petition, and that this assessment was being attempted to be enforced, and taxes collected upon its basis. This petition also sets out the organization of the bank, its contract under the fifteenth section of its original charter, the acts extending its existence, and claims that any authority alleged to exist in the county to make the assessment is invalid as violative of the obligation of the plaintiff's contract with the State. The act under which the county claimed to make this assessment is one entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court," and was approved March 17, 1876. (1 Acts 1876, 78.) The second and third sections of that act are as follows:

> "Sec. 2. That it shall be the duty of the chief officer or agent of any railroad company, bank, mining or manufacturing company, toll-bridge or turnpike road company, any gas or water company or association, or any other incorporated person or persons or company doing business or owning property in said county, residing in said county, to list or cause to be listed with the assessor of said county all the property of said railroad, bank, mining, manufacturing, toll-bridge, turnpike road, gas or water company, or other incorporated person or company situate in said county; but if they fail or refuse to do so upon demand made upon them

by the assessor, then the assessor shall list the same and shall add twenty-five per centum to the value as a penalty for such refusal; but if no officer or agent of any of said companies reside in said county, then the assessor shall ascertain the value of said property and list the same.

"Sec. 3. That all the property thus listed and assessed shall be subjected to an equal and uniform rate of tax."

The defendants demurred to the petition (No. 356, R. 26), and this demurrer was overruled, and the defendants declining to plead further, judgment went in favor of the Bank of Kentucky on May 17, 1884, by which it was adjudged that "the defendants are perpetually enjoined and restrained from further proceeding to collect the taxes mentioned in the action." (No. 356, R. 26.) From this judgment the defendants prayed and prosecuted an appeal to the Court of Appeals, where it was affirmed. The opinion delivered by the Court of Appeals is reported under the style of "Franklin County Court v. Deposit Bank of Frankfort," 87 Ky. 375.

An examination of the record in these two cases will disclose the fact, which we hardly believe will be controverted, that the sole ground upon which the litigation proceeded was the claim by the Bank of Kentucky upon the one side, and the denial by the city and county upon the other, of the existence and irrevocable nature and extent of the contract contained in Section 15 of the charter of the Bank of Kentucky.

BANK OF KENTUCKY v. FRANKLIN CO., 1893–1895.

As we have stated in a former part of this brief, in the year 1891 a new Constitution was adopted in Kentucky. This Constitution provided what property should be exempt from taxation by Section 170, and then, by Section 172, provided as follows:

"All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale."

As heretofore stated, the legislature passed a general revenue law, which took effect November 11, 1892. As applicable to banks this law provided for a report by them to the Auditor, and a valuation of their assets by a board composed of the Auditor, Secretary of State, and Treasurer. Upon the basis of this valuation the bank was required to pay to the State Auditor the current rate of State taxation, and the board was required to certify to the various municipalities where the bank exercised its franchise to the proper proportion of the total value found by the board, used in each of these localities. Following out the terms of this law, the board certified to the city of Frankfort, and to the county of Franklin, that there was $195,000 of value belonging to the Bank of Kentucky subject to be taxed by the city of Frankfort and by the county of Franklin. Under these circumstances, the county authorities being about to enforce the payment of a tax upon this basis of valuation, the Bank of Kentucky filed in the Franklin Circuit Court on December 22, 1893, its petition against the sheriff of the county and the Franklin County Court (the fiscal authority of the county). (No. 356, R. 40.) In this pleading it set out its original organization, its contract in reference to taxation with the State contained in Section 15 of its charter, the laws extending its corporate existence, the passage of the Hewitt law in 1886, its agreement with the State based upon that law, its full compliance with the provisions of its charter as to taxation down to the time of the passage of the Hewitt law, its full compliance with the Hewitt law since its passage, the passage by the legislature of the Act of November 11, 1892, the proceedings of the Board of Valuation and Assessment thereunder, and threatened effort by the defendants of the collection of a tax based thereon; and upon this statement of its case the bank alleged, with entire distinctness and with great fullness, its claim that it was protected from the scheme of taxation embodied in the Board of Valuation and Assessment law, and that the provisions therein were in violation of its contract with the State, and therefore null and void. To

this petition a demurrer was filed, and the demurrer was sustained, and the petition dismissed January 27, 1894. (No. 356, R. 40.) From this final judgment the bank took an appeal to the Court of Appeals. Its case is one of those decided on June 1, 1895, and reported under the style of "Commonwealth for use, &c., v. Farmers Bank of Kentucky, &c.," 97 Ky. 590. The Court of Appeals reversed the judgment of the Franklin Circuit Court, and sent down its mandate directing that a judgment should be entered in the Franklin Circuit Court in accordance with that mandate; and on January 21, 1896, the Franklin Circuit entered the following judgment, to wit (No. 356, R. 57):

> "This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the Court of Appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that Article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, Chapter 92, Article 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than is prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of this State and the Act of November 11, 1892 (Article 3, Chapter 103, Acts 1891–2–3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void; that the Board of Valuation and Assessment provided for in said Act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the

same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants, Franklin County, and R. D. Armstrong, sheriff of said county, be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin County upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its cost in this action expended."

BANK OF KENTUCKY V. CITY OF FRANKFORT, 1894–1895.

On the 6th of September, 1894, the Bank of Kentucky filed a suit in the Franklin Circuit Court against the city of Frankfort and its tax collector. (No. 356, R. 58.) In that petition allegations were made in all respects similar to those which we have described above as made in the suit against Franklin County. It was alleged that Franklin County was not only attempting to collect taxes under a return made by the Board of Valuation and Assessment for the years 1893 and 1894, but that it was attempting to collect city taxes upon all of the real and personal property of the Bank of Kentucky for the year 1892, under the assumption that the Constitution by its own force had repealed the Hewitt law. The existence of the bank and its contracted rights were fully set up in this petition and entirely relied on. On September 25, 1894, the court decided the case, holding that the city of Frankfort could not collect the tax for 1892, because it required legislative action to carry into effect the provisions of the Constitution in regard to taxation; but that it could collect the tax for 1893 and 1894 upon the valuation certified by the Board of Valuation and Assessment; and thereupon dismissed the petition of the Bank of Kentucky as to these two years' taxes. (No. 356, R. 72.) From this judgment the Bank of Kentucky appealed to the Court of Appeals, where this judgment was reversed, the opinion in this case being

delivered at the same time as the opinion in the Franklin County case above mentioned. A mandate from the Court of Appeals went down in accordance with its order of reversal, and thereupon a judgment was entered in the Franklin Circuit Court which is in all respects similar to the judgment entered in the case of the Franklin County Court above recited. (No. 356, R. 76.) It may be well to state here that the opinion of the learned Circuit Judge of Franklin County in these two cases was to the effect that the Bank of Kentucky had absolutely released its contract under its charter by its proceedings under the Hewitt law, and that it had further agreed that the Hewitt law might, whenever the State chose so to do, be repealed, and the bank remitted not to its original rights, but to be considered as having no contract whatever. (No. 356, R. 50.)

BANK OF KENTUCKY v. CITY OF LOUISVILLE, 1894–1895.

Following the adoption of the Constitution and of the law applicable to cities of the first class, the city of Louisville, on the 29th of January, 1894, passed an ordinance requiring all banks located within its limits to pay, as a license fee, four per cent of the gross earnings, the payment to be made to the commissioners of the sinking fund, and the ordinance providing a penalty for failure to make such payment. By Section 2922, which is one of the sections applicable to cities of the first class, the legality of an ordinance can under certain circumstances be tested by one who is being prosecuted under it by a writ of prohibition in the Jefferson Circuit Court. An attempt having been made to proceed against the Bank of Kentucky in the City Court, and to subject it to the penalty denounced by this ordinance, the bank, on May 4, 1894, filed its petition in the Jefferson Circuit Court and asked a writ of prohibition against the Hon. R. H. Thompson, Judge of the City Court of Louisville (No. 356, R. 78). This petition sets out the history of the organization of the bank, its contract under Section 15 of

its charter, its compliance therewith down to the time of the passage of the Hewitt law, its compliance with the Hewitt law, and payment of taxes thereunder; makes claim that the ordinance passed by the city of Louisville is violative of its contract rights, and asks that further proceedings under it be prohibited. To this petition there was a demurrer, and the demurrer being overruled, judgment was entered accordingly in favor of the bank, holding the ordinance invalid, and prohibiting any further proceedings upon the warrant against the Bank of Kentucky for violation thereof. (For opinion of Circuit Judge Field, No. 356, R. 85.) (For Judgment, No. 356, R. 88.) From this judgment the defendant Thompson and the city of Louisville appealed to the Court of Appeals, where it was affirmed, this also being one of the cases decided and reported as above.

It will thus be seen that prior to the passage of the Hewitt law, in a direct contest with the city of Frankfort and the county of Franklin, it had been determined that the charter provision of the Bank of Kentucky in regard to taxation was inviolable and beyond the power of the legislature to change or limit. It will be further seen that after the passage of the Hewitt law and the adoption of the new Constitution, and the new system of taxation under it, it was determined in one case where the Bank of Kentucky was complainant and the county of Franklin defendant; in another case where the Bank of Kentucky was plaintiff and the city of Frankfort defendant; and in the third case where the Bank of Kentucky was plaintiff and the city of Louisville (or what is equivalent, the judge of the City Court) was defendant; that the contract made by the bank with the State under the terms of the Hewitt law was inviolable. The records in all of these cases are filed as exhibits in this cause, and it needs only an inspection of them to show that they are based upon the existence of these contracts and the claim upon the part of the Bank of Kentucky that they are inviolable. We have above adverted to the fact shown by the record that it was the city of Louisville which prosecuted the appeal in the last case.

Indeed, the judgment of the Jefferson Circuit Court in these proceedings in prohibition was directly against the city of Louisville. We quote from it:

> "It is considered by the court that the prayer of the petition be granted and that the city of Louisville and R. H. Thompson, Judge of the Louisville City Court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, the Bank of Kentucky in the city of Louisville, or making any further order therein; and it is further considered that the plaintiff recover of the defendant, the city of Louisville, its costs herein expended, and may have execution therefor. To all of which defendants except and pray an appeal to the Court of Appeals, which is granted." (R. 88, 89, No. 356.)

While these various suits were going on, the Auditor declined to accept from the Bank of Kentucky or the other banks any thing more than the ordinary rate of taxation based upon the valuation of the State Board. After the suits had been decided in favor of the banks and the Court of Appeals had held that the Hewitt contract was still in force, the Auditor called upon and required the banks to pay to him the difference between what had already been paid to him and the amount due under the Hewitt law. This was for State taxation. The Bank of Kentucky and all the other banks without exception complied with this demand.

As above stated, the opinion of the Court of Appeals in the Bank of Kentucky case and the other cases heard with it was delivered in June, 1895, four judges holding that the contract under the Hewitt law was not repealable; three holding that it was repealable. In 1897 the same court, in other cases, decided that the contract under the Hewitt law was repealable, four judges so holding and three holding that it was not repealable. It was after this last decision that these suits were filed.

This statement of our case is regrettably long, but we have not seen where we could condense it except at the expense of clearness.

Upon this statement we submit that, under the conclusive presumption of the thing adjudged, the Bank of Kentucky has established its contract and the terms of it and its character as one not subject to be lessened or impaired by any constitution or law of the State of Kentucky.

This brings us directly to the discussion of

Authorities upon Res Adjudicata.

The authorities upon this subject are so numerous and full in the Federal Courts that we have not thought it necessary to go outside of them. In Tioga Railroad v. Blossburg Railroad, 20 Wallace, 142, it appears that the one railroad sued the other upon a contract of lease. There was a dispute as to the proper construction of this contract. The Supreme Court of New York, construing the contract, gave judgment according to that construction. A subsequent suit was brought for other sums due on the same contract, and again the question of its proper construction was raised. This time the suit was in the Circuit Court of the United States, and the plaintiff having again recovered judgment, the case was carried to the Supreme Court of the United States. Mr. Justice Bradley, delivering the opinion of the court, said:

> "Some attempt has been made to show that in the suit brought in January, 1855, in the Supreme Court of New York by the Blossburg Company against the Tioga Company, on the contract now in question, the matter of the difference for which the present suit is brought was not a question decided; but we have looked at the record and proceedings therein which were in evidence in this case, and are satisfied that it was decided. The report of the case in 1 Keyes, 486, shows that it was the only question before the Court of Appeals, to which court the case was carried. The point then is *res judicata* between the parties. It can not be litigated again on the same contract."

In Southern Minnesota Co. v. St. Paul Co., 55 Federal Reporter, 695, Judge Thayer delivering the opinion for the Circuit Court of Appeals for the eighth circuit, says:

> "The doctrine is well established that when an issue of fact, or a mixed question of law and fact, on which the decision of a case depends, has been tried and determined, the parties to such trial will be estopped, even in a second suit on a different cause of action, where the same issue or question arises, from contending to the contrary of what was thus found and determined. . . . The authorities furthermore show that the estoppel, arising from a finding in previous suit between the same parties, is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision construing an agreement between the parties, and to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

The leading case upon this subject, and one which is more cited than any other, is that of Cromwell v. County of Sac, 95 United States, 352. The Supreme Court, speaking through Mr. Justice Field, is there considering the difference between the plea of *res adjudicata* where the suit is between the same parties on the same cause of action and on a different cause of action. We make the following extract from the opinion:

> "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In Forsyth v. City of Hammond, 166 United States, 506, we find this state of case presented: An effort was made in the State Court of Indiana to annex certain territory to the town of Hammond. In the proceedings taken to effectuate this purpose, Forsyth appeared to resist, and a judgment having been rendered

annexing her land, she appealed to the Supreme Court of Indiana, where the judgment was affirmed. Pending her appeal, she filed a bill in the Circuit Court of the United States to enjoin the city of Hammond from annexing the territory. Judge Baker dismissed her bill. The Circuit Court of Appeals reversed this judgment, and directed that a decree be entered enjoining the annexation. A certiorari was taken to the Supreme Court of the United States, where Judge Baker's judgment was affirmed, and that of the Circuit Court of Appeals reversed. In passing upon the question of *res judicata*, Mr. Justice Brewer said:

> "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal acting independently and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

The same learned Justice also said in Last Chance Mining Co. v. Tyler Mining Co., 157 United States, 691:

> "It is said that the defendants did not contest; that they withdrew their answer, and that there was only a judgment by default; but a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.
>
> "The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached?"

These principles have been frequently applied by the Supreme Court and by the circuit courts and circuit courts of appeals of the United States. Thus in Lumber Co. v. Buchtel, 101 United States, 638, there was an action upon a guaranty which contracted for the payment of purchase money in instalments. To a suit for the first instalment, the defendant, the guarantor, pleaded that it was induced to make the contract of guaranty by fraud; nevertheless, judgment was recovered. To the second action it set up the same defense, and also that a representation was made to it which amounted to a warranty. The court held that as to the first defense there could be no doubt that the first judgment was conclusive. That as to the second, the same was true, because in looking into the record the court ascertained that the finding of the referee upon which the first judgment was rendered showed that no representation at all had been made by the plaintiff to the defendant, and this finding having gone into the judgment was conclusive as to the facts found in all subsequent controversies between the parties on the contract.

The case of Wilson's Exor. v. Deen, 121 United States, 529, presents the converse to this case, and again the former judgment is held binding.

The case of Nesbitt v. Riverside District, 144 United States, 619, presents the converse to the case of Cromwell v. County of Sac, and is decided by applying the same principle.

In Johnson Co. v. Wharton, 152 United States, 256, the court applied the same principles, although the judgment in the first case was for so small an amount that the Supreme Court had been without jurisdiction to hear it on writ of error. This circumstance was held to make no difference.

We might cite many other cases upon this general subject, but these are, we believe, sufficient to show that the court will look into the records we have here filed and ascertain for itself whether in fact the construction, the validity, and the sanctity of the contract between the Bank of Kentucky and the State have been litigated; that the court will look into the opinions delivered

by the Court of Appeals of Kentucky to see what was the real matter in issue, and so looking will ascertain that the Court of Appeals of Kentucky has held that the matter in issue in the cases decided in 1887, and reported in 87 Kentucky, and from which we have so extensively quoted, was as to the existence of the contract between the Bank of Kentucky and the State of Kentucky, as embodied in the fifteenth section of its charter; as to the meaning and extent of this contract as a protection to the bank against further taxation than that exacted by the terms of that section; and as to the inviolability of that contract during the continued existence of the bank under the statutes extending its charter life.

In like manner the court will, in looking into the records and the opinion of the Court of Appeals of Kentucky, delivered in June, 1895, and reported in 97 Kentucky, ascertain that the matter that was there in issue was the effect of the Hewitt law; of the compliance therewith by the Bank of Kentucky; of its scope and true meaning, and of the protection it afforded to banks involved in that litigation against the scheme of assessment and taxation provided under the new Constitution and the revenue law of November 11, 1892, or any other constitutional or statutory enactment which, during the charter life of these banks, should endeavor to impose a different mode or greater rate of taxation upon the litigating banks than was imposed by the terms of the contract made between the State and the banks under the authority of the Hewitt law.

We invite an examination into the pleadings of the Bank of Kentucky in these cases. In every instance its claim for relief is specifically based on its contracts just as embodied in its original charter, and then as prescribed by the Hewitt law.

Res Adjudicata as Applied to Tax Cases.

It now remains for us to consider some cases which have been decided upon the proper application of the doctrine of *res adjudicata* to a litigation in reference to taxation.

An examination of these will show that the principles to be applied here are exactly similar to those in other cases.

In City of Davenport v. Railroad Co., 38 Iowa, 633, it appears that there was a suit for taxes by the city against the railroad company. These were claimed on the depot grounds situated within the limits. The question seems to have turned upon the construction of an Iowa statute, whether the railroad, by paying a tax on its gross earnings, thereby relieved itself from the payment of city taxes on real estate situated within the corporate limits.

A railroad company, predecessor to the one sued, had enjoined the city from the collection of such taxes for several years. It was insisted that this was *res adjudicata*. The court held that this was not true, that each year's taxes was a separate cause of action, and that the decision in the former case was not binding in this case. Among other things the court said:

> "Again, this case does not fall within the principle involved, where a particular issue of fact is tried and determined and judgment rendered upon such determination, which judgment estops both parties afterwards from denying the fact thus found and determined."

Here the court itself distinguishes this case from such a one as is at bar, because in the various cases which have been heretofore decided there has certainly been a mixed issue of law and fact; the existence, construction, and validity of the contracts between the banks and the State.

The cases of Keokuk & Western Railroad Company v. Missouri, 152 U. S. 301; K. & W. R. R. Co. v. Scotland Co., 152 U. S. 317, and K. & W. R. R. Co. v. Scotland Co., 152 U. S. 318, present this question of *res adjudicata* in various phases.

It seems that the Alexandria & Nebraska Railroad Company was a Missouri corporation having a certain exemption from taxation. A Constitution was adopted in Missouri subsequent to the organization of this company, forbidding further exemption from taxation. After this time the Alexandria & Nebraska Railroad

Company consolidated with the Iowa Southern Company. The new company made a mortgage upon its line. This mortgage was foreclosed, and the property purchased by the K. & W. Railroad Company. The question was whether the exemption from taxation originally belonging to the Alexandria & Nebraska Railroad Company passed to the consolidated company and inhered in the property and could be taken advantage of by the successor, the Keokuk & Western Company. The court held that by the consolidation the exemption from taxation entirely ceased. It appeared that the county of Scotland had sued the consolidated company, the M. I. & N. R. R. Company, to recover the taxes for 1872 upon the property in question, and had been defeated, the court holding it to be exempt under Section 9 of the charter of the Alexandria & Nebraska Railroad Company. The Supreme Court held that this estoppel did not apply in the present action for various reasons: 1. That there was no privity of estate between the Keokuk & Western Company and the M. I. & N. Company, because the K. & W. Company had purchased under a mortgage which had been granted prior to the suit against the M. I. & N. Company; that neither the trustee under the mortgage nor the bondholders had been parties to that suit, and that as an estoppel must be mutual, the judgment, if one had been rendered in favor of the county for taxes, would not be an estoppel against the trustee under the mortgage, and, therefore, could not be an estoppel in favor of a purchaser under foreclosure by such trustee.

2. The Court said that a suit for taxes for one year was not a bar to a suit for taxes for another year. We quote:

> "The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac, 94 U. S. 351."

The Court then quotes largely from this case, and quotes from the case of Davenport v. Chicago Railway, 38 Iowa, 633, which

we have above cited. Again, the court held that a suit by certain stockholders of the M. I. & N. Railroad Company against the company itself and against the County Court and officers of certain counties to enjoin the collection of taxes for 1881 was not such a suit as would raise an estoppel against the county, even though successful, because the Keokuk & Western Railroad Company, or the trustee under the deed of trust which was foreclosed, would not have been bound by an adverse decision.

We especially call the attention of the court to the fact that it appears in K. & W. R. R. Company v. Missouri, 152 U. S. 313, and in the Supreme Court of Missouri, Missouri v. K. & W. R. R. Co., 99 Missouri, that in the former adjudication which was attempted to be applied in bar it had been conceded and not decided that the exemption belonging to the original company had passed to the consolidated company. The question in the new case turned upon this conceded proposition, and the court held under the principles laid down in Cromwell v. County of Sac, and the other cases which we have cited, that the parties were only bound by such questions as had been decided in the former case, and not also by questions which might have been but were not in fact decided.

Here, again, we perceive the radical difference between this case and those at bar, because it only requires an inspection of the record, including the opinion of the Court of Appeals in these bank cases, to show that the very question here attempted to be made by the banks in regard to their contracts *were* made, and that the cases turned upon those very questions.

In Mills, Guardian, v. Hopkinsville, 11 Ky. Law Rep. 164, this state of the case appeared: One Mills had died, leaving an infant daughter. The domicile of the decedent had been in the city of Hopkinsville. The father appointed one Landes guardian of his daughter. The young girl lived for awhile in Hopkinsville where her guardian lived, but afterwards moved to Bowling Green. The question arose as to whether her personal property was taxable in Hopkinsville. The taxes had been paid,

and the guardian was suing to recover them. It appeared that the taxes sought to be recovered by the guardian were for the years 1886 and 1887. In September, 1886, the parties to this action had submitted an agreed case to the Christian Circuit Court, in which the guardian sought to enjoin the collection of the taxes for 1886 upon precisely the same grounds upon which he now sought to recover back the money. It was held that the taxes were legally assessed, and the court dismissed the action. There could be no appeal, owing to the amount in controversy. The court said:

> "That judgment is unquestionably decisive of appellant's right to recover back the taxes for 1886. The matter is *res adjudicata*. It is at least questionable whether it is not also decisive of the right to recover back the taxes for 1887. It is true the appellants did not in the former suit seek to enjoin the collection of taxes for the last named year, but the parties were the same as in this action; the facts upon which relief was therein sought as to the taxes of 1886 were precisely the same as those now presented, upon which the appellant bases his claim to recover back the taxes paid for both years. The same identical question is now presented. Before, it related only to taxes for the one year, while now it relates to both years. The ground upon which relief is sought is, however, precisely similar. The court is now asked to determine the same question between the same parties and upon the same facts. . . . While we think the doctrine of *res adjudicata* should in reason and upon authority be applied to appellant's entire claim, yet another point is decisive of this case beyond question."

In this Kentucky case it will therefore be perceived that the doctrine of *res adjudicata* is applied to a tax case just as to any other.

A very strong case is that of St. J. & G. I. R. R. Co. v. Steele, 63 Fed. Rep. 867, S. C., 27 U. S. App. 436, United States Circuit Court of Appeals for the eighth circuit, Brewer, Circuit Justice; Sanborn and Thayer, Circuit Judges; opinion by Judge Thayer. It is to be observed that this case was decided October 8, 1894, whereas the case of K. & W. R. R. Co. v. Mis-

souri, 152 United States, 301, was decided March 12, 1894; and although the case we are now dealing with does not cite the other case, yet it can not be doubted that the court was fully aware of what had been decided in it. In this case it appeared that the railroad company had filed a bill against one Steele, sheriff of Doniphan County, Kansas, to restrain him from selling a portion of a bridge across the Missouri River under a tax warrant. The question was as to whether the bridge had already, under the law of Kansas, been included in the general assessment of the railroad property.

It appears that the railroad company had filed another bill against the former sheriff of Doniphan County, and in this suit it had been finally adjudged and determined that the right to assess the bridge for the purpose of taxation was vested by the law of Kansas in the local township assessor, and not in the Board of Railroad Assessors.

This judgment in the former case was pleaded in the latter case. The Circuit Court of Appeals held that the former judgment was a bar to the subsequent proceeding, notwithstanding that the second proceeding was against a different sheriff and for a different year's taxes. The court said that the ultimate point to be decided in the former case was, whether the bridge was subjected to assessment by the local township assessor, and that the decision of that question turned upon the further inquiry, whether it was, in fact, a toll-bridge within the meaning of the Kansas statute which permitted toll-bridges to be assessed by local assessors. And the court held that this was the same question to be decided in the new case, and the result was that the decree in the suit against the former sheriff was held to operate as an estoppel, and to preclude the complainant in the action from contending to the contrary from what was therein found and determined, namely: That the bridge in question was a toll-bridge, and, as such, subject to assessment by the local authorities of the county.

This case has been carried to the Supreme Court of the

United States, and has been there reversed with directions to dismiss for want of original jurisdiction. (St. Jos. & G. I. Co. v. Steele, 167 U. S. 660.)

An authority, however, which the Circuit Court held to be conclusive of the question at bar is that of the city of New Orleans v. Citizens Bank of Louisiana, 167 U. S. 372. That was a bill filed by the Citizens Bank of Louisiana in the Circuit Court of the United States against the city of New Orleans, Board of State Assessors of the Parish of Orleans, and certain State tax collectors. The bill alleged that the complainant was contractually exempt from State and municipal taxation under its charter and the acts supplementary thereto.

It appeared that the bank was chartered in 1833. The term of the charter was to expire in 1884. In 1868 the State of Louisiana adopted a Constitution which directed that all property should be taxed in proportion to its value, provided that "the General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes."

In 1874 the General Assembly passed an act extending the charter to the year 1911. It appeared that prior to the time that the charter would have originally expired there had been certain litigations between the bank and the taxing authority, under which it had been adjudged that the bank could not be subjected to taxation. After the bank had entered upon the period of its extended existence, there were two suits determined in the Civil District Court which were not appealed. In each of these cases it was held that the bank was not subject to taxation. The *res judicata* of all these suits was set out in the bill of complaint. The court, however, in considering the question, eliminated all the judgments rendered prior to the period when the amended charter took effect, and confined the examination to the two judgments rendered by the Civil District Court, one as to the taxes for 1886 and the other as to those for 1887. The court said:

"The reason relied on to establish that these judgments do not constitute the thing adjudged are embodied in three propositions: *First*, because although it is true the officials who are made defendants are the successors in office of the officers who were impleaded in the judgments relied upon, as they are not the same natural persons, therefore there is a want of identity of parties; *second*, because the records do not show with sufficient certainty that these judgments were based on the identical claim of exemption from taxation which is now asserted, and therefore that the judgments do not establish that the matter here in issue was necessarily therein concluded; *third*, because whatever as a general principle may be the efficacy of the thing adjudged, that rule has no application to taxes of different years, since a judgment decreeing a tax of one year illegal can never be *res judicata* as to a tax of a future year—although the right to tax for a future year is resisted upon the same facts and between the same parties, and upon the identical legal grounds held to be conclusive in a judgment previously rendered between them. . . .

"The first contention based upon the mere change in the person holding the particular office is without merit. It is not denied that the tax collectors and board of assessors who stood in judgment in the suit when the decisions were rendered were duly qualified and empowered to that end. And it is also not gainsaid that the successors in office of those officers who are defendants here are also duly empowered. The mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged. (Scotland County v. Hill, 112 U. S. 183; Harshman v. Knox County, 122 U. S. 306; State v. Rainey, 74 Mo. 229; Harmon v. Auditor, 103 Illinois, 122.)

"The second question, then, is this: Were the final judgments which held that there was no power to levy the taxes on the Citizens Bank for the years 1886 and 1887 based upon the identical claim of exemption now asserted by the bank in order to defeat the taxes here in question?

"The petition filed by the bank in the suit, by it commenced, to have the taxes of 1886 on stock canceled and annulled is set out in full in the margin. It will be seen that it specifically averred the charter of the bank, and that under its provisions the bank could not be taxed, and to do so would impair the contract obligations created by the charter, and would be violative of the Constitution of the State of Louisiana and of the United States. It, moreover,

referred to the previous adjudication by the Supreme Court, and contained an allegation that the assessments, besides 'being illegal and without warrant of law, were excessive.' But the relief prayed was not the correction or reduction of an excessive assessment, but solely that the assessment be decreed 'void and null,' and be 'canceled and annulled.'

"The answers of the defendants asserted the legality of the assessment and denied the right of the bank to question the amount, because it had not availed itself of the antecedent statutory remedies necessary to entitle it to assert such right. The judgment rendered upon these issues decreed, not that the tax was excessive, not that it should be reduced, but that it was null and void, and must be canceled.

* * * * * * * * * *

"The judgment rendered for the tax of 1887, if it were possible, was even more conclusive of the identity of the issue than the one rendered for the taxes of 1886. In that case the suit was brought by the bank, not to assail an assessment which had been actually made, but to enjoin the making of any assessment against it whatever. The petition which is set out in the margin stated no ground for relief other than the claim of exemption. Indeed, the very nature of the remedy invoked precluded the possibility of any other ground, since the relief sought related not to an assessment already made, but to prevent any assessment whatever under the existing law of objects named from being made. How can it be contended that the assertion in the pleadings, that there was no power to make any assessment at all of the specified property, was simply a claim that an assessment was irregular? The judgment . . . was responsive to the issue presented, and enjoined in the making of any assessment for taxes for the year 1887. . . .

"It results from the foregoing that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive, unless the proposition be sound that a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year can not be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defense, and of the facts upon which the defense is founded.

"There is difficulty in meeting the argument by which the foregoing proposition is supported, because the reasoning commingles and treats as one two distinct and different questions. For instance, the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of *res judicata* to demands for taxes, but contends that wherever there are different demands the thing adjudged has no application, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances.

"On the other hand, the reasoning that this must be the rule because it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year, has for its basis the proposition that as a matter of public policy and public necessity the principles of the thing adjudged can never apply to taxation. In considering the question we separate at once these two conflicting contentions and examine first the proposition that, because a tax of one year is a different demand from the tax of a subsequent year, therefore *res judicata* as to one can never apply as to the other; and the second question, of whether as a matter of public policy the thing adjudged applies to taxes at all.

"The proposition that a suit for a tax for another, therefore *res judicata* can not apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

The court here relies on various authorities which we have already considered in this brief, among others Tioga R. R. Co. v. Blossburg R. R. Co., 20 Wall. 137; Mason Lumber Co. v. Buchtel, 101 U. S. 638; Cromwell v. Sac, 94 U. S. 353; Last

Chance Mining Co. v. Tyler Mining Co., 157 U. S. 687, also upon a Louisiana case, and then proceeds:

"It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

"The argument that, as a matter of public policy, the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law-making and not to the judicial department. But if the judicial mind could entertain the suggestion, it seems clear that it is without real merit. In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies: To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the case under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court, from the foundation of the government, declaring a particular tax or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged; for, manifestly, if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel can not also result from a judgment enforcing taxation.

"It is contended, however, that the asserted theory finds support in two authorities: one a decision of this court,

Keokuk & Western R. R. v. Missouri (152 U. S. 301), and the other, Davenport v. Chicago, Rock Island, etc., Railway (38 Ia. 633, 640). But that these authorities do not sustain the contention is demonstrable. In the Keokuk case, the court held that the controversy which it decided was not between the same parties as was the controversy in the case wherein the judgment was rendered, which was relied upon as *res judicata*. The two judgments, not being between the same parties, could have been and was no necessity for deciding whether, if the judgment had been between the same parties or their privies, it would have been *res judicata*. True it is, that in the Keokuk case the opinion *arguendo* discusses the question of whether a judgment against the validity of a tax for one year would be a bar to a suit for taxes for a subsequent year. But that this reasoning was not considered as relating to a case where the validity of the tax was resisted on a particular ground, which particular and special defense had been previously held between the same parties to be valid under identically the same conditions and circumstances, becomes clear when the context of the opinion is examined, and it is discovered that it approves and quotes the case of Cromwell v. Sac, the opinion in the Keokuk case saying: 'If there were any distinct question litigated and settled in the prior suit, the decision of the court upon this question might raise an estoppel in another suit upon the principle stated in Cromwell v. Sac, 94 U. S. 351.' To seek, then, to avail of the general language used in the opinion in the Keokuk case, without taking note of the circumstance that it was there said that the estoppel would exist even as to a tax in a case like this, is, in reason, to misinterpret the opinion and make it cover the very case which it in express language declared it was not intended to govern. It may also be conceded that language was used in the course of the opinion in Davenport v. Chicago, Rock Island, etc., Railway (*supra*), which is susceptible of the interpretation that under no circumstance, even between the same parties, would a judgment as to the tax of one year operate as the thing adjudged as to the tax of a future year. But that case stands alone, and the language therein used has been since, if not repudiated, at least qualified by the Supreme Court of Iowa to the extent necessary to bring that case in harmony with the true and universal doctrine so often laid down by this court. In Goodnow v. Litchfield (59 Ia. 226), where the Davenport case was pressed as an authority upon the Supreme

Court of Iowa, that court, in an opinion on a rehearing, said:

"'It is undoubtedly true that the taxes of each year ordinarily constitute separate and distinct rights or causes of action. But when an action is brought to recover taxes paid in one year, and an action is afterward brought to recover for the taxes paid in a subsequent year, and the adjudication in the first is pleaded as a bar to the recovery in the second action, the question whether the estoppel is effectual will depend upon the issues in the two actions.

"'If the right to recover and the defense thereto are based upon necessarily the same grounds, why litigate again the question that has been determined? In such case the very right of the matter is determined by a court of competent jurisdiction. It is not essential that the causes of action should be the same, but it is essential the right or title should be; that is, the issues in both actions and the matter on which the estoppel depends must be the same or substantially so. The very matter or thing which it is sought to litigate must have been adjudicated in the prior action. In such case the bar or estoppel is complete. This rule will not, we think, be disputed. Therefore authorities are not required in its support; but see Merriam v. Whittemore, 5 Gray, 316.'

"It follows, then, that the theory by which it is sought to take questions of taxation entirely out of the reach of the rule of the thing adjudged, is not only without foundation in reason, but is also without support of authority, since the case from this court, which is cited to sustain it, can not properly be said to maintain the contention, and the other from the Supreme Court of Iowa has been either overruled or qualified."

This case is in all respects so apposite that we forbear any comment upon it, but rely upon its judgment and its reasoning as fully conclusive of the question here at bar.

It was cited and applied in Sou. Pacific Co. v. U. S., 168 U. S. 51, as one of the latest expressions of the Court on the subject of *res adjudicata*.

We submit, therefore, that the cases relating to taxation proceed upon the same principles as other cases.

Various reasons are given why the Bank of Kentucky can not

rely upon the judgments rendered in its favor as determining, by the presumption of the thing adjudged, the existence and the character of its contract. Running through the argument of counsel upon the other side, there seems to be an idea that because the Bank of Kentucky stated what its rights were, besides stating what they had been adjudged to be, it thereby set the whole matter at large, and prevented itself from relying upon the adjudications as conclusive evidence of the truth of its allegations in reference to its rights.

Whatever doubt there may have been upon this subject at one time, this court has settled the law to be, that a party may rely upon a record, and judgment in a former case, without specially pleading, with the same effect as if he had pleaded it. Thus this court in Southern Pacific Railroad v. United States, 168 U. S. 59, said:

> "That the record and judgment in the former cases were admissible in evidence without being specially pleaded we entertain no doubt. . . . There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issues to which it relates, but is only persuasive evidence, and that the court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon principle the former judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it. Mr. Greenleaf correctly says that 'the weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence it is equally conclusive in its effect as if it was specially pleaded by way of estoppel. (1 Greenleaf on Evidence, Sec. 531.)' This view is in accord with the decisions of this court above cited."

If a record can be given in evidence, without being specially pleaded at all, *a fortiori* it can be used where it is specially pleaded, and the fact that the pleader also sets out what his rights were, in accordance with the judgment so alleged by him, can not prejudice the effect of the judgments as establishing the truth of his allegations.

There is another ground which is set up as avoiding the effect of these judgments, and that is, the assertion that where a litigant comes into a court of chancery he can not rely upon a judgment theretofore obtained by him unless such judgment can be shown to be without error.

It is quite obvious from the mere statement of this proposition that the highest form of evidence, viz., presumption from the thing adjudged, can never avail the complainant in a suit in equity, because if he must show not only the judgment but that it is without error, his showing of the judgment is a mere matter of supererogation. But such is not the law. It would extend this brief too long to attempt to go into the exceptional cases relied on to establish this proposition. They are, it seems to us, well summed up by this court in the case of Gay v. Parpart, 106 U. S. 699, where Mr. Justice Bradley, delivering the opinion of this court, adopts the opinion of the court of first instance in the following terms:

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem. In outward semblance this partition decree is a decision of court upon the relative rights of Charles D. Flaglor and his children, under the will of Garrett. In essential character it is but the judicially recorded supposed agreement of Flaglor. And upon an appeal to equity by original bill to lend its assistance for carrying it into execution, because of an omission in the decree in providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of

> any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension and want of consideration, to remain passive. (Wadhams v. Gay, 73 Ill. 415.)"

The case of New Orleans v. Citizens Bank, 167 U. S. 371, was one, as we have heretofore shown, on all fours with the case at bar. It was a suit to enjoin the collection of taxes, and the right of the complainant to its contract was established by producing records in which it had been adjudged that such contract existed. The court found no hesitancy in granting the relief.

So in Southern Pacific R. R. Co. v. United States, 168 U. S., page 1, the United States filed a bill in equity to quiet its title to certain land, and produced in evidence, as establishing its title, the record of a former suit between it and the defendant. The court gave the relief to the United States and refused to examine any evidence which might contradict the conclusions of the former judgment (see pages 62 to 66).

Another ground urged by the counsel for the city of Louisville is that the proceedings and judgment in the case of the bank against R. H. Thompson, Judge of the City Court of Louisville, was not such as to establish the right and contract of bank. The record of this suit will be found, Case No. 356, R. 77, 89. The judgment in that case we have heretofore quoted. We again call attention, however, to the fact that its language is as follows:

> "It is considered by the court that the prayer of the petition be granted, and that the City of Louisville and R. H. Thompson, Judge of the Louisville City Court, be and they are hereby prohibited from proceeding further with the warrant against the plaintiff, the Bank of Kentucky, in the city of Louisville, or making any further order therein. And it is further considered that the plaintiff recover of defendant, the City of Louisville, its costs herein expended, and may have execution therefor. To all of which defendants except and pray an appeal to the Court of Appeals, which is granted."

At page 89 appears the record of this case in the Court of Appeals of Kentucky, and it there appears that the appellants were the City of Louisville and R. H. Thompson, Judge of the City Court of Louisville.

In order to ascertain what are the issues in a cause, we know of no better way than by looking at the pleadings in the cause. In order to ascertain what was decided in a cause, we know of no better way than looking at the opinion in the cause. We mean that if it is desired to find out actually—not technically—what was involved in a controversy, there is no better method than the one we have above stated.

If the court will look at the petition of the Bank of Kentucky at R. 78, it will find that it rested its whole right upon its contract with the State, and the contention was that the ordinance was a violation of this contract right. If the court will look at the opinion of the court (Judge Field) at R. 85, it will find that this is the only question discussed by him. The case went off on demurrer to the petition.

As a matter of fact, therefore, no one can doubt what was the matter at issue in this cause, and unless there is some rule of law requiring the court to be blind, it must inevitably see that the only question involved, and the only question decided, was as to the contract right of the bank to commute its taxes under the Hewitt Law.

Exactly this same thing is true in reference to the proceedings and opinion and judgment in the Court of Appeals. The opinion of the Court of Appeals dealt with this contract right of the bank to so commute its taxes, and with nothing else. The learned counsel for the city of Louisville insists that the court might have decided that the ordinance was void, because the legislature had no right to grant to the city of Louisville the power to impose a license tax in lieu of an *ad valorem* tax; and cites the case of Levi v. City of Louisville, 97 Ky. 394, decided nearly a month before the bank cases reported in 97 Ky. 590, as establishing this proposition.

It must be admitted that the question determined in the Levy case was not in fact raised in the bank tax cases. The pleadings do not raise it; the opinion of the court of first instance does not refer to it, nor does the opinion of the Court of Appeals in any way touch upon it. Under these circumstances, suppose the matter were turned round, and we were claiming that we had established, as a matter of *res adjudicata*, by our proceedings, that the legislature could not authorize the city of Louisville to levy a license tax in lieu of an *ad valorem* tax, and attempted to prove this by the record presented to the court in this cause—is it not perfectly obvious that the learned counsel would reply: Whether or not you might have raised such a question, and whether or not the court would have decided it if you had raised it, it appears from all the proceedings, both in the court of first instance and in the Court of Appeals, that you did not raise it and that it was not passed on?

It is a mistake to say that we were not entitled to remedy by prohibition. Indeed, that was our only remedy. It is true the statute in this case provides (Section 2922, Kentucky Statutes) that the prohibition suit should only apply to an ordinance where a fine of twenty dollars or less was imposed by the ordinance. But in the case at bar the minimum fine imposed by the ordinance was five dollars; the maximum, one hundred dollars. Under the contention of the counsel there would be no remedy whatever, either by appeal or by writ of prohibition, in such a case, unless the court should impose a fine of as much as twenty dollars.

This, however, is quite beside the question. The Jefferson Circuit Court did take jurisdiction of the proceedings in prohibition; did render its judgment, and that judgment has been affirmed; and it is quite too late to raise such a question as this.

Another ground of objection is that the writ of prohibition is a criminal proceeding. Undoubtedly it must be admitted that under the Kentucky Code of Practice the writ of prohibition is a civil proceeding. It is provided for and the practice in ref-

erence to it prescribed in the Civil Code of Procedure. (Civil Code Kentucky, Chapter XII.)

We are, however, quite content to rest this part of the case upon the opinion of Judge Taft, from which we make the following extract:

> "The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its jurisdiction because proceeding under a void law. To that writ of prohibition the city of Louisville was not formally made a party in the Jefferson Circuit Court, but the litigation before the Jefferson Circuit Court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson Circuit Court to the Court of Appeals, the appellants were the City of Louisville and the Judge of the Police Court. By this means the city of Louisville formally made itself a party to the record, and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution, it might have been attached for contempt. (Bac. Abr. "Prohibition," M.) It is urged that the litigation was really a criminal litigation, and that a judgment in a criminal case can not be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil, and the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. (Armstrong v. County Court, 15 W. Va. 190; Walton v. Greenwood, 60 Me. 356.) However this may be, the city of Louisville,

admitting its interest, did appear as appellant, and so made itself a party to the whole litigation, and was so treated by the Court of Appeals of Kentucky."

Quite a different question is raised against the Bank of Kentucky by the learned counsel for the county of Franklin and the city of Frankfort. It is argued that the judgments rendered in favor of the Bank of Kentucky in the Franklin Circuit Court, in the two suits (one of which was brought against the county of Franklin and the other against the city of Frankfort) have been appealed to the Court of Appeals of Kentucky, and that pending this appeal these judgments have no force as *res adjudicata.*

The precise facts are important to be here noticed. The Bank of Kentucky brought two suits—one to enjoin the authorities of Franklin County, and the other to enjoin the authorities of the town of Frankfort from levying taxes upon the property of the branch bank carrying on business within the boundaries of those municipalities. The ground of suit in both instances was exactly that asserted now, viz., the contract which the Bank of Kentucky had made with the State by its original charter, and the altered contract made by the Bank of Kentucky with the State under the Hewitt law. In each suit the right of the bank to resist these taxes under this contract was set out fully, and the municipalities were asked to be enjoined from the violation of the contract rights of the bank.

To the petitions of the bank in each case demurrers were interposed by the municipalities. The learned judge holding the Franklin Circuit Court sustained the demurrers in each case, holding, in an opinion which is copied in the record, No. 356, page 50, that the contract under the Hewitt law was subject to cancellation by the State, and had been voided by appropriate legislation. From the judgment dismissing these petitions an appeal was taken by the Bank of Kentucky to the Court of Appeals, and, as we have heretofore pointed out, these were two of the cases decided by the Court Appeals and reported under

the style of Bank Tax Cases, 97 Ky. 590. The mandate in each case, addressed to the lower court, was to set aside its judgments dismissing the petitions, and to enter a judgment in conformity with the opinion of the Court of Appeals.

Thereupon the Franklin Circuit Court, in obedience to this mandate, on January 21, 1896, entered a judgment in each case, enjoining the municipalities from endeavoring to collect the taxes complained of, and fully establishing the contract right of the bank during the continuance of its charter life.

Two years after the decree was thus entered in obedience to the mandate of the Court of Appeals, the defendants in these two cases, viz., the City of Frankfort and Franklin County, appealed from these judgments to the Court of Appeals. It is this appeal from judgments rendered by the Franklin Circuit Court, in obedience to the mandate of the Court of Appeals of Kentucky, that is said to avoid the presumption from the thing adjudged herein asserted by the Bank of Kentucky.

This is, of course, no place to argue whether or not the judgment entered by the Franklin Circuit Court, in pursuance to the mandate of the Court of Appeals, did in fact conform to that mandate in form as well as substance. But it will hardly be denied that such a case is much stronger than one in which a judgment originally entered by the Circuit Court upon its own consideration of the question has been appealed from.

We respectfully submit that this contention of the learned counsel for the city of Frankfort and county of Franklin is met by either one of two propositions: First, a pending appeal does not affect a judgment as *res adjudicata*, and this is especially the case where nothing has been done to suspend the judgment by the execution of a bond or other appropriate proceeding. Second, we submit that whether or not the opinion of the Court of Appeals in 97 Ky. 590, is the law as applied to other cases, it is the law as applied to the cases in which it was rendered, without regard to the fact that it may be sound in argument or entirely erroneous.

The following is the judgment entered by the Franklin Circuit Court, in the case against the City of Frankfort, upon the return of the case from the Court of Appeals (R. 76):

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the Court of Appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that Article 2, of the Act of the General Assembly, entitled, 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886 (Gen. Stats., Chap. 92, Art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes, or in a different mode or at a greater rate of taxation than as provided for in said Act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business: That the provisions of the present Constitution of this State and of the Act of November 11, 1892 (Art. 3, Chap. 103, Acts 1891–2–3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property, or franchise, except to assess a tax for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void: That the Board of Valuation and Assessment provided for in said Act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now hereby, made perpetual, and the defendants be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

The following is the judgment of the Franklin Circuit Court, entered in the suit against the County of Franklin, in pursuance of the mandate of the Court of Appeals (R. 57):

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the Court of Appeals heretofore filed, reversing the former judgment of this court, and the Court being now sufficiently advised: It is adjudged that Article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, (Gen. Stats., Chap. 92, Art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business: That the provisions of the present constitution of this State and the Act of November 11, 1892 (Art. 3, Chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess a tax for county and municipal purposes, its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void: That the Board of Valuation and Assessment provided for in said Act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation: That the temporary injunction which was granted in this cause at the commencement of the action be and the same is now made perpetual, and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purpose of Franklin County upon the franchise or property of the plaintiff, except taxes upon its real estate used in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

In Kentucky there was for a long time a peculiar practice in injunction suits. Where an injunction had been granted originally and was dissolved on final hearing, the bill being dismissed, an appeal, with supersedeas, reinstated the injunction. Yocum v. Moore, 4 Bibb. 221; Talbot v. Morton, 5 Lit. 326; Smith v. W. U. T. Co., 83 Ky. 269; E. R. R. Co. v. Ashland R. Co., 94 Ky. 478.

To the contrary, however, where the injunction was made perpetual by the final decree, an appeal with supersedeas did not dissolve the injunction, but a party was subject to proceedings for contempt who violated it, pending the appeal. K. & I. B. Co. v. Krieger, 91 Ky. 625.

This matter was finally fixed by statute. The following is Section 747 of the Civil Code of Practice of the State of Kentucky:

> "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued. The provisions of the Civil Code concerning supersedeas on appeals shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions. When an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal upon such terms as to bond or otherwise as may be proper for the security of the rights of the opposite party. Either party, within twenty days after the entry of such order, may take a transcript of the record, or all parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party move the Court of Appeals, or, if in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified or continued pending the appeal. Pending such application to the Court of Appeals or judge thereof, but not longer than for twenty days, the status existing immediately before the entry of the judgment appealed from shall be maintained, and the lower court shall so provide in the judgment upon the request of either party. If, at any time, upon reasonable notice to the party affecting,

> it may be made to appear that the sureties upon the bond required in the court below are insufficient, the Court of Appeals, or a judge thereof in vacation, may set aside the order suspending, modifying or continuing the injunction pending the appeal, unless sufficient surety be furnished by a day fixed by the court or judge."

Under this it is apparent that the appeal from the judgments given above have no effect whatever upon their binding force. In other words, they must be obeyed until reversed.

A writ of error from this court does not vacate the judgment below. This is expressly decided in Railway Co. v. Twombley, 100 U. S. 81. In that case judgment had been recovered on a right of action given by a statute. Pending a writ of error to this court, the statute was repealed. It was insisted that this made an end to the cause of action, but this court held to the contrary. It said:

> "A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition."

So this court has held consistently that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court. Slaughter House Cases, 10 Wall. 297; Hovey v. McDonald, 109 U. S. 161; Leonard v. Ozark Land Co., 115 U. S. 468.

The case of Hovey v. McDonald is particularly pertinent. At page 161 is given the rule adopted by this court in October, 1878, which is quite like the Section 747 of the Civil Code of Practice of the State of Kentucky above cited, in giving the power to suspend or modify an injunction during the pendency of an appeal. In reference to this Mr. Justice Bradley says (page 162):

> "Of course where the power is not exercised by the court nor by the judge who allows the appeal, the decree retains its intrinsic force and effect."

Such is the rule in Kentucky. A judgment or decree (under our present practice all are judgments) stands in full force and effect until reversed. An appeal does not stay proceedings even unless a supersedeas be issued. (Section 747 of the Civil Code, *supra*.)

In Dupuy v. Johnson, 1 Bibb, 565, the court said:

> "That a judgment or a decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it never can be overhauled or its correctness questioned in an original suit, is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion."

In Allen's Heirs v. Hall's Heirs, 1 Marshall, 526, the court said:

> "There is no doubt but that the parties to a suit either at law or in the chancery are bound by the judgment or decree pronounced therein, and are bound thereby, while it remains unreversed, from rediscussing in another suit the matters thereof, and their privies are alike bound and barred."

In Cates v. Loftus' Heirs, 4 Monroe, 443, there was a bill in equity to which the defendant answered, pleading a decree which he had obtained in another cause between himself and the complainant, and it was insisted that this decree was a bar. The Circuit Court dismissed the bill, holding that the bar was valid. The Court of Appeals affirmed the judgment. It said that it knew that since the decree under examination was rendered the decree pleaded in bar had been reversed, but that the court was bound by the record, and must affirm the decree which was rendered prior to the time of such reversal.

This seems to us decisive of the present controversy.

In Bank of Kentucky v. Van Meter, 10 B. M. 66, it appeared that a decree was rendered directing the sale of certain property. One of the parties prayed an appeal from this decree. Under the law he was entitled to execute bond within forty days thereafter. Within those forty days the decree was executed by

a sale of the land. The decree was subsequently reversed; and thereupon the litigant who had thus succeeded in reversing the decree of sale endeavored to have the sale set aside; but the court decided to the contrary, expressly holding that the granting of an appeal does not *ipso facto* suspend the judgment or prevent any proceeding for its enforcement.

In Kaye v. Kean, 18 B. M. 846, there was no action for malicious imprisonment. It appeared that one Kean had applied to the Jefferson Circuit Court for a mandamus upon the common council of the city of Louisville to grant him a tavern license. The Circuit Court granted the mandamus. The council refusing to obey, the members were imprisoned. On appeal the judgment for the mandamus was reversed, and the petition ordered to be dismissed. Thereupon one of the members of the council sued Kean as above; but the court held that the judgment of the Circuit Court must have been obeyed pending the appeal and until it was reversed.

These cases seem to us to abundantly support the proposition that such a judgment as we have here pleaded is in full force and effect for all purposes, notwithstanding an appeal may be pending from it.

And, as we have insisted above, this must be true *a fortiori*, because whatever may be the law in any other case, the opinion of the Court of Appeals in this case is the law of this case.

That the opinion of the Court of Appeals in a case is binding as *res adjudicata* upon the Court of Appeals on a second appeal has been frequently held in Kentucky. We need only refer to such old cases as Morgan v. Dickerson, 1 Monroe, 20; Carlisle v. Long, 3 Marshall, 435; and to so new a case as Smith v. Brannin, 79 Ky. 117. The last case is particularly striking, as holding that where there was an equal division of the court upon the first appeal the decision of the vice-chancellor, from whose court the appeal had been taken, so far as concurred in by two judges, was the law of the case upon any subsequent appeal.

We do not think it necessary to examine the many cases cited

in the text-books upon the subject of the effect of an appeal upon a judgment offered to be pleaded in bar. These cases at last turn on the question as to the effect of the appeal upon the judgment sought to be reviewed. Where this effect is to nullify or vacate the judgment so that there is no judgment until the appellate tribunal has passed upon the appeal, then of course the judgment thus vacated or nullified is not good in bar as *res adjudicata*. On the contrary, where the appellate tribunal does not try the case *de novo*, but its power and authority are confined to an affirmance, reversal, or modification of the judgment of the tribunal of first instance, then until the judgment is modified or reversed it is effectual for all purposes, and, among others, as a bar to another proceeding involving the same matter.

This explanation of these cases is given with great clearness by Judge Deady in Sharon v. Hill, 26 Fed. Rep. 345. It was there held that a judgment of the Superior Court of California pleaded in bar could not be so used, as it appeared that the judgment was pending upon an appeal, and the California Code provided that an action should be deemed to be pending from the time of its commencement until its final determination upon appeal. The appeal, therefore, was held to be as much a step in the case as the original decision of the tribunal of first instance.

The matter is also stated with entire clearness by the Supreme Court of Connecticut in the case of Bank of North America v. Wheeler, 28 Conn. 433. Many cases to the same effect are cited in 1 Freeman on Judgments, 4th Ed., Section 328, note.

So also in Faber v. Hovey, 117 Mass. 108, where there was an action upon a judgment rendered in a court of the State of New York, from which an appeal was still pending, the court said:

> "The case stated shows by the law of New York an appeal does not vacate the judgment appealed from or stay execution unless the appellant gives security to pay the judgment with costs and damages if it is affirmed, and corresponds in this respect rather to a writ of error or review than to an appeal under our practice. It follows that the

judgment recovered by the plaintiff against the defendants is in full force notwithstanding the appeal, and that the plaintiff is entitled to maintain his action thereon. And so are all the authorities."

We therefore submit that the pendency of an appeal from these judgments in no way affects their validity or their effect when pleaded or given in evidence in the controversy now at the bar.

The question made by the defendants, the county of Franklin and the city of Frankfort, in paragraph 20 of their answer (R. 108), and noticed by the Circuit Court in the conclusion of its opinion (R. 163), need not be further noticed, as it is not embraced in the assignment of errors (R. 165) nor mentioned in the brief of counsel.

In conclusion, we respectfully submit that the decree appealed from should be in all respects affirmed.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
For Appellee.

APPENDIX.

THE HEWITT ACT.

SECTION 1. That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation as is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

SECTION 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the Auditor of Pub-

lic Accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and 20 per cent upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths:

> "I ——— ———, swear (or affirm) that I am the ——— of ——— ———, and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulations of said ———, and how or in what said surplus, undivided profits, or undivided accumulations is invested."

SECTION 3. If any such bank, institution or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits, or undivided accumulations than an amount equal to 10 per cent of such capital stock, the excess of the amount so invested over the amount equal to 10 per cent of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

SECTION 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular

or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right, under the acts of Congress or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

SECTION 5. The said banks may take the proceeding authorized by Section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, they pay the tax provided in Section 1 from the passage of this act.

SECTION 6. This act shall be subject to the provisions of Section 8, Chapter 68, of the General Statutes.

SECTION 7. If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in Section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits shall be assessed as directed by Section 2 of this act, and the same taxes—State, county, and municipal—shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: *Provided*, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

STATUTORY METHOD OF COLLECTING TAXES.

SECTION 4129. *Sheriff to collect unless law otherwise directs.*—The Sheriff, by virtue of his office, shall be collector of all State, county, and district taxes, unless the payment thereof is, by law, especially directed to be made to some other officer.

SECTION 4148. *Sheriff may distrain—Compensation for collecting taxes—Limit.*—The sheriff, from and after the first day of March in each year, shall collect the taxes due in his county, and upon failure by the persons bound therefor to pay the same, may distrain the goods and chattels owned by or in the rightful possession of the persons from whom the tax is due, notwithstanding the existence of any lien upon the same; and may proceed to sell the title of such person in so much thereof as will pay the tax due and all costs, in the mode prescribed by law. Sheriffs shall be allowed by the Auditor the following commission upon the sums collected and accounted for or paid into the treasury in each year: Upon the first $5,000, 10 per cent, and upon the residue, 4 per cent; *Provided*, that in no case shall the aggregate annual compensation of the sheriff for official services exceed $5,000, independent of the compensation of legally authorized deputies and assistants.

SECTION 4151. *Real estate sold if no personalty found—Advertisement and sale—Costs.*—If there be no personal property that the sheriff or tax collector can distrain for taxes due, and the same shall not be paid by the first day of July, the sheriff or tax collector shall sell for cash any real estate belonging to or listed by such delinquent taxpayer, or so much thereof as will pay the taxes due and his commission, in the same manner that lands are sold under execution, except that the land shall not be valued or levied on, and shall be advertised by posting, for fifteen days before the sale, a written or printed notice at the court-house door, and by publication once a week for four weeks prior to the day of sale in a newspaper of general circulation, if there be one in

the county; if not, then by printed hand-bills posted for fifteen days before the sale at the court-house door, and in three or more conspicuous places in the tax district; and he shall, not less than fifteen days before the sale, mail to the delinquent a postal card addressed to his place of residence or place of business, if such can be ascertained, notifying him of the time and place of the sale; and in order to cover the cost of such advertisement and notification, the sheriff shall have two dollars for each person whose property is advertised, to be paid by the delinquent, but in no event to be paid by the State.

SECTION 4184. *Form of notice to person indebted to delinquent taxpayer.*—If the sheriff, his deputy, or other person having revenue, county levy, or other taxes of any character, or other public dues, in his hands for collection, believes another person to be indebted, in money or property, to the person owing taxes or public dues, and believes he can not otherwise collect the tax, he shall deliver, or cause to be delivered, to the person owing the taxes or public dues, and to the person owing him, anywhere he may be found, written notice in substance as follows:

"Mr. A B, the taxes due by C D amount to the sum of $——— ——cents. To that extent you are notified not to pay or deliver to him any money or property which you now owe, or may hereafter be indebted to him, and to appear before the county court of——— County on the first day of its next term, to show cause why you should not be adjudged to pay said taxes. This—— day of———, eighteen———.

"———, *Sheriff.*"

REVIEW OF CASES INVOLVING CONTRACTS.

The cases in which the remedy by injunction has been sought to protect a contract commuting taxation or exempting certain property from taxation are of two classes: One in which the remedy has been sought in the State court, and the case has come to this court by writ of error from the highest State court.

These cases are interesting, as showing what is the general State law on the subject. The other class embraces cases in which the remedy was originally sought in the Circuit Courts of the United States, and the case came to this court by appeal.

We do not pretend to say that the question of the jurisdiction in equity was discussed in these cases. Indeed, in only a few of them do we find the subject adverted to. But we believe that no better test can be made of the law as to the jurisdiction of a court of equity to grant an injunction than the ascertainment of whether or not jurisdiction has been actually taken in such cases. Nor do we pretend that if these cases are examined it will not be found, in many of them, that there were special circumstances, the existence of which would give jurisdiction—as the question of cloud upon title to land, or the avoidance of a multiplicity of suits. In many cases the facts show that there did exist one or the other of these circumstances; but in others, so far as the opinions in this court go (and we have not attempted to examine further than this), no such circumstances existed. And this jurisdiction has been assumed as well where it has been sought to enjoin the assessment of tax forbidden by contract to be exacted, as where it was sought to enjoin the collection of the tax.

A short statement of these cases is as follows:

Cases Brought Originally in Circuit Courts of the United States.

New Orleans v. Citizens Bank, 167 U. S. 372. Suit by bank against sundry sheriffs to enjoin the collection of taxes against the property of the bank.

Shelby County v. Union Bank, 161 U. S. 150. Suit by bank to restrain municipal authorities from collecting tax on surplus of the bank.

Keokuk R. R. v. Scotland County, 152 U. S. 318. Suit by Railroad Company against judges of three county courts in Missouri to enjoin collection of taxes.

Yazoo R. R. v. Board of Levy Commissioners, 132 U. S. 190. Suit against sundry tax collectors to enjoin collection of taxes on the railroad.

Picard v. East Tennessee Co., 130 U. S. 638. Suit to enjoin collection of taxes assessed by Board of Railroad Tax Assessors.

Huntington v. Worthen, 120 U. S. 99. Suit against sundry sheriffs to enjoin from collecting taxes assessed by Board of Railroad Commissioners.

Hoge v. R. R. Co., 99 U. S. 349. Suit to enjoin taxing officers of South Carolina from levying State, county, or municipal taxes upon property of the railroad company.

County of Calhoun v. American Co., 93 U. S. 124. Suit to enjoin municipal authorities from collecting tax on certain lands.

Bailey v. Magwire, 22 Wall. 216. Suit to enjoin Magwire, Collector of State, County, School, and City Taxes for county and city of St. Louis, Mo., from collecting certain taxes on the Railroad Co.

The Delaware R. R. Tax, 18 Wall. 208. Suit to enjoin the State Treasurer and Collector of State Taxes of Delaware from collection of certain taxes.

Humphrey v. Pegues, 16 Wall. 246. Suit to enjoin county officers from collecting certain taxes.

Tomlinson v. Jessup, 15 Wall. 454. Suit to enjoin certain officers of the State of South Carolina from levying a tax on the property of the Railroad Co.

Tomlinson v. Branch, 15 Wall. 460. Suit to enjoin State Auditor and certain county collectors from collecting certain taxes imposed on the Railroad Co.

City of Charleston v. Branch, 15 Wall. 471. Suit to enjoin Councils of Charleston to prevent collecting of certain taxes.

CASES ON APPEAL FROM THE HIGHEST COURT OF THE STATE.

Wilmington R. R. v. Alsbrook, 146 U. S. 279. Error to the Supreme Court of the State of North Carolina. Suit to enjoin the Sheriff of Halifax County from collecting certain taxes.

Yazoo R. R. Co. v. Thomas, 132 U. S. 174. Error to the Supreme Court of the State of Mississippi. Suit to enjoin sundry tax collectors against the collection of certain taxes.

Southwestern Co. v. Wright, 116 U. S. 231. Error to the Supreme Court of Georgia. Suit to restrain the collection of taxes.

Southwestern Co. v. Georgia, 116 U. S. 231. Error to the Supreme Court of Georgia. Suit to restrain the collection of taxes.

Chesapeake R'y Co. v. Miller, 114 U. S. 177. Error to the Supreme Court of Appeals of the State of West Virginia. Suit against the auditor of that State to restrain the collection of a tax.

Memphis Co. v. Commissioners, 112 U. S. 609. Error to the Supreme Court of the State of Arkansas. Suit to enjoin Board of Railroad Commissioners from assessing property for taxation.

Railroad Co. v. Loftin, 105 U. S. 258. Error to the Supreme Court of the State of Arkansas. Suit by the Railroad Co. to restrain the collection of taxes.

St. Louis R'y Co. v. Berry, 113 U. S. 471. Error to the Supreme Court of the State of Arkansas. Suit to restrain the Railroad Commissioners of the State from assessing for taxation certain property.

Wilson v. Gaines, 103 U. S. 417. Error to the Supreme Court of the State of Tennessee. Suit to enjoin the collection of taxes on a railroad.

Railway Co. v. Loftin, 98 U. S. 563. Error to the Supreme Court of the State of Arkansas. Suit to enjoin the Collector of Jackson County from collecting certain taxes.

Railroad Co. v. Gaines, 97 U. S. 698. Error to the Supreme Court of the State of Tennessee. Suit by three railroad companies to enjoin officers of the State from assessing and collecting taxes.

Wilmington R. R. v. Reid, Sheriff, 13 Wall. 264. Error to Supreme Court of North Carolina. Suit to enjoin a sheriff from the collection of certain taxes.

Home of the Friendless v. Rouse, 8 Wall. 433. Error to the Supreme Court of Missouri. Suit to enjoin the Collector of Taxes of St. Louis from collecting certain taxes.

Armstrong v. Treasurer of Athens County, 16 Peters, 301. Error to the Supreme Court of Ohio. Suit to enjoin a tax collector from enforcing the payment of a certain tax.

These cases—both those originally instituted in the Circuit Courts of the United States and those originally instituted in the chancery courts of the various States—were all founded upon an allegation that the tax was about to be assessed or levied in violation of a contract between the State and the person or corporation owning the property.

ACTS EXTENDING CHARTER.

An Act to Extend the Charter of the Bank of Louisville, Bank of Kentucky, and Northern Bank. Approved February 15, 1858.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the chartered privileges and rights of the president, directors, and company of the Bank of Louisville shall continue in full force for the period of twenty years from the first day of January, 1863; that the chartered privileges of the president, directors, and company of the Bank of Kentucky shall continue in full force for twenty years from the first day of October, 1864; and that the chartered privileges and rights of the president, directors, and company of the Northern Bank of

Kentucky shall continue in full force for twenty years from the first day of May, 1865. But said extensions of the charters of said banks shall be subject to the restrictions and provisions following, viz:

1. Each of said banks shall be subject to all the restrictions, limitations, penalties, conditions, and duties imposed on them by the respective acts for their incorporations and the acts amendatory thereto.

2. The legislature shall at all times have the power to prohibit the issue of bank notes under the denomination of five dollars, and, after 1875, of notes under the denomination of ten dollars.

3. After the termination of the present charters, and after this act takes effect as to each of said banks, neither of them shall at any time have in circulation a greater amount than the actual capital paid in.

4. In one year from the 1st of June, 1858, the Northern Bank shall establish a branch in the town of Glasgow, in the county of Barren, with a capital of one hundred and fifty thousand dollars. The Bank of Kentucky shall establish a branch at the town of Columbus, in the county of Hickman, with a capital of one hundred and fifty thousand dollars. And the Bank of Louisville shall establish a branch at the town of Burkesville, in Cumberland County, with a capital of one hundred and fifty thousand dollars.

SECTION 2. That said banks shall not invest in bills of exchange more than double the amount of the notes discounted and suspended debt and other investments of said bank bearing six per cent interest, excluding from the computation of bills of exchange the remittances which said bank may make for the collection at points where the funds may accumulate.

SECTION 3. That the stockholders of the several banks aforesaid shall, within one year from the 10th of May, 1858, by a vote of a majority of all the stockholders, given at a stated or called meeting, determine whether they will accept the proposed

extensions. The Governor of this Commonwealth shall have the power, in person or by proxy, to vote the stock of the Commonwealth; and each bank accepting the provisions of this act in the mode aforesaid shall notify the Governor of the Commonwealth of the acceptance by the certificate of the president and directors of such bank; and when notice is thus given this act shall be considered in full force and effect as to such bank.

SECTION 4. That said banks shall issue no bills or bank notes, checks, or orders, to circulate as money, of a less denomination than five dollars; and after 1870 they shall issue no bills or notes, checks, or orders, to circulate as money, of a less denomination than ten dollars; and said banks shall redeem before 1865 all their notes and bills of a less denomination than five dollars, and shall not pay out the same again after that date; and said bank shall redeem before 1870 all their bills and notes of a less denomination than ten dollars, and shall not pay out the same again after that date.

SECTION 5. That no part of the capital of either of said banks shall be used in the purchase of bills or discount of notes beyond the limits of this State; but money received by either of said banks in payment of bills purchased or discounted within this State, and payable at points beyond its limits, may be reinvested out of this State in bills of exchange having not more than ninety days to run; and nothing herein shall be so construed as to prevent either of said banks from receiving any bill or note out of the State in payment or settlement of any bad or doubtful debt.

SECTION 6. That the Bank of Kentucky, the Northern Bank of Kentucky, and the Bank of Louisville shall be and the same are hereby required to pay annually to the commissioners of the sinking fund fifty cents upon each one hundred dollars of the contingent fund now held or may hereafter accrue to said banks over and above the amount now required to be retained by their respective charters.

AN ACT TO AMEND THE CHARTER OF THE BANK OF KENTUCKY. APPROVED FEBRUARY 1, 1872.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the president and directors of the Bank of Kentucky be and they are hereby authorized and empowered to purchase from the commissioners of the sinking fund the stock of said bank owned by the State; and the commissioners of the sinking fund be and are hereby authorized to sell on such terms as may be agreed on with said commissioners.

SECTION 2. That the said president and directors of said bank may cancel the stock so purchased, and may at their pleasure reissue the same in such amounts and on such terms as they may deem proper: *Provided*, That the said bank shall issue no stock except when it has been subscribed for on its books and actually paid in.

SECTION 3. That from and after the purchase of the stock as in this act authorized, the right of the State of Kentucky to appoint or retain directors in said bank shall cease; but the number of directors thereof shall remain nine, as now provided by law, all to be elected by the stockholders of the bank.

SECTION 4. That the said president and directors of said bank may continue, establish, and withdraw its branches, as to them may seem desirable, and increase the capital stock of the bank, but not to exceed three millions of dollars; and may use so much of the capital stock in the city of Louisville as they deem is for the interest of the stockholders: *Provided*, That said bank shall annually, on the first day of January, pay into the treasury, to go into revenue proper, a tax of fifty cents on each share of one hundred dollars of its increased capital stock, which shall be in full of all tax or bonus on such increased capital stock.

SECTION 5. That the charter of the Bank of Kentucky be and the same is hereby extended twenty-five years.

SECTION 6. The president, directors, and company of said bank shall have all the rights, privileges, and franchises granted

to other banks of Kentucky: *Provided*, That nothing in this act shall be so construed as to give to the Bank of Kentucky the privilege to engage in insurance, warehousing, or any other business except a legitimate banking business.

SECTION 7. The directors of the bank may appoint a vice-president thereof, whose powers, duties, and term of service shall be regulated by the by-laws of said bank.

SECTION 8. This act shall take effect from its passage.

SUPREME COURT OF THE UNITED STATES.

SAMUEL H. STONE, AUDITOR, ETC., - - *Appellants,*

No. 356. *VERSUS*

BANK OF KENTUCKY, - - - - - - *Appellee,*

AND

SAMUEL H. STONE, AUDITOR, ETC., - - *Appellants,*

No. 358. *VERSUS*

BANK OF LOUISVILLE, - - - - - *Appellee.*

We beg leave to present a copy of the Act to Extend and Continue the Charter of the Bank of Louisville, approved May 1, 1880.

The first act extending the charter of this bank will be found in our brief for the Bank of Kentucky, at page 101.

And we further present the opinion of the Court of Appeals of Kentucky, delivered March 2, 1899, dismissing the appeal of the City of Frankfort from the judgment rendered by the Franklin Circuit Court, January 21, 1896. (R. No. 356, p. 76.) And from a similar judgment rendered in favor of Farmers Bank of Kentucky, January 21, 1896. (R. No. 385, p. 127.)

ALEX P. HUMPHREY,
GEO. M. DAVIE,
For Appellee.

AN ACT TO EXTEND AND CONTINUE THE CHARTER OF THE BANK OF LOUISVILLE.

Whereas, It is represented to this General Assembly that the charter of the Bank of Louisville will expire and cease on the first day of January, 1883, and in order to remedy and continue and extend the same,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the chartered rights and privileges of the president, directors, and company of the Bank of Louisville shall continue and extend in full force and effect for twenty years from and after the said first day of January, 1883.

Section 2. Said bank, under the continuance and extension hereby granted, shall be subject to the restrictions, limitations, penalties, conditions, and duties, and be entitled to all the rights imposed and granted upon and to it by the act of its incorporation and the acts amendatory to, or relating thereto, now in force; but it may, at any time, sell and dispose of any or all real estate taken by or conveyed to it in payment of any debt or debts due it.

Section 3. Before this act shall go in force or take effect, it must be approved and accepted by a majority in interest of its stockholders at a meeting ordered or called for that purpose by the president and directors of said bank.

Section 4. If it should be so approved and accepted, notice thereof shall be given by the president of said bank to the Governor of said Commonwealth; and, when given, this act shall be considered and held to be in full force and effect.

Approved May 1, 1880.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT V. FARMERS BANK OF KENTUCKY.

SAME v. BANK OF KENTUCKY.

(Court of Appeals of Kentucky, March 2, 1899.)

Time—Method of Computation—Limitation of Appeals—Rehearing of Motion to Dismiss Appeal.

1. Civ. Code Prac. S. 681, providing that "if a certain number of days be required to intervene between two acts, the time of one only of the acts may be counted," does not apply where the computation is to be made from an act done, in which case the day on which the act was done must be included; and therefore an appeal granted January 21, 1898, from a judgment rendered January 21, 1896, is too late, under Civ. Code Prac. S. 745, providing that "an appeal shall not be granted, except within two years next after the right to appeal first accrued."

2. The computation of the two years within which an appeal may be granted must be made from the time at which the appeal might first have been granted by the trial court, and not from the time it might first have been granted by the clerk of the Court of Appeals.

3. The court may grant a rehearing of a motion to dismiss an appeal which has been overruled.

"To be officially reported."

Petition for rehearing. Granted.

For former report, see 47 S. W. 872.

DURELLE, J.

In each of these two cases the judgment appealed from was rendered January 21, 1896, and the appeal was granted by the clerk of the Court of Appeals upon application of appellant, January 21, 1898. In each case the plea of limitation is filed, and motion made to dismiss the appeal, under Section 745 of the

Civil Code of Practice, which provides: "An appeal shall not be granted, except within two years next after the right to appeal first accrued."

In Smith v. Cassity, 9 B. Mon. 192, where the decree was rendered on the 25th day of September, 1845, and the writ of error sued out on the 25th day of September, 1848, it was held that the then existing period of limitation of three years had not expired, the court using the following language:

> "The universal rule of computing time from one day to another is to exclude one and include the other."

But in Chiles v. Smith's Heirs, 13 B. Mon. 460, the final decree was rendered on October 18, 1848, and the writ of error sued out October 18, 1851. The statute was, in language, similar to the existing statute, and provided that no writ of error should be sued out, "except in three years next after the judgment or final decree, and not thereafter." The court, in a very carefully considered opinion by Judge Simpson, in which the then existing authorities were discussed, said:

> "If the day in which the decree is rendered is to be included in the computation of the time, then the three years had expired on the 17th of October, 1851, and the bar was complete when the writ of error was sued out. The rule in regard to the computation of time seems to be that, when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done; but when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded."

But it is urged that Section 681 of the Code of Practice has changed the rule. That section reads as follows:

> "If a certain number of days be required to intervene between two acts, the day of one only of the acts may be counted."

After a careful reconsideration of the question here presented, we are unable to see that the Code section just quoted applies to the question before us. It was intended to apply to cases like the one presented in Fehler v. Gosnell, 35 S. W. 1125, where the statute under construction provided that fourteen days must elapse between the passage of an ordinance by the board of council and by the board of aldermen of the city of Louisville. Moreover, the law embodied in Section 681 appears to have been first adopted in 1854, and to have been continued from that time down to the present, notwithstanding which the rule of construction announced in the case of Chiles v. Smith's Heirs has been repeatedly reaffirmed by this court, down almost to the present day. In Batman v. Megowan, 1 Metc. (Ky.) 544, decided in 1858, the statute required notice of an application to contest the election to be given within ten days after the final action of the board of examiners. They acted on the sixth; and, on the authority of Chiles v. Smith's Heirs, notice given on the sixteenth was held too late. Counsel for appellant called attention to the fact that in that case it was held (page 549) that the part of the statute which directs the sheriff to deposit the poll-books within two days "next" after the election had effect to exclude the day of the election. This, however, was done upon the peculiar phrascology of the statute, the court holding that the two days "next" after the election meant the two next or following days. In Mallory v. Hiles, 4 Metc. (Ky.) 53, decided in 1862, the Chiles Case was referred to with approval. In Long v. Hughes, 1 Duv. 387, decided in 1864, in considering the Section (371) of the Civil Code of Practice which required the application for new trial to be made within three days after the verdict or decision was rendered, it was said, through Judge Williams:

> "Doubtless, the day on which a verdict or judgment is rendered should be computed; for, as said in Chiles v. Smith's Heirs, 13 B. Mon. 460, 'when the computation is to be made from an act done, the day in which the act was done must be included.'"

And this has always been the construction placed upon the provision as to new trials. In White v. Crutcher, 1 Bush, 472, decided in 1866, the rule laid down by Judge Simpson was again applied to Section 371 of the Civil Code of Practice, providing when motions for new trial might be made. In Wood v. Com., 11 Bush, 220, decided in 1875, the rule was again approved; and again in Handley v. Cunningham's Trustee, 12 Bush, 402; and again in Mooar v. Bank, 80 Ky. 308, decided in 1882; and again in Com. v. Shelton, 99 Ky. 120, 35 S. W. 128, decided in 1896. The same question was distinctly decided in Greer v. Spencer, 3 Ky. Law Rep. 469, decided in 1881.

It is urged by counsel that the right to appeal by suing out the appeal in the office of the clerk of this court does not accrue until after the end of the term at which the judgment is rendered. But we are clearly of opinion that the language used was intended to refer to the first accrual of the right of appeal; for the question of whether the appeal can be obtained from the lower court or from the office of the clerk of the court of appeals is one merely of procedure and not of right.

It is further objected that, having once acted upon the motion to dismiss by overruling it, the court should not now reconsider the question (which had been determined by interlocutory order) upon a petition for rehearing. But we are clearly of opinion that the court has power over such orders, within the term; and, so far as that is concerned, the petition for rehearing might be treated as a renewal of the motion. For the reasons given, the former opinion herein is withdrawn, and both appeals are dismissed.

Whole court sitting.

(49 Southwestern Rep. 811.)

[redacted]

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[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

SAMUEL H. STONE, AUDITOR, *et al.* - - - - - *Appellants,*

No. 358. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

CITY OF LOUISVILLE, - - - - - - - - - - - *Appellant,*

No. 359. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

Additional Brief for Appellants.

We desire to respond to some of the statements in the brief of counsel for appellee in these two cases, concerning the stipulation obtained from Judge Barker, former City Attorney, and his testimony, which does not appear to be borne out by the record.

The deposition of Judge Barker, taken by appellee, will be found in Record No. 362, pp. 42–63.

I.

The following statement in our original brief is called "remarkable" by appellee's counsel:

> "Is it not probable, therefore, that this retrospective agreement was not reduced to writing and signed until after the decision of the Court of Appeals of June 1,

> 1895? There is nothing in it to show it was executed at an earlier date. Thus this important stipulation appears to have been carried in the memory of counsel until that decision, and then it was formulated for the first time."

The Court's attention is invited to the testimony of Judge Barker, where he is interrogated as to when this document was prepared and signed. (*Ib.*, pp. 50, 51.) He does not fix the date, but states it was before Mayor Tyler's death, which occurred in January, 1896. Judge Pryor's decision was rendered June 1, 1895. When asked to point out anything in the stipulation itself indicating it was prepared or signed before that date, Judge Barker fails to do so, and states he remembers it was in Mayor Tyler's lifetime. He admits it was not reduced to writing until after the Jefferson Circuit Court had decided in July, 1894, the three prohibition cases (*Ib.*, p. 47), as well as after the second payments of license taxes by the banks, which began January 25, 1895, and continued until April 15, 1895. (Exhibit No. 6, Terry's Depo., Record 362, p. 77.) This is confirmed by the fourth clause of the stipulation, wherein it is recited that the banks had "*paid* the whole of the amount of taxes claimed as against them." (*Ib.*, p. 15.) Thus the preparation and execution of this stipulation must have occurred as late as April 15, 1895, only six weeks before the Pryor decision. In the absence of definite testimony fixing the correct date of its execution, we submit that we were justified in stating it was probably done after that decision, and, having been carried in the memory of counsel for a year or more, was then formulated in writing for the first time.

The apparently intentional and unexplained omission to give this important stipulation a date certainly subjects it to criticism, if not suspicion, for if executed before the liti-

gation ended in the Court of Appeals no good reason can be offered why it was not dated.

It was the duty of appellee, not of appellants, to take the testimony of others who signed this stipulation, in order that the Court might have all the light possible concerning the time and circumstances under which it was prepared and signed by those whose names appear thereto.

We did take the deposition of Mr. Terry, who has been the Secretary of the Commissioners of the Sinking Fund and the custodian of its records for twenty-three years. Being asked if he ever saw or knew anything of this stipulation, he answered as follows (R. 362, pp. 68-69):

> "A. No, sir; I never saw it.
>
> "Q. Was that document ever presented at any meeting of the Board of Commissioners and approved or ratified by it?
>
> "A. Not to my knowledge.
>
> "Q. Is there any minute on the journal of the Board of Sinking Fund Commissioners as to that document?
>
> "A. No, sir.
>
> "Q. Did you ever have it in your custody or control or keep a duplicate of it?
>
> "A. No, sir."

II.

Again, appellee's counsel in their brief (p. 24), speaking of the four banks that repudiated this stipulation, and sued the Commissioners of the Sinking Fund to recover back the license taxes paid by them, notwithstanding their counsel had signed it for them, state:

> "These suits were brought in the spring of 1896. The city promptly answered, setting up this stipulation as a bar."

This charge is repeated time and again in the brief of appellee's counsel.

Now the City of Louisville did not answer at all in said suits, and was not a party defendant thereto. They were brought against the Commissioners of the Sinking Fund, a distinct corporation, whose employed attorney, Judge Barker, filed their answer. He first testified he did not remember whether these suits were against the Sinking Fund or the City, but states (R. 362, p. 59): "They may have been, and probably were, against the Sinking Fund, but, *as attorney for the Sinking Fund,* I set up as a defense this agreement."

After his deposition was closed he, on his own motion, having in the meantime examined the records in said suits, added the following (p. 60):

> "As a part of my answer to said cross-question sixty-four, I desire to incorporate the third paragraph of *the answer of the Sinking Fund of Louisville* to the petition in the case of the German Security Bank *vs. The Sinking Fund of Louisville.*"

Thus it is made clear and beyond question that these four suits of the recalcitrant banks were not against the City at all, and the answers filed therein were not those of the City but of the Sinking Fund.

It is further stated in the brief of appellee's counsel (pp. 37–38) that the City of Louisville, by its own answers in said suits, not only first relied upon said stipulation as a bar in said suits, but admitted in such answers it was the real party in interest in the prohibition suits brought against the Police Court.

We submit that the appellee's counsel are hardly fair, in view of the facts shown by the record, in persistently stating to the Court that the answer of the Commissioners of the Sinking Fund in said suits, prepared and filed by their employed attorney, was the answer of the City of Louisville.

Instead of the City being the first to rely upon said stipulation, or estopped to dispute its validity, it was not even a

party to the suits of the four recalcitrant banks, who were clients of appellee's counsel and the first to repudiate said stipulation as a binding obligation on them. These four suits to recover back license taxes from the Sinking Fund were still pending and undetermined when Judge Barker's deposition was taken.

III.

It is claimed by appellee's counsel in their brief (pp. 33–34) that the rule laid down in Starr *vs.* Hall, 87 N. C., 381, that an attorney under his general authority cannot accept service of the original process in a suit brought against his client, does not apply to the City Attorney of the City of Louisville, "because the relation of client and attorney always exists between the City of Louisville and the City Attorney by virtue of the statute defining the authority of the City Attorney."

The statute does not create the relation of client and attorney between the City and City Attorney before suit is commenced by the issuance and service of the original process on the Mayor.

Its language is:

> "It shall also be his duty to prosecute and defend all *suits* for and against the City, and to attend to such other legal business as may be prescribed by the General Council." (Sec. 2909, Ky. Stats.)

The General Council has not prescribed any other legal business for the attention of the City Attorney, and without such legislative action by the General Council the City Attorney had no power whatever to bind the City by said stipulation with respect to its right to taxes for past or future years against institutions that had brought no suits involving such right.

The following testimony is taken from Judge Barker's deposition (R. 362, p. 48):

> "Q. 36. Was there any corporate action of the City of Louisville, by resolution or otherwise, passed by the General Council of the City of Louisville delegating to you authority to go into any agreement with the banks in respect to the rights of the City and the banks and trust companies.
>
> "A. No; there was no resolution or ordinance passed by the Board of the General Council authorizing me to do that; I did not think it was necessary that there should be; I thought then, as I know now, I had full authority as attorney for the City to make the agreement, and acted upon that supposition, rightfully or wrongfully."

The decision in Hefferman *vs.* Burt, 7 Ia., 320, is not in point, nor is it sustained by the weight of authority. Besides, in that case, the attorney had been employed in relation to that particular case, and the suit was actually brought. The stipulation made merely waived the requirement that the suit should be filed ten days before the approaching term of court. Furthermore, in that case the client recognized the right of the attorney to appear for him by paying part of the judgment, and agreeing to deliver property to satisfy the remainder. The court held that the defendant's remedy was not by appeal; but to enjoin the judgment, or hold the attorney responsible for all damages resulting from his unauthorized act.

In our original brief on this subject we said (p. 74):

> "No precedent was cited in the opinion by the court below, and none has been cited in the brief of counsel for these institutions, upholding an agreement like the one under consideration as coming withing the general authority of an attorney. We venture the assertion that opposing counsel cannot produce a decision of this court, or of the highest court of any State, which

> sustains a stipulation like the one presented in these cases, as being within the general authority of an attorney. In all the cases cited, or that can be cited on this point, it will be found that the stipulation in question by the attorney under his general authority was upheld or enforced with respect to pending cases in court only."

Although the briefs of appellee's counsel were prepared after they saw this challenge in our original brief, it has not been met or answered by the production of a single decision in point. This challenge is still open pending the oral argument of these cases.

That the authority of a corporation counsel or city attorney is no greater than the general authority of a retained private attorney, is abundantly established by the authorities. (People and Taylor *vs.* Mayor, 11 Abb. Pr. 66; our original brief pp. 72–73.)

IV.

We furthermore insist that the Circuit Court and this Court are without jurisdiction in these cases based as they are on purely non-Federal questions, which pertain only to matters of evidence to uphold a plea of *res judicata*, and the authority of an attorney under general law, or of the City Attorney of the City of Louisville, under the statute of the State of Kentucky for the government of that City. (Phœnix Fire & Marine Insurance Co. *vs.* Tennessee, 161 U. S., 183.)

In this connection we desire to cite this Court to the recent decision in the case of Union & Planters Bank *vs.* City of Memphis *et al.*, 46 S. W. Rep., 557–561, decided April 2, 1898. There the Supreme Court of Tennessee, in an able opinion by Justice McAlister, unanimously held, under a state of facts very similar to that shown in these cases, upon said bank's plea

of *res judicata* by reason of two prior decisions of that court in cases to which the City of Memphis was a party (State *vs.* Butler, 13 Lea, 400; City of Memphis *vs.* Union & Planters Bank, 91 Tenn., 546), that its said prior adjudications holding that said bank was by its charter, contractually exempt from the payment of all municipal taxes to said city, did not estop said city from claiming and collecting from said bank privilege taxes as well as *ad valorem* taxes.

The court on that point states (*Ib.*, 561):

> "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. *Since this is not a Federal question*, we decline to follow the ruling in City of New Orleans *vs.* Citizens Bank, 167 U. S., 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved. In State *vs.* Bank of Commerce, 95 Tenn., 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case.'"

As in our original brief, we respectfully submit that the decrees appealed from herein should be reversed, with direction to the Court below to dismiss the appellee's bills.

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Attorney-General,
For Samuel H. Stone, Auditor et al.

HENRY LANE STONE,
City Attorney,
For City of Louisville.

Office Supreme Court U.S.
FEB 17
JAMES H. McKENNEY

No. 358 and 359.

Brief of Humphrey & Davie for Appellee.

Nos. 358 and 359.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

Filed Feb. 17, 1899.

SAMUEL H. STONE, Auditor, et al., - *Appellants,* VERSUS BANK OF LOUISVILLE, - - - - *Appellee.*	No. 358.
CITY OF LOUISVILLE, - - - - *Appellant,* VERSUS BANK OF LOUISVILLE, - - - - *Appellee.*	No. 359.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR THE BANK OF LOUISVILLE.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Appellee.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

SAMUEL H. STONE, AUDITOR, &c., - - - - - - *Appellants,*

No. 358. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

—AND—

CITY OF LOUISVILLE, - - - - - - - - - - - *Appellant,*

No. 359. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

Brief in behalf of President, Directors, and Company of the Bank of Louisville.

STATEMENT OF CASE.

The president, directors, and company of the Bank of Louisville was incorporated by an act in the General Assembly of Kentucky, approved February 2, 1833. The original charter provided that the bank should continue in existence until January 1, 1853. By an act approved February 16, 1838, it was given power to establish certain branches, and it was provided that if it should establish one branch within three years, its charter should be extended four years, and on the establishment of a second branch, the charter should be extended five additional years. The bank established two branches: one at Paducah and one at Flemingsburg, and in this way its charter life

was extended nine years. By an act of the General Assembly of Kentucky, approved February 15, 1858, the charter was extended for twenty years from January 1, 1863. By an act approved May 1, 1880, it was provided that the charter rights and privileges should continue for twenty years from January 1, 1883.

It thus appears that the charter of the Bank of Louisville will not expire until January 1, 1903.

The sixth section of the original charter of the bank is as follows:

> "The cashier of the bank shall, on the first day of July, 1834, and on the same day annually thereafter, pay into the treasury of the State, twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank, provided that the legislature may increase or reduce the same, but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank."

Taking advantage of this right to increase the rate, the legislature, by an act approved February 12, 1836, imposed a tax of fifty cents on each share of stock in all banks.

Judicial Construction of this Charter.

In our brief on behalf of the Bank of Kentucky, we have given the judicial construction of the Court of Appeals upon the charter of the Northern Bank of Kentucky, the Farmers Bank of Kentucky, and the Bank of Kentucky, each of which was substantially similar to that of the Bank of Louisville, and the history of this construction need not be here repeated.

The Hewitt Act.

In the same brief there has been given an account of the passage of what is called "The Hewitt Act."

The Bank of Louisville accepted this act, and has continued, from the time of its acceptance, to comply in full with its terms.

Board of Valuation and Assessment Law of 1892.

The same brief states the effect of the new Constitution adopted in Kentucky in the year 1891, and the passage of the act of November 11, 1892, providing for the Board of Valuation and Assessment.

The Bank of Louisville, although as heretofore stated it had established in the past certain branches, has in the meantime wound up those branches, so that now its only institution is the principal bank, located at Louisville.

Under the terms of this new system of taxation, the Bank of Louisville would be taxed by the State and also by the City of Louisville, to which latter municipality the Board of Valuation and Assessment would make a return, as above indicated.

In 1893, 1894, and 1895, the Bank of Louisville made its returns to the auditor of public accounts, under this law, but under protest.

In July of 1893, and July of 1894, it offered to pay to the auditor the amount of tax calculated under the Hewitt Law, but the auditor refused to receive any amount greater than that due under the new law.

In June, 1895, the Court of Appeals having decided the bank tax cases, the Bank of Louisville paid to the auditor the amount of tax under the Hewitt Law, and also the amount of the difference between what it had paid in 1893 and 1894 and the amount due under the Hewitt Law.

It has proceeded in the same way since then.

In 1897, the Court of Appeals having delivered the new opinion in the bank tax cases, these two suits were brought. One of these suits is to enjoin the Board of Valuation and Assessment from proceeding to assess the bank for the years 1895 and subsequent; the other to enjoin the city of Louisville from attempting to collect the taxes certified under the assessment for the years 1893 and 1894.

These cases differ from the cases of the Bank of Kentucky in that the Bank of Louisville has had, up to the time it filed these two bills, no litigation in its own name, either with the City or the State, on the subject of its original contract, or its contract under the Hewitt Law.

The Bank of Louisville, however, claims to be privy to the judgment obtained in favor of the Bank of Kentucky in its suit in prohibition against the judge of the city court of Louisville and the city of Louisville, and to have the same benefit of presumption from the thing adjudged as belongs to the Bank of Kentucky.

The Circuit Court held that it was so entitled, and granted an injunction in each of the cases.

The opinion in the record in the case of Samuel H. Stone v. The Bank of Commerce, No. 362, is applicable to the cases now under discussion.

Stipulation in Reference to Litigation Between the City of Louisville and the Banks.

The Bank of Louisville is a member of the Clearing House Association of that city.

At a meeting of this Association, held October 30, 1893, the following resolution was adopted:

> "*Resolved:* That it is the sense of this association that in any and all legal contests that may be instituted or arise, concerning taxation, whether it be to sustain the charter rights of the old banks, the contract under the Hewitt Law, or on any other lines, the members of this association will act jointly, and bear their proportion of the fees and costs incurred, to be calculated and fixed by uniform assessment on their respective capital, surplus, and deposits.
>
> "*Resolved:* That Messrs. James P. Helm and Alex. P. Humphrey be employed to represent the interests of this association in such legal proceedings."

Among the other banks voting in favor of this resolution was the Bank of Louisville (No. 362, R. 86).

In December, 1893, the City of Louisville passed an ordinance, requiring all the banks in the city to pay, in lieu of an *ad valorem* tax, 4 per cent upon their gross receipts.

Henry S. Barker, now one of the judges of the Jefferson Circuit Court, was at that time the City Attorney of the City of Louisville, and also the attorney of the Sinking Fund Commission of the City of Louisville.

In his deposition (No. 362, R. 43) he says:

> "The matter in controversy between the banks and the city came to a head about November, 1893. About that time, in conference with the attorneys for the banks and trust companies, Messrs. Helm & Bruce and Humphrey & Davie, the litigation being in the immediate charge of Mr. Helm and Judge Humphrey, of these two firms. I knew, as I said before, that they were contending and had contended all the time that they had an inviolable contract under the Hewitt bill with the State of Kentucky exempting them from all local taxation. The city authorities having come to the conclusion that they had the right to tax the banks and other financial institutions of the city, chose to tax them by means of a license tax upon their gross receipts. On the banks and trust companies the amount fixed was four per cent of their gross earnings. As soon as this ordinance became a law, under my direction the various license inspectors of the Sinking Fund notified each bank and trust company in his district that it would be required to pay the license at once or the ordinary proceedings would be taken against them to force them. This was what is called an ordinance warrant, by which the party is summoned before the police court of the City of Louisville, and if found delinquent on his license a fine is imposed, which is repeated as long as the delinquency continues."

At a meeting of the Clearing House Association, held on the 2d of February, 1894 (No. 362, R. 87), the following resolution was adopted:

> "*Resolved:* That the committee heretofore appointed at the meeting of October 30th, 1893, be, and are hereby, authorized to determine the matter of resisting the city ordinance providing license taxes, and to determine whether

each bank shall resist or test cases be made by banks selected by the committee, and also to determine whether any portion of said license tax be paid, or, if any portion, what shall be, and how it shall be paid, and by what banks. In the event the committee make test cases, it is understood that any expense or penalties suffered by any bank making such test cases shall be borne by the clearing house in the proportion of capital, surplus, and deposits."

At a meeting of the Louisville Clearing House Association, held on February 12, 1894, the committee on taxation made a report.

We make the following extract (No. 362, R. 88):

"We have had several conferences with Messrs. Humphrey & Davie and Helm & Bruce with reference to the probable expense of the banks in the matter of the tax litigation. . . . The services so rendered by the attorneys will include all the legal attention that is required, of whatsoever kind, growing out of this tax question, for every bank in the city of Louisville, with preparation and argument of the cases before the Court of Appeals and the Supreme Court of the United States, if necessary; and for such services the fees to be charged shall in no event exceed the amount named as the maximum, and with the further understanding that the fees charged shall be based upon the reasonable value of services rendered.

"Your committee are further advised to say that if this litigation is placed in its hands it proposes to have regard to that which will be of permanent benefit to the banks, rather than any effort to gain mere temporary success. It may well be that the present system of taxation proposed by the State and city can be entirely avoided temporarily, but if such a defect were pointed out and urged as a defense, the result might well be that the State would by legislation cure this defect, and be led to adopt a system of taxation which is much more onerous than the present one. Your committee will expect, in conducting this litigation upon the part of the banks, to have regard to sound policy and commercial reasons and prospects to a greater extent than to mere questions of law. In other words, it will be the purpose of the committee to secure to the banks what are their rights, but to endeavor, in making the effort to secure them, not to involve the banks in such questions as will lead to

their being much more heavily taxed than is at present proposed if the litigation should be unsuccessful.

"It will be the purpose of the committee to maintain as friendly and pleasant relations with the taxing power as are possible, and to do nothing to stir up any public sentiment against the banks, and to do nothing that will give any one occasion to say that the banks are making mere technical objections in order to escape their fair proportion of public burdens.

"In reposing the power in the committee to conduct this litigation a very large discretion must necessarily be given. The committee will endeavor to use it wisely and to the best interests of all concerned."

This report was adopted, the Bank of Louisville, among others, voting for it.

Under the ordinance of the City of Louisville, the license tax of four per cent on gross receipts was payable to the commissioners of the sinking fund.

On February 13, 1894, the following proceedings were had by the commissioners of the sinking fund of the City of Louisville, and the same spread at large upon their minutes (No. 362, R. 64):

"A committee, consisting of Messrs. Thomas L. Barret, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing house and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 20, 1894, on the ground that said banks were not legally liable to pay the same; but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

"After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust

and title companies, who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

"First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the 'Hewitt bill.' This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

"Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid; but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund above described.

"Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license."

Judge Barker, in his deposition, describes this conference as follows (No. 362, R. 44):

"When this conference of February 13, 1894, was held, we were brought face to face with the fact that all the banks

and trust companies claimed immunity; also that they were divisible into three classes. One class was those banks whose charters had been granted them prior to the act of 1856, with which the court is familiar; those State banks whose charters had been granted them subsequent to the act of 1856; and the National banks; and it was supposed by counsel that the trust companies went into the class of State banks whose charters had been granted subsequent to the act of 1856. The attorneys for the banks informed us that they proposed to resist the payment of any tax, license or *ad valorem*, and to stand upon and contend for their rights under the Hewitt bill; and, of course, unless some agreement was made for selecting and making the test cases, this would result in bringing a suit for each one of the corporations involved, there being from twenty-three to twenty-five, if I recollect correctly. It seemed to us that it would be useless to bring so many suits, entailing a very much larger cost upon the losing side, and also entailing a good deal more labor upon the judges who had the matter to decide; and we therefore agreed to select one of each of the natural classes into which these financial institutions divided themselves in regard to their defenses, and allow the final judgment rendered in that case to go as to all of that class."

Judge Barker further states, in the same connection, that he was given to understand that if this arrangement was not entered into, each of the institutions would refuse to pay any thing; and would bring its separate suit; and that, to save all this, the agreement in regard to the classes was made. (No. 362, R. 44.)

At a meeting of the Louisville Clearing House Association, held on the 14th day of February, 1894, the special committee on taxation presented the following report (No. 362, R. 90):

"Your committee on taxation would respectfully report that in pursuance of their authority to arrange in reference to testing all of the legal rights of the banks in regard to taxation, and at the same time to prevent any unnecessary friction with the taxing authorities, your committee, in company with the counsel selected by the clearing house, have had a conference with the Board of Sinking Fund Commissioners of the City of Louisville. This conference

was held upon yesterday afternoon, and we have called this meeting so as to lay before you the result of the joint action of your committee and the Sinking Fund Commissioners. As you are aware, the four per cent tax on gross earnings prescribed by the ordinance is payable to the sinking fund. It so happens that, this year, the maturities of the sinking fund are to a very considerable amount in excess of any probable income. You are further aware that the council, in making its levy of ad valorem taxes, omitted the usual levy that is made for the benefit of the sinking fund; under the idea that the new licenses which, under the charter, the council had the authority to impose, would make up an income to the sinking fund, commensurate with the former ad valorem tax. It would be, therefore, a matter of considerable disappointment to the city, as well as to the Sinking Fund Commissioners, should this substituted income to the Sinking Fund Commissioners not be collected; and as the credit of the city is a subject upon which the community is naturally very sensitive, we believe that it is our duty to do every thing we can to avoid giving any sort of shock to it.

"The proposition that has been formulated by the conference between your committee and the sinking fund, is as follows:

"All of the banks which are not selected to make the test cases shall pay to the sinking fund 32½ cents on each share of capital stock of the bank. This 32½ cents is the difference between the 42½ cents paid to the State on the first of July and the 75 cents which would have been paid under the Hewitt Law. Besides the payment of this 32½ cents to the sinking fund, it is further proposed that each of the banks, not selected to make the test cases, shall lend to the Sinking Fund Commissioners, at four per cent interest, an amount equal to the difference between the 32½ cents on each share of capital stock and the 4 per cent on gross receipts. The sinking fund commissioners are to execute to each of the banks making such loan a non-negotiable security, payable if and when it shall be decided that the city had not the right to exact the 4 per cent on gross receipts from the banks.

"The result of this will be, that if our litigation turns out favorable to the banks these obligations will become due to the banks; if it turns out to be unfavorable, they will be simply used as a payment by the banks of the tax which is exacted by the ordinance.

"It is further proposed that, as to the testing banks, viz., those banks that are selected to make the test cases, they shall lend to the sinking fund, upon a similar obligation and at the same rate of interest, the 4 per cent on their gross receipts, payable in the same way as the other obligations above described.

The reason why the difference is made between the banks that make the test cases and those who do not, is that it is thought desirable by our counsel that those banks that make test cases shall not have paid any thing at all upon the tax. It is, however, thought desirable that they shall lend the money, so as not to disappoint the sinking fund in its present necessities.

"If this plan is followed out, the sinking fund will have all of the money that it expected to get, and will have had it at a low rate of interest, even though it should turn out hereafter that they had no right to collect any of it.

"Your committee, after full conference with their counsel and the sinking fund commissioners, believe that this proposition is a fair one on both sides; that it is as much as the banks can be asked to do, and that the sinking fund has the right, if our litigation is to be a friendly one, to ask that this much be done.

"Your committee in this matter have deemed it of the highest importance that this litigation shall be carried on in a way that will show a friendly spirit on the part of the banks, will show that they are not standing upon their rights in any mere technical spirit, and that what they are doing is not with any motive or purpose to embarrass the city or to escape the payment of what is justly due or to make a litigation which is for the purposes of embarrassment or delay; but that the banks are doing every thing they can to aid the sinking fund upon the one side, and at the same time not sacrifice any of their legal rights upon the other.

"We strongly recommend to every bank in the clearing house that it follow out this arrangement, thus proposed by the joint action of your committee and the Sinking Fund Commissioners, and which is unanimously agreed on both sides."

This report was adopted; the Bank of Louisville being present.

The Bank of Louisville complied with this arrangement, and paid to the sinking fund, on February 20, the sum of $2,036.26 (No. 362, R. 70, 72).

It executed no note; because four per cent upon its gross earnings about equaled the 32½ per cent upon its capital stock. In other words, the scheme was that each bank coming into the arrangement was to pay to the sinking fund, absolutely, 32½ per cent upon the face of its capital stock; being the difference between 42½ per cent, which the State demanded under the Board of Valuation and Assessment law, and the 75 cents which would have been payable upon each share of capital stock under the Hewitt Law; and to lend to the sinking fund the difference between the 32½ per cent and the 4 per cent on the gross earnings; for which latter amount the Sinking Fund Commissioners gave to each of the banks a promissory note, the form of which is at No. 362, R. 69.

An agreement was made between Judge Barker, as city attorney, and the counsel for the banks, with the view of carrying out the arrangement embraced in the resolutions of the commissioners of the sinking fund and the proceedings of the clearing house. This formal stipulation, however, was not at that time reduced to writing (when it was so reduced to writing, and signed, will be considered hereafter); but that the whole matter was thoroughly considered by all persons interested, will appear from the extracts which we have given, and from the deposition of Judge Barker and of Mr. Leathers, a member of the committee. Thus, Mr. Leathers is asked (No. 362, R. 82):

21 *Q.* Do you recollect the three banks that were selected to bring suit?

A. I do.

22 *Q.* What were they?

A. The Bank of Kentucky, the Third National Bank, and the Louisville Banking Company.

23 *Q.* Will you please state what counsel were employed by the committee to conduct this litigation?

A. The firms of Humphrey & Davie and Helm & Bruce.

24 *Q.* Will you please state what authority was given by your committee to these lawyers in regard to the conduct of this litigation?

A. The clearing house authorized the committee to select the attorneys, which they did, and the attorneys selected were afterwards approved by the clearing house, but the committee itself had full power to act.

25 *Q.* I hand you an agreement purporting to be made between the counsel for the banks and trust companies on the one side, and H. S. Barker, City Attorney, on the other side, approved by C. H. Gibson, President of the Sinking Fund Commission of the City of Louisville, being the original contract filed with the deposition of Judge Barker. I will get you to read that contract and state whether the counsel, Messrs. Humphrey & Davie and Helm & Bruce, had authority from your committee to enter into that contract.

(Objected to by counsel for defendant, The City of Louisville, as incompetent and irrelevant.)

A. Yes, sir; the attorneys for the banks and trust companies, Messrs. Humphrey & Davie and Helm & Bruce, had full authority to act for the banks in making this contract with the Sinking Fund, and were instructed by the committee to do so.

26 *Q.* I will get you to state what was the position of the banks making the test cases, and the banks not making the test cases, in regard to the result of the litigation?

(Objected to by counsel for defendant, The City of Louisville, as incompetent and irrelevant.)

A. Well, we were all to share exactly alike. We had to have three banks of certain classes to make the test cases, by instructions of our attorneys; and it was, in reality, no easy thing to get any of the banks to agree to become the ones selected for that purpose; but the Bank of Kentucky and the Third National Bank and the Louisville Banking Company finally agreed that their names should be used in this litigation, as representing all the banks of their respective classes in the clearing house.

Again (No. 362, R. 85):

Q. As to whether or not the members of each of these classes, which you say the suits that were brought that the banks

who brought suit were to represent, were on the same footing, you never undertook to investigate? You left that to the attorneys entirely, as to whether they had the same legal standing in court as the banks that did bring suit?

A. It was not part of our business to look into that; but all the banks shared alike exactly, in the costs of the litigation; and it was clearly understood that they were to share alike in the benefits that were derived from it.

Judge Barker says (No. 362, R. 45, 46):

> "I had many conferences with the mayor and with the finance committee of the general council of the city of Louisville. This was a most important question to the city of Louisville, and it was the subject of many earnest conferences between the mayor of the city of Louisville and myself and various officers of the city of Louisville. We calculated roughly that these corporations would produce annually, in round numbers, one hundred thousand dollars; a sum which cut a very large figure in the financial calculation of the city and its officials; and it was of the utmost importance to have every thing done that would expedite and simplify the contention between these corporations and the city of Louisville; and I want to say just here that, while it does not seem to have been put into any of these agreements, there was a very important understanding between the counsel for the banks and myself, and that was to expedite this litigation as far as it could possibly be done; and which was done and carried out, although it does not seem to have been reduced to writing."

Q. You say you had this conference with the mayor and the finance committee of the general council. Did they concur with you in the propriety of entering into this agreement?

A. Most fully. I want to say here that this was a most important matter, both to the banks and to the city, and we approached the subject with the view of settling the contention in the most expeditious way possible, and at the same time in a manner that would injure the banks the least. The mayor of the City of Louisville and myself both recognized that litigation such as this was calculated to alarm the stockholders of the banks, and might result in a very serious injury, and all of the parties to the litigation—the bankers, through their counsel; the counsel for the city; the mayor and the officers of the city—all approached this subject with a view of doing the greatest good and the least harm possible to the parties concerned in it.

Warrants were taken out in the city court of Louisville, against the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank: the Bank of Kentucky as representing a class of banks whose charters antedated the year 1856, of which there were only two, the Bank of Kentucky and the Bank of Louisville; the Louisville Banking Company as representing the State banks whose charters were granted since 1856, of which there were quite a number, and also the trust companies; the Third National Bank as representing the National banks. But all of each class were assumed to have accepted the Hewitt Law.

Three suits, for prohibition, were brought in the Jefferson Circuit Court by the three banks: the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank.

In each petition the claim was made that the bank could not be taxed in any other method than according to the provisions of the Hewitt law. (See petition of Bank of Kentucky, in No. 356, R. 78; petition of Louisville Banking Company, No. 360, R. 16; petition of Third National Bank, No. 404, R. 17.)

On July 24, 1894, Judge Field, of the Common Pleas Division of the Jefferson Circuit Court, delivered an opinion in all three of these cases, which had been submitted to him on demurrer. (No. 356, R. 85.)

In the case of the Bank of Kentucky, he entered a judgment, which has been copied into the brief filed in behalf of that bank; prohibiting the City of Louisville and R. H. Thompson from proceeding further with the warrant against the Bank of Kentucky.

In the other two cases he sustained the demurrers and dismissed the petitions.

The City of Louisville, and Judge Thompson, as appellants, prosecuted an appeal from the case decided in favor of the Bank of Kentucky. (No. 356, R. 89.)

The Louisville Banking Company and the Third National Bank prosecuted appeals in the cases which had been decided

against them, the appellees being Judge Thompson and the City of Louisville.

The case of the Bank of Kentucky was affirmed; the other two reversed; in accordance with the opinion in the "Bank Tax Cases." (97 Ky. 590.)

It will be observed that the judgment rendered in these cases in the Jefferson Circuit Court was in July of 1894.

The opinion of the Court of Appeals was not rendered until June, 1895.

In the mean time, at a meeting of the Louisville Clearing House Association, held December 17, 1894 (No. 362, R. 92), the following report was made, which was adopted:

> "Captain Leathers, from the committee of taxation, reported as follows: That it was expedient that all the banks, except the Bank of Kentucky, Bank of Louisville, Third National Bank, and the Louisville Banking Co., should surrender the notes given them by the sinking fund in 1894, and that all the banks except the Bank of Kentucky and the Bank of Louisville should, for the year 1895, pay the four per cent license tax without reservation; provided, always, that the general council shall pass a levy ordinance that does not include in its terms tax on capital stock, surplus of banks and trust companies."

Accordingly, in accordance with this resolution, all the banks who had taken notes from the commissioners of the sinking fund, except the Bank of Kentucky, the Louisville Banking Company, and the Third National Bank, surrendered these notes (No. 362, R. 69, 70, 78); and all of the banks, with the exception of those three, paid the license tax for the next year. The sum thus paid into the treasury of the Sinking Fund amounted to about $150,000.

About this time the following stipulation was signed (No. 362, R. 65, 66):

"STIPULATION BETWEEN THE CITY OF LOUISVILLE, THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, AND THE BANKS, TRUST, AND TITLE COMPANIES OF THE CITY OF LOUISVILLE.

"It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville on the one part, and the various banks, trust, and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

"First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust, and title companies, acting through their committee, to wit, Messrs. Thomas L. Barret, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

"Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

"(*a*) Banks whose charters had been granted prior to 1856.

"(*b*) Banks whose charters had been granted subsequent to 1856.

"(*c*) National banks.

"It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

"Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company, representing class B, and the Third National Bank, representing class C, and these banks re-

spectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

"It was distinctly understood and agreed at that time, and this agreement was made for the best interests of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the Sinking Fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the Sinking Fund Commissioners of February 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

"HUMPHREY & DAVIE,

"HELM & BRUCE,

"*For the Banks, Trust and Title Companies of the City of Louisville.*

"H. S. BARKER,

"*City Attorney.*

"Approved:

"C. H. GIBSON,

"*President Commissioners Sinking Fund, City of Louisville.*"

As to when this agreement was signed, Judge Barker makes the following statement (No. 362, R. 46):

15 *Q.* The agreement which you have examined and which I now hand you again, signed by the parties, appears not to have been dated. Can you state about when that agreement was reduced to writing and signed?

A. I have no independent recollection of that matter, but an examination of the paper itself convinces me that it was December, 1894.

16 *Q.* Before or after the second payment?

A. After the second payment—immediately after.

17 *Q.* Now, state when the second payment by the banks and trust companies was made.

A. In December, 1894. I know that this original stipulation represents truthfully the facts in every particular, and the recitation of the surrender of the notes and the payments being made absolute, in it, convinces me that it was made after the second payments were made; and I know that it must have been done immediately after, and perhaps was drawn up and agreed to in every detail at the time the payments were made, and delivered afterwards.

18 *Q.* At the time this agreement was reduced to writing had there been any decision rendered either way by any court?

A. Yes; a decision by the lower court had been made and was, except in the cases of the Bank of Kentucky and the Bank of Louisville, adverse to the banks and trust companies.

Also (No. 362, R. 50, 51):

50 *Q.* I will ask you to state, if you can state now positively, if this original agreement, which you did sign, was executed before the decision of the Court of Appeals by Judge Pryor, June 1, 1895.

A. Most assuredly it was; and before Mr. Tyler died. (The Mayor.)

51 *Q.* What enables you to state that?

A. Every fact in it shows it.

52 *Q.* What fact shows it?

A. The fact that the mayor agreed that he would sign it, and I know it to be true, and I would have remembered it distinctly; and in the second place I know the banks would not have agreed to it afterwards, and there would not have been any use in executing it afterwards.

53 *Q.* Point out any thing in the body of that contract that indicates that it was signed before June 1, 1895.

A. I do not need to look at that. I know that it was signed before. I remember that it was signed before, in Mr. Tyler's lifetime. I remember, as I told you, that he could not be present, and asked me to sign it.

54 *Q.* Did he tell you to sign his name or the city of Louisville to it?

A. No; he told me to execute it; and I did execute it as an agreement theretofore made and theretofore in a large part carried out.

Judge Barker is asked further in reference to this agreement (No. 362, R. 49, 50):

A. No; I do not remember who reduced it to writing, but the matter was all fresh in our minds, and it had been carried out to the letter, as we all understood it, and there was no controversy about the details of the agreement.

40 *Q.* Do you know why it was left undated?

A. No; I do not. You can see that it was acted on before it was reduced to writing, and I can only say that that was the result of the absolute confidence that existed between the city attorney at that time, and the counsel for the banks. Whatever they said to me I relied on implicitly, and I know whatever I said to them they relied on with equal certainty.

41 *Q.* Who presented that agreement to you for your signature?

A. I do not remember now but one independent circumstance, Colonel, and that was that Mayor Tyler did not sign it. He, having to go somewhere, told me to sign it; but I presume that they were all present except the mayor.

42 *Q.* That agreement purports to be entered into by the mayor of the city, as I understand it. Did Mayor Tyler or any one as mayor of the city ever sign that agreement?

A. No; as I told you, that was the only independent circumstance that I remember now. Mayor Tyler had to be absent, and I remember distinctly of his so saying, that he could not be present, and told me to sign it.

43 *Q.* I have not asked what he said, but simply the facts.

A. I am giving you the reason the signature does not appear there.

44 *Q.* How long was he absent from the city?

A. I don't know that he was absent from the city at all. He was to be absent at the time that paper was to be signed.

45 *Q.* Was there any reason why he did not sign it subsequently when he had the opportunity?

A. None except the fact that the bankers and their attorneys knew that that paper was signed in absolute good faith and would be carried out in absolute good faith by Mayor Tyler and myself. As I said to you, these gentlemen had had many conferences, both with Mayor Tyler and myself, and they knew what he thought, and knew how he regarded this matter; and all of that was a, b, c, to us.

Again (No. 362, R. 52):

65 *Q.* Can you give any good reason why this agreement was not reduced to writing at the start instead of being put off and left in a verbal and indefinite condition for a year or more?

A. I can give you a reason. I don't know whether it would be a good one. I think I have already given it. The banks relied on me, and I relied on their attorneys. There was no question but what it would be enforced to the letter as between the attorneys and myself; and if we had won, I would have expected every one of those corporations to step up and pay.

Again, he says (No. 362, R. 54):

75 *Q.* In this undated agreement which you signed I see that it refers, in the outset of it, as being executed under the authority of the Board of Sinking Fund Commissioners, given at a regular meeting of said Board; had that reference to the meeting of February 13, 1894?

A. I presume that that is true; that seems to be the sense of it, and, although it is not on the minutes, this paper was signed by the President of the Board of Commissioners of the Sinking Fund, with the full knowledge of the Board.

(Defendant excepts to the answer on the ground that the minutes of the Board show the acts of the Board.)

And again (No. 362, R. 55):

77 *Q.* Why is it that instead of the President of the Sinking Fund Commissioners executing the agreement contemplated by the resolution of February 13, 1894, he simply approved the agreement entered into between you and the attorneys for the banks?

A. I presume that he considered that that was the same thing; that what he did, was the execution of it.

78 *Q.* I will ask you to state if that agreement, which bears no date, signed by you, was ever presented at a regular meeting of the board of sinking fund commissioners and approved or ratified by that board?

A. Yes; and it was signed at a regular meeting, by me.

79 *Q.* Does the journal of the board of sinking fund commissioners show any such state of fact as that?

A. I don't know, but it was lying on the table, and signed by me, right there, in their presence.

80 *Q.* Would not the secretary of the board of sinking fund commissioners know of that fact if it had been there?

A. I don't know that he would have remembered it.

81 *Q.* Will you give the date of any such alleged board meeting when a majority of the commissioners were present and this was presented for ratification or approval?

A. No; I don't remember the date.

Again (No. 362, R. 57):

90. *Q.* It was left, however, to the recollection of yourself or counsel claiming to represent the banks and trust companies as to what banks or trust companies were entitled to claim under this agreement. In other words, there is no record preserved, either in the agreement itself or otherwise, as to what banks and trust companies could claim under it?

A. We had the best record in the world, Colonel; we had their money; every one of them paid, while the agreement was in our mind; and the record shows exactly who was in it; it shows who paid, and who did not, and when they paid; and it shows the amounts they paid.

We have endeavored to make this narrative as consecutive as possible, taken as it is from the depositions of various witnesses and the proceedings of the sinking fund commission and the Louisville Clearing House Association. It will effect our purpose if it will show, what the reading of all of the evidence will demonstrate—that there was the most perfect understanding between the counsel representing the city upon the one side, and the banks and trust companies upon the other; that the banks and trust companies were claiming the benefit of their contracts under the Hewitt law, but desired that the litigation over the matter should be as little troublesome to the city and the sinking fund commission as was possible, consistent with a full and fair determination of the whole matter; and with a view to putting an end to the controversy in every case by the determination of a case which should be typical.

The question then arises, as a matter of law, whether the Bank of Louisville, under these circumstances, is privy to the

Bank of Kentucky in the suit brought by the Bank of Kentucky in the prohibition proceedings.

In the brief filed on behalf of the City of Louisville, this stipulation is called an "undated agreement;" with a reiteration that would seem to imply that this was a vice, for which there could be no apology or palliation.

In the same brief it is stated that the stipulation "bears on its face the earmarks of an agreement whose covenants were framed in the light of a decision of the Court of Appeals of June 1, 1895, and in all probability to form the basis of a plea of *res judicata*, in the event that the decision was subsequently overruled. In other words, it is apparently the result of an *afterthought*."

Again it is said:

> "Is it not probable, therefore, that this retrospective agreement was not reduced to writing and signed until after the decision of the Court of Appeals of June 1, 1895? There is nothing in it to show it was executed at an earlier date. Thus this important stipulation appears to have been carried in the memory of counsel until that decision, and then it was formulated for the first time."

We have only to set over against these remarkable statements, the testimony of Judge Barker. If that was not satisfactory, the present representative of the City of Louisville might easily have called some one or other of the signatories to that paper. It does not mend the matter that the same brief, in speaking of Judge Barker, says:

> "We do not question his motive, or good faith, in entering into this alleged stipulation."

There is, however, another circumstance, a consideration of which the learned counsel, in drawing these extraordinary conclusions, seems to have entirely omitted. We quote again from the deposition of Judge Barker on cross-examination (No. 362, R. 53):

69 *Q.* I will ask you to state whether or not the terms of this agreement have been abided by or violated by any of the banks existing in the city of Louisville when it was entered into; if so, what banks and in what way?

(Objected to.)

A. Well, I don't know any thing on that that the records will not show you fully. Some time after the first decision by the Court of Appeals four banks brought suit against the city of Louisville to recover the money they had paid under the agreement. I want to state that the counsel who represented the banks and who made the agreement with me were not the counsel who brought those suits, but, on the contrary, they refused to bring them, and all of them have assured me that they were ready to give any evidence they could that would enable me to defeat those suits. The banks in question were the German Bank, the Western Bank, the German Security Bank, and the Louisville City National Bank. All of these suits are, of course, public records, and will show for themselves what they claim and by whom they are brought.

These suits were brought in the spring of 1896. The city promptly answered, setting up this stipulation as a bar (No. 362, R. 59–61).

We quote from that answer (No. 362, R. 61):

> "For further answer herein to both paragraphs of the petition, the defendants say that after the passage of the ordinance set out in the petition assessing the banks the plaintiff and all the banks and trust companies of the city of Louisville entered into a combination and jointly employed counsel to test their rights under the contract with the State of Kentucky as contained in the act known as the Hewitt bill; that by agreement with and at the instance of counsel for plaintiff and the other banks and trust companies in the city of Louisville these defendants, in order to make test cases wherein might be decided the respective rights of the city of Louisville to tax the banks and the rights of the banks under the contract set forth in the 'Hewitt bill,' sued out three warrants in the city court of Louisville, one against the Bank of Kentucky, another against the Louisville Banking Company, and another against the Third National bank of the city of Louisville,

> whereupon the said three banks last named, by their said counsel, instituted three separate actions in the Jefferson circuit court against R. H. Thompson, judge of the city court of Louisville, and the city of Louisville, wherein it was claimed that the ordinance in question was void, and praying that the said city of Louisville and the said R. H. Thompson, judge of the city court of Louisville, be prohibited from prosecuting said actions against said banks. It was then and there agreed that the judgment of the court in these three actions should be the judgment as to the rights of all the banks and trust companies in the city of Louisville."

We are far from denying that the purpose of the stipulation was to form the basis of a plea of *res adjudicata*. But this purpose was one which the city had as well as the banks. And the first use made of the stipulation in court was by the city.

The question that this court will have to determine, in the first instance, is the question of fact.

Did the counsel for the banks, upon the one side, and the counsel for the city of Louisville, upon the other side, enter into an agreement by which there were to be three test cases, which were to decide finally, for the city and for the other banks and trust companies, the matters involved?

Was there an agreement by which the judgment which should be entered in these test cases was to bind both parties, not only in the particular litigation, but in respect to each of the institutions falling within the same category?

It seems to us there can be no doubt of the answer to this question upon the evidence presented, and the learned Circuit Court had no difficulty whatever with it.

The effect of such an agreement is the next question to be determined.

As we understand, it is admitted by the counsel for the city that if warrants had been taken out against all of the banks, and suits in prohibition brought by all of the banks, it would have been entirely competent for the city attorney to agree to try one

or more of the cases, and to have the same judgment entered in all of them; that this was within the scope of his authority as the legal representative of the city of Louisville. Nor do we understand it to be denied that if this agreement was within the scope of the authority of the city attorney, the banks, in each of the classes designated, became thereby privy to their representative institution, and would be entitled to plead the judgment upon the one hand, or would be bound by it on the other, whatever that judgment might be; just as if such bank had been the party upon the record.

These two positions seem to be conceded; and, indeed, the authorities given in the opinion of the learned Circuit Court conclusively establish them.

There is no question here as to the right of the city attorney or the mayor of the city of Louisville, or the commissioners of the sinking fund or common council of the city of Louisville, to make an agreement by which any property holder shall be exempt from taxation for any length of time. There is here no question relating to the power of any city official to commute the taxes of any citizen.

The provisions of the Constitution of the State of Kentucky upon this subject are quite beside the mark.

The question to be determined is:

Was this agreement such an one as was embraced within the power of the city officials who entered into it and authorized it, as a step in the orderly ascertainment of the right of the city, upon the one side, and of the banks upon the other?

Undoubtedly we have shown that the counsel for the banks had the right to make this stipulation on behalf of their clients.

There is no doubt that if the cases had been decided in the Court of Appeals in 1895 as similar cases were decided in the Court of Appeals in 1897, all of the banks and trust companies in and embraced by this agreement, would have been bound by such judgments; even though, in other cases, a contrary decision had subsequently been arrived at.

In other words, let us suppose that a majority of the Court of Appeals, in 1895, had held that the Hewitt Law was repealable; manifestly, all of the banks who entered into this arrangement with the city of Louisville would have become taxable under the Board of Valuation and Assessment law; and this result would not have been in the least affected, if, in 1897, the Court of Appeals had, in another case or cases, decided that the Hewitt law was irrepealable.

We simply mention this to show that the authority of the city attorney can not be measured by the result of the exercise of that authority. Indeed, at the time when, according to the evidence in this case, this agreement was actually reduced to writing, it condemned all of the banks and trust companies in the City of Louisville, with the exception of the Bank of Kentucky and the Bank of Louisville, to the payment of taxes under the Board of Valuation and Assessment law; because, at that time, viz., in December, 1894, the judgment of the Jefferson Circuit Court, unreversed, was in favor of the Bank of Kentucky and the Bank of Louisville, but against all of the other institutions.

If the Court of Appeals in 1895 had been composed of the same judges as composed it in 1897, we would have heard of no challenge of this agreement on the part of the City of Louisville.

For convenience we now quote substantially in full the opinion of Judge Taft on this question:

> "We are of the opinion that the City Attorney was vested with ample authority to bind the City of Louisville to the contract mentioned in so far as it affected the complainant herein. By Section 2909 of the Revised Statutes of Kentucky it is provided that:
>
> "'There shall be elected by the General Council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the Mayor and members of the General Council, and all other officers and boards of the city in discharge of their official duties. If requested, he shall give his opinions in writing,

and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the General Council.'

"The foregoing section makes this officer the retained attorney of the city in every suit brought by it or against it. The question at issue between the banks and the City of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the City Attorney and the commissioners of the sinking fund, whose duty it was to receive the money for the benefit of the city, that they intended to resist the collection of the tax by litigation. It was the duty of the City Attorney, under the statute above set forth, to take charge of the litigation thus about to be brought. It was his duty, as the attorney of the city, to save, so far as he could without prejudice to the city's interests, costs which might be accumulated should suits to the number of 20 be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation, and was entirely under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the City Attorney and the attorneys for the banks of this character would have been as clearly a part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the City Attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion, and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation, and the authorities fully sustain this conclusion.

"In Railroad Co. v. Stephens, 36 Mo. 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that, as the same facts arose in all the cases, they would abide by the judgment that should be rendered in one of them, and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement, and that it was void. The court sustained the agreement as within the authority of the attorney. It said:

"'The arrangement in this case is not a "compromise" according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of the thing to be recovered. It comes nearer within the general management of the case.'

"In Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"'It is undoubtedly true that an attorney can not consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It can not be doubted that, under them, counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a

trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial.'

"See also Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933; Gilmore v. Insurance Co., 67 Cal. 366, 7 Pac. 787.

"In Thompson on Trials (Volume 1, S. 195) the author says:

"'Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys, in virtue of their general retainers, to stipulate that only one shall be tried, and that the others shall abide the result of that one.'

"We think, therefore, that, in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

"The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In Patton v. Caldwell, reported in 1 Dall. 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties, and therefore not admissible, upon which an agreement of all the underwriters to be bound by one verdict was proven. McKean, C. J., said:

"'The defendant had no opportunity of cross-examining upon the former trial; and the answer is that he, with the rest of the underwriters, had agreed to be bound by one verdict, which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel. Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the wit-

nesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement, yet, on receiving that satisfaction, we think it would be unfair to suppress it; and for the future, we desire that all such agreements may be entered on the records of the court.'

"The Court then held that the verdict thus offered was not conclusive. As the latter proposition, however, is in conflict with the rule laid down by the Supreme Court of the United States in a recent case of Southern Pac. R. Co. v. U. S. 1, 18 Sup. Ct. 18, that part of the decision can not be regarded as authority here.

"In Brown v. Sprague, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

"Mr. Freeman, in his work on Judgments, says (Section 174):

"'Neither the benefit of judgments, on the one side, nor the obligations, on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons, who, being neither parties, upon the record, nor acquirers of interests from those parties after the commencement of the suit, are, nevertheless, bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. . . . The fact that an action is prosecuted in the names of nominal parties can not divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action. . . . Where one

seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party, and for the protection of his own interests.'

"These principles are sustained by the cases cited by the learned author. See Cole v. Favorite, 69 Ill. 457; Wood v. Ensel, 63 Mo. 193; Tate's Ex'rs v. Hunter, 3 Strob. Eq. 136–140; Palmer v. Hayes, 112 Ind. 289, 13 N. E. 882; Gill v. U. S., 7 Ct. Cl. 522, 526. See also, Herm. Estop. S. 139.

"In 1 Greenl. Ev. S. 523, the principle is stated as follows:

"' But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with them in interest; and, wherever his identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage assigned by him shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him.'

"In the case of Rapelje v. Prince, 4 Hill, 119, Mr. Justice Bronson, speaking for the Supreme Court of New York, said:

"' When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party.'

"In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits which were conducted were openly con-

ducted in the interest of all the parties to the agreement with the knowledge and by the consent of the City of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have been so bound. Had the result gone the other way, and a judgment been rendered in favor of the city of Louisville in the cases referred to, it can not admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the Sinking Fund Commissioners of the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit, and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of the complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city, and a formal judgment was not taken. It is just that, inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit."

It is argued, however, that the city attorney did not have power to make this stipulation; because, it is said, among other things, that an attorney can not accept service for his client of an original process by which action is begun, and therefore, can not make any stipulation, except in reference to a suit actually in court.

The reason why an attorney can not enter his client's appearance is stated in Starr v. Hall, 87 N. C. 381, thus:

"The principle upon which these authorities rest is that it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client of the original process by which the jurisdiction of the court

> over the person of the client is forcibly established, for, until that be done, the relation of client and attorney can not begin, nor can it be created by the act of the attorney alone."

This reasoning can have no application to the case at bar, because the relation of client and attorney always exists between the City of Louisville and the city attorney; by virtue of the statute defining the authority of the city attorney.

Nor is there any reason why an attorney can not enter into a stipulation before a suit is brought, as well as after the suit is brought.

In Hefferman v. Burt, 7 Ia. 320 (s. c., 71 American Decisions, 445), an attorney, prior to the filing of a suit, agreed that it might be filed at any time within the coming term of the court, and have the same force as if filed ten days before the term.

The court said:

> "If Goodrich, the lawyer, was in fact the attorney of defendant, and had been employed by him in relation to this particular case, he could make the agreement. An attorney may be employed in contemplation of a suit to be brought, and when thus employed, his client would be bound by his stipulation, in relation to the same, to the same extent as if he had stipulated after the suit was brought."

Now, what is the difference in principle between the authority of a retained attorney, authorized to appear in ten cases, if he stipulates that only one need be brought, and that the others shall be concluded by the judgment, and a stipulation, after all ten are brought, that only one need be tried, and the same judgment entered in all?

The one is as large a power as the other. The difference, if there be any, is only that, in the one case, it is easier to prove the authority of the attorney than in the other.

But, in the case at bar, the attorney had a full warrant to appear in all cases; the statute being his warrant; and who can

doubt that the city attorney of the City of Louisville has the right to enter the appearance of the City to any action that may be brought against it?

We have shown above how promptly the City of Louisville took refuge under this stipulation when sued by the recalcitrant banks. When, therefore, learned counsel says in his brief, that the Banks can sue for the money paid by them under the agreement, we respond that four banks did do this, and the City promptly pleaded the stipulation as a complete answer to the demand.

The order in time, of events, is frequently an argument of great weight. In December, 1894, when the suit that bound the city to respect the Hewitt contract as to two banks had been thus decided, and the other suits that cancelled the Hewitt contracts as to all other institutions had been so decided, this stipulation, theretofore verbally agreed and acted on, was committed to writing. In June, 1895, the Court of Appeals decided all the cases against the city. In 1896, four of the banks, disregarding their agreement, sued to recover the money paid under it as without consideration. The city insisted on the agreement as a bar. In 1897, the Court of Appeals reversed its ruling. The institutions which had stood loyally by the agreement now find that the city claims it was never binding at all and affords them no protection.

The learned counsel for the City of Louisville substantially admits that this plea is entirely technical, and that the arrangement could have been made, if we had only insisted upon twenty-five warrants being sworn out, and twenty-five suits in prohibition filed.

But, as this was not done, the banks must bear with complacency the consequences of any mistakes made by their chosen counsel.

We respectfully submit that there is no merit in this contention; that considering what was the authority of the city attorney of Louisville, under the statute, he had full right to enter

into this stipulation, and that, before doing so, he was careful to obtain the assent of the chief executive officer of the City, of the Sinking Fund Commission, and of the other officials, whose duty it was to consider and determine the fiscal condition of the municipality.

In view of what this record shows, it is entirely idle to speak of this agreement having been the result of an afterthought.

So far from its being anticipated that the Court of Appeals might change its ruling, as we have shown above, certain of the banks, disregarding the agreement which had been made on their behalf by counsel having full authority so to do, attempted to recover back money paid under this agreement, as paid under mistake of law, and the city, through its legal representative, defended these suits upon the ground that the agreement was a valid and binding one on both sides.

It seems to us that it would be difficult to imagine a more complete ratification of the agreement than this was. And it would be indeed singular if this ratification should extend to the banks who brought suits to recover the money, and should not extend to the banks who stood by the payments which they had made, in good faith.

Counsel for the city seeks to avoid the plea of *res adjudicata* by attempting to show, among other things, that there is not identity of person, and he seeks to maintain that proposition upon two theories: First, that the suit is only between the banks and R. H. Thompson, Judge of the City Court, and second, that at the most it is a suit between the banks and the Sinking Fund Commissioners of the City of Louisville. We have very little to say upon either of these propositions. It is perfectly evident that Thompson is not sued individually, but only in his representative capacity, and that the real party in interest behind him is the City of Louisville.

Learned counsel, however, insists that the City of Louisville is not the real party in interest whom Judge Thompson represents, but that it is the Sinking Fund Commissioners of the City of Louisville, which he says is a separate corporation.

In response to this we suggest that while the Sinking Fund Commissioners is a separate corporation for the purposes of making contracts and suing and being sued, it is a mere department of the City Government, and has been so distinctly recognized by our Court of Appeals in construing the various acts touching the City and the sinking fund commissioners. Thus it will be found in the case of Clark, Sheriff, v. Water Company, 90 Ky. 522, the Court, in speaking of the Sinking Fund, used this language:

> "While the Sinking Fund of the city of Louisville is a distinct corporation, yet it is owned by the City and merely controls its funds. It discharges no governmental duties, and was created merely to make money for the City."

In that case it was held that money paid by the Sinking Fund into the City was simply the money transferred from one pocket of the city to the other, and was not a real payment.

Again, we have already shown in this brief that the city of Louisville was the first to rely upon this stipulation between the banks and trust companies upon the one side and the city upon the other as a complete estoppel against the action by the four banks which brought suit to recover the money paid under the agreement. We now call attention again to that answer only for the purpose of showing that the city of Louisville in that answer put its own interpretation upon the test suits brought by the three banks for the purpose of determining the alleged contract rights of the bank. In its answer to one of these petitions, this language is used:

> "Whereupon the said three banks last named by their said counsel instituted three separate actions in the Jefferson Circuit Court against R. H. Thompson, Judge of the City Court of Louisville, *and the City of Louisville*, wherein it was claimed that the ordinance in question was void, and praying that said *City of Louisville* and the said R. H. Thompson, Judge of the City Court of Louisville, be prohibited from prosecuting said actions against said banks." (No. 362, R. 61.)

Here the City of Louisville, by its own answer, not only first relied upon the stipulation as a bar to those suits, but did not hesitate to admit at that time that it was the real party in interest, and that a suit against R. H. Thompson, Judge of the Police Court, was in fact and indeed a suit against the city, Thompson being the mere nominal party, while the City of Louisville was the real party.

In this connection, Judge Barker says (No. 362, R. 47):

23. *Q.* Mr. Barker, did you represent Judge Thompson in that litigation?

A. Yes, sir; I represented all that side.

24. *Q.* How did you happen to represent Thompson?

A. Well, that was the way to represent the city, and I got Judge Thompson's permission to do so.

25. *Q.* In order to protect the interests of the city?

A. In order to protect the interests of the city. The writ of prohibition against Judge Thompson was only taken out to test this case and carry out this agreement, and I made known the fact to Judge Thompson, and he, of course, turning the matter over to me, I had absolute charge of that whole side.

Under these circumstances we submit that the city of Louisville can not at this time repudiate that contract and deny that it was the real party in interest.

In conclusion, we respectfully submit, that the agreement was one entirely within the power of the city attorney of the city of Louisville, beneficial to the city, concerning the orderly progress of litigation, and binding, by its effect, the city to all of these banks as privy to the judgments obtained in the three cases of the representative institutions.

And as to the bank whose case is now being considered, the Bank of Louisville, we submit that it was a privy to the suit brought by the Bank of Kentucky, and as fully protected as that bank by the determination of the question.

Respectfully submitted,

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

SAMUEL H. STONE, &c., ... *Appellants,*

vs. **No. 360.**

LOUISVILLE BANKING COMPANY. . . . . *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 361.**

LOUISVILLE BANKING COMPANY, ... *Appellee.*

SAMUEL H. STONE, &c., ... *Appellant,*

vs. **No. 362.**

BANK OF COMMERCE, ... *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 363.**

BANK OF COMMERCE, ... *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 364.**

THIRD NATIONAL BANK, ... *Appellee.*

CITY OF LOUISVILLE, ... *Appellant,*

vs. **No. 365.**

CITIZENS NATIONAL BANK, ... *Appellee.*

THIRD NATIONAL BANK, ... *Appellant,*

vs. **No. 404.**

SAMUEL H. STONE, &c., ... *Appellees.*

CITIZENS NATIONAL BANK, ... *Appellant,*

vs. **No. 405.**

SAMUEL H. STONE, &c., ... *Appellees.*

FIDELITY TRUST & SAFETY VAULT COMPANY, . *Appellant,*

vs. **No. 406.**

CITY OF LOUISVILLE, ... *Appellee.*

FIDELITY TRUST & SAFETY VAULT COMPANY, . *Appellant,*

vs. **No. 407.**

SAMUEL H. STONE, &c., ... *Appellees.*

LOUISVILLE TRUST COMPANY, ... *Appellant,*

vs. **No. 408.**

CITY OF LOUISVILLE, ... *Appellee.*

LOUISVILLE TRUST COMPANY, ... *Appellant,*

vs. **No. 409.**

SAMUEL H. STONE, &c., ... *Appellees.*

FIRST NATIONAL BANK, ... *Appellant,*

vs. **No. 634.**

SAMUEL H. STONE, &c., ... *Appellees.*

FIRST NATIONAL BANK, ... *Appellant,*

vs. **No. 635.**

CITY OF LOUISVILLE, ... *Appellee.*

BRIEF FOR BANKS AND TRUST COMPANIES.

We represent the banks and trust companies above named, being the appellees in the six cases first mentioned in the caption of this brief, and the appellants in the succeeding eight cases; the place of business of these institutions being in Louisville, Ky.

Each of the institutions named filed two bills in the Circuit Court of the United States for the District of Kentucky; in one, the members of the Board of Valuation and Assessment and the City of Louisville are united as defendants; in the other the suit is against the City of Louisville alone.

In the former class of suits an injunction was sought to restrain the Board of Valuation and Assessment sitting at Frankfort, Ky., and composed of the Auditor, Secretary of State and Treasurer from proceeding to assess the property of the several complainants under the alleged authority of the general Revenue Act of the State, approved November 11, 1892, and the Auditor from certifying said assessment to the County Clerk of Jefferson county, and also to restrain the City of Louisville from attempting in any way to cause such assessment to be made or to collect such taxes.

In the latter class of cases an injunction was sought to restrain the City of Louisville from collecting the tax for the years 1893 and 1894 upon assessments which had already been certified by the Auditor, under the authority of the law in question, to the County Clerk of Jefferson county, and by him certified to the City Tax Collector.

In all the bills except those filed by the First National Bank it is alleged that a contract formally entered into under the authority of the act passed in 1886, hereafter called the Hewitt act, was made between the State of Kentucky and each of the complainants, by which the complainants could severally discharge themselves and their shareholders of all taxation against the corporation and its shares of stock, by the payment of seventy-five cents on each share of stock of the par value of $100, and the current rate on the surplus over ten per cent. of the capital, and the local taxes on the building in which it did business; that the contract thus made extended through the corporate existence of the respective complainants; that the contract is inviolable; but that nevertheless the State has, by the act above mentioned, of November 11, 1892, attempted to tax the complainants by a different method, and imposed upon them a much heavier burden of taxation than was imposed under the Hewitt act of 1886. Apt allegations are, in each instance, made as to the amount involved, and of payment or tender of amounts admitted to be due.

It is further alleged that the identical questions now involved were presented in litigation between the City of Louisville and the

complainants (except in the case of the First National Bank), in which the State, by its Attorney-General, participated and opposed the contention of the complainants, and that in June, 1895, the Court of Appeals, the court of final resort in the State, decided the questions in favor of the complainants and adjudged that the contract made under the Hewitt act of 1886 was inviolable, and lasted during the corporate existence of the respective complainants; and this adjudication is pleaded as a bar to the right of the State or city to attempt to assess or collect taxes in the method pointed out by the act of November 11, 1892.

It is alleged that the members of the Board of Valuation and Assessment are threatening to assess, and will, unless restrained, proceed under the authority of the act of November 11, 1892, to assess, all the property of the complainants for the years 1895, 1896 and 1897; and that the Auditor will, unless restrained, certify said assessments to the Clerk of the Jefferson County Court, who will, in turn, certify the same to the City Tax Collector for collection; and that, unless restrained, the city will proceed by its proper officers to distrain or sue for the alleged taxes, and also for the taxes of 1893 and 1894, already certified by the Auditor, and will attempt, by distraint and levy or suit, to collect the same, and thus will cause irreparable injury to the complainants and their stockholders.

Further allegations are made showing that the State, under the authority of the act of November 11, 1892, will attempt to impose a fine of $1,000 against complainants for failing to report, as required by that act, and an additional fine of $50 per day for each day the companies have been in default in making the reports as required by the act.

The national banks, in addition to insisting that their acceptance of the Hewitt act of 1886 constituted a contract with the State, also insist that the act of 1892, which defendants are seeking to enforce as against them, is void as to them because in conflict with the National Banking act.

They also claim that, under the circumstances, hereafter more at large stated, they are entitled to be placed upon a footing as to taxation equally favorable with the most favored State bank doing business in the city of Louisville.

The cases were heard at Nashville, Tenn., before Justice Harlan and Circuit Judges Taft and Lurton on the motion of complainants for a temporary injunction and on the demurrers of the defendants. Temporary injunctions were granted; and afterward the Circuit Court entered final decrees in favor of the Louisville Banking Company and the Bank of Commerce in both of their cases; and in favor of the Third National Bank and the Citizens National Bank in their cases which sought to restrain the collection of the taxes for 1893 and 1894, but the Court dismissed their bills which sought to restrain the assessment of the taxes after the

year 1894; and dismissed both of the bills of the two trust companies. The City of Louisville has appealed in the first six cases, and the different institutions mentioned have appealed in the last eight cases.

The Circuit Court was of opinion that the extension of a National Bank charter under the act of Congress of 1882 did not continue the old corporate existence, but created a new corporate existence, and therefore as the Third National Bank and the Citizens National Bank had availed themselves of this act to extend their charters in the year 1894, the Court held that their contracts with the State under the Hewitt act expired at that time, and they were held liable under the general revenue law of November 11, 1892, for all years after the year 1894.

The court was further of the opinion that the aggregate tax levied upon National Banks was not greater than would be levied if they were taxed upon their shares of capital, and therefore, apparently without inquiring into the question as to whether the tax was in fact a tax upon all the property of the banks according to valuation, the court seems to have rested its opinion wholly upon the idea that the banks did not suffer because another kind of tax on the shares of capital would have made them carry approximately the same burden.

The court was also of the opinion that the trust companies, not being exactly similar institutions to banks, and probably not performing a public service, there was sufficient dissimilarity between such corporations and the corporations actually involved in the litigation to make the contract of the city—on which, as hereafter explained, rests the claim of *res adjudicata*—not enforceable.

FACTS.

From the earliest history of this State down to 1892, it had been the policy of the State to tax all the banking capital of the State according to a uniform rate, and as this could only be done by exempting them from local burdens, the policy was adopted of taxing them somewhat higher for State purposes and exempting them from local taxation.

When the General Assembly came, in 1886, to adopt a general revision of the revenue law, one of the first serious controversies which arose in that body, was upon the method of taxing banks. It was claimed by many of the members that the taxation upon banks was too light, and not just to the remainder of the taxpayers of the State. It was pointed out that they were allowed to discharge themselves of all kinds of tax by the payment of fifty cents on a share of stock equivalent to one hundred dollars, while the remainder of the taxpayers of the State must pay to the State forty-seven cents on the one hundred dollars, and then bear in addition the local burdens of their respective communities. It was

insisted that the banks should be taxed just as every other taxpayer, and be made to bear no more of the State burdens than taxpayers generally, but should be made to bear their full share of all the local taxation. This argument, upon the face of it, seemed fair. But as investigation went further into the subject, it was found that, throughout the whole legislative history of bank taxation in this State, the banks had never been, by a single law, taxed by the political subdivisions of the State. The question which was then debated was whether that policy should be continued or now changed for the first time, and banks be taxed in the future as other taxpayers.

In order to determine this question, the Legislature inquired into the reason for the policy which had existed so long in this State, and, of course, discovered the economic truth, which can not be answered or evaded, that there can be no discrimination in favor of or against capital employed in the banking business, without those most heavily burdened being forced to the wall by the competition of those less heavily burdened.

A bank in Louisville, if it must carry a burden of $2.30 on the $100 (the sum of State and local tax) can not compete with the banks in the surrounding counties, whose total burden is less than a dollar; nor can they compete with the banks of the flourishing cities of New Albany and Jeffersonville, in Indiana, just across the river, which do not carry one half of that burden.

And so the illustration might continue. In no two counties in the State, we venture to say, are the local burdens exactly the same. But it was insisted that, while it might be true that it was not practicable to subject banks to local taxation, because of the difference in the burdens which they must respectively carry, yet there was no reason why they should not all be taxed upon the strictly *ad-valorem* system. It was said: "We are now adopting a law which does not give an individual a right to deduct his debts from his assets. Why, then, should not we tax these banks upon *all their assets*, including bills receivable? Then, we will compel them to carry a larger share of the public burden, and then the tax will be uniform."

But upon further investigation it was found that this could not be done, for precisely the reason applicable to local taxation, as shown by the following consideration:

National Banks, being agencies of the Federal Government, can not be taxed by the States to any extent, unless the Federal Government consents that they may be, and then they can not be taxed beyond the limits of that consent; and no consent has been given to tax their personal assets.

So, then, it was apparent to the Legislature that, to tax by the *ad-valorem* system all the assets of the State banks, would result in the grossest discrimination against them in favor of the National banks, the effect of which would be to drive them out of existence,

or force them to become National banks. To make a long story short, after considering every phase of the question, the Legislature determined that the old policy was the best policy, and so they continued it. But, it was said that the tax burden on the banks was not sufficiently heavy, and that they should be made to pay more than fifty cents on the share, if they were to be exempt from local taxation. It was then determined to retain the method of specific taxation, but to *increase the rate* of taxation. And here again the Legislature was met with this difficulty:

There were three or four banks in the State which had charters granted prior to the act of 1856 (which was the first act adopted in Kentucky reserving the general right to alter, amend or repeal charters). These charters gave them a contract right to discharge themselves of all their tax burdens by the payment of fifty cents on each share of stock. And, again, it was declared by the National banks that they were entitled to be put upon an equally favored footing, in view of the important part which the capital of the old banks, as compared with the total bank capital, played in the State. And it was so decided by the Court of Appeals in the case of City National Bank vs. Paducah, 9 S. W. Rep., 218 (10 Kentucky Law Reporter, 21), on the authority of Covington City National Bank vs. City of Covington, 21 Fed. Rep., 484.

There was a good deal of discussion between the Revenue and Taxation Committees, representing the Legislature, on the one side, and the representatives of the banks on the other. Finally it was agreed, upon the part of the old banks and the National banks, that if the State would put all the banking capital on the same plane and give a contract that it should remain at that rate for the remainder of the corporate existence of the several banks, they would consent to a modification of their rights and to pay taxes to the State, as indicated in the pending bill. This was agreed upon; and the Hewitt act was accordingly adopted.

By this act (article 2), and the agreement thereunder, the banks and other corporations therein named contracted to pay 75 cents on each share of stock equivalent to $100 at par, and the current rate of taxation on the surplus of the bank over 10 per cent. of the capital, and, in addition, to pay local taxes on the buildings in which their business was done. Neither party, however, was willing to trust to the ordinary statutory contract, but preferred that the agreement which had been arrived at should be put in the most formal and definite shape. Accordingly, by the fourth section of the second article, it was declared as follows:

"Sec. 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same, as herein provided,

"and to waive and release all right under the acts of Congress "or under the charters of the State banks to a *different mode or* "*smaller rate* of taxation, which consent or agreement to and "with the State of Kentucky, shall be evidenced by writing, "under the seal of such bank, and delivered to the Governor of "this Commonwealth; and upon such agreement and consent "being delivered, and in consideration thereof, such bank and "its shares of stock shall be exempt from all other taxation "whatsoever so long as said tax shall be paid during the cor- "porate existence of such bank."

In pursuance of this section all of the complainants in existence at that time, except the First National Bank (which seems in some unexplained way to have overlooked the matter), convoked their stockholders in special meeting and laid the proposition of the State before them; and in each instance a majority of the stockholders accepted the proposition of the State, and signified that acceptance in writing, under the seal of the bank or trust company as the case might be, and delivered the same to the Governor, as required by the section quoted. The First National Bank either did not hold this meeting, or else it failed to make a record of it. At any rate, no minute of the meeting can now be found, though, in company with all the other banks and moneyed institutions, it paid taxes under and in accordance with the Hewitt act from the date it took effect.

In 1891 a new Constitution was promulgated in Kentucky. From the passage of the Hewitt act, in 1886, and until 1892, (when the Legislature assembled for the first time after the adoption of the new Constitution), all the banks and trust companies paid taxes under the Hewitt act, by which act, as we have seen, all the banking and moneyed institutions of the State were put upon an exactly equal plane with reference to taxation.

On the 11th of November, 1892, the Legislature passed the present law. So much of that law as bears upon this question, as well as the second article of the Hewitt act (the one relating to taxing institutions of loan or discount) will be found in the Appendix to this Brief.

By the first section of Article 3 of the present revenue law, numbered in the Kentucky Statutes as 4077, it is provided, so far as banks and trust companies are concerned (omitting the names of other corporations), that every incorporated bank and trust company shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are thereby constituted a Board of Valuation and Assessment for fixing the value of said franchises. * * * The Auditor shall be chairman of said Board, and shall convene

the same from time to time as the business of the Board may require.

Section 4078 prescribes the method of ascertaining the value of the franchise, and has been held by the Court of Appeals of Kentucky, and by this Court, to include *all the intangible property of the corporation*, including its franchise proper.

Section 4083 provides for the Auditor sending out notices to the various corporations of the values fixed, and thirty days are given to the corporations after receiving the notice to appear before the Board and seek a reduction of the assessment.

Section 4084 declares that the Auditor shall, at the expiration of thirty days after the final determination of such value, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

Section 4087 declares that "any corporation, or officer thereof, willfully failing or refusing to make reports as required by this chapter, shall be deemed guilty of a misdemeanor, and for each offense shall be fined $1,000, and $50 for each day the same is not made after October 1st of each year."

Section 4090 declares that should any corporation fail to make the reports as required therein, on or before the first day of October of each year, the said Board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

Section 4091 provides that all taxes against any corporation, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to the corporation by the Auditor; and that every such corporation failing to pay its taxes after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the taxes shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; and that any such corporation failing to pay its taxes, penalty and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

By section 4092 it is declared that all banks and trust companies shall file their reports required by section 4078 of this article on or before the first day of March, 1893, and annually on or before

March 1st thereafter. Said reports shall be made up to and including the 31st day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports or to pay said taxes as herein required, said banks and trust companies shall be subject to the same fines and penalties as prescribed in section 4091 of this article. It will be seen that the only difference made between banks and trust companies and other corporations is as to the *date* of report and payment.

After the adoption of this law, the banks and trust companies of the State were called upon to make reports as required by the act. Under the advice of counsel they did this under protest, at the same time claiming that they had a contract with the State to pay as provided by the Hewitt act. When the time came for payment they tendered the amount due by them under and in accordance with the Hewitt act; and, this being refused by the Anditor, they paid under protest the amount *due the State* under the existing revenue law, which was less than the amount due the State under the Hewitt act, the latter being in full of all taxes.

AGREEMENT WITH THE CITY OF LOUISVILLE.

About this time the City of Louisville passed an ordinance levying a tax of four per cent. on the gross receipts of the banks and trust companies, payable to the Sinking Fund of the city. This was intended as a substitute for the *ad-valorem* tax, and was a means of arriving at the taxable values by reference to gross receipts. These institutions denied the power of the city to levy any such tax, claiming they had immunity from all taxation except as provided in their contract contained in the Hewitt Act, which exempted them from all local taxation. A committee of the bankers and trust companies, with their counsel, met the Sinking Fund Commissioners and Mayor, with their counsel. The Mayor and Sinking Fund Commissioners pointed out that, because it had been supposed that the banks and trust companies would pay the license tax, no adequate *ad valorem* tax had been levied for the benefit of the Sinking Fund, and that, unless some arrangement could be made by which this tax could be paid at least for the current year, the Sinking Fund would be embarrassed in meeting its obligations. On the other hand, it was pointed out that the banks and trust companies could not pay the tax they were seeking to enjoin, for the obvious reason that the cases after payment would be mere moot cases. As the result of this conference there was an agreement made at the instance of and in the interest of the city, that a sufficient number of banks should be selected to sue, to illustrate every phase of the controversy, and that the other banks and trust companies should pay to the Sinking

Fund Commissioners, absolutely and without reservation, the difference between the amount which they were compelled to pay *the State* under the existing revenue law and the amount which they would have been compelled to pay under the Hewitt act, and that they would lend the commissioners the difference between the amount thus paid and the amount which the four per cent. tax would yield, and for this difference the Sinking Fund of the City of Louisville was to give, and did give, its notes. At a later date, at the earnest solicitation of the Sinking Fund Commissioners, all the banks and trust companies, except those actually engaged in litigation, surrendered these notes and agreed to pay, and did pay, the whole amount of the four per cent. tax during the pendency of the litigation. This, it was agreed, should be without prejudice to their rights. This meeting at the Sinking Fund office occurred on February 13, 1894, and the following is a copy of the minute as it appeared upon the books of the Sinking Fund Commissioners, a copy of the same being filed as Exhibit A, with each bill of complaint.

"SINKING FUND OFFICE, February 13, 1894.

"A committee, consisting of Messrs. Thomas L. Barret, John "H. Leathers and George W. Swearingen, appeared before the "Board on behalf of the banks who are members of the Louis- "ville Clearing House, and stated that it was the purpose of "said banks to resist the payment of the license fee demanded "of them under the license ordinance approved January 29, 1894, "on the ground that said banks were not legally liable to pay "the same; but, in order to save the Sinking Fund from any "embarrassment occasioned by their refusal to pay said license "fee, the banks, with two or three exceptions, were willing to "enter into an agreement whereby they would pay a part of the "amount demanded of them, and lend the Sinking Fund the "balance thereof, to be repaid with interest at four per centum "per annum, if it was finally decided and adjudged that the "banks were not liable to pay said license fees.

"After discussion, the President was, on motion of Mr. Tyler, "seconded by Mr. Summers, authorized to enter into the follow- "ing arrangement with the different banks, trust and title com- "panies, who will be subject to the payment of the license fees, "if the license ordinance is finally adjudged to be valid and "enforceable.

"First. To accept from each of said banks and companies a "payment equal to the difference between the amount they now "pay to the State taxes and the amount they would be required "to pay for State taxes under the provisions of what is known "as 'the 'Hewitt bill.' This sum shall be an actual payment,

"not to be repaid under any circumstances, but its payment "shall not in any manner, or to any extent, prejudice the banks "or companies paying it, or be taken as a waiver of any legal "right which they have in the premises.

"Second. In addition to making the above payments, the "said banks and companies, save those selected to test the "question involved, shall each lend the Sinking Fund a sum "which, added to said payment, will equal four per centum of "its gross earnings during the year 1893, and the Sinking Fund "will execute for said loans its obligations, agreeing to repay "the same with interest at four per centum per annum, when, "and if, it shall be finally adjudged by the court of last resort "that said banks or companies are not liable to pay the license "fee required by the ordinance aforesaid, but if it is finally "adjudged that they are liable to pay said license fee, then the "said loan shall be taken and deemed as a payment of said "license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the ques- "tions involved will each lend the Sinking Fund a sum equal "to four centum of their gross earnings for the year 1893, "and will receive therefor the obligations of the Sinking Fund "as above described.

"Fourth. This arrangement is to be entered into with the "understanding that the said banks and companies will institute, "without delay, and diligently prosecute such actions, as may "be necessary to settle and adjudge the right and liabilities of "the parties in the premises, and pending such proceedings the "Sinking Fund will not prosecute them, or any of them, for "doing business without license.

"A true copy. Attest: "J. M. TERRY,

"*Secretary and Treasurer.*"

This minute did not show as formally and distinctly as it should the precise agreement between the City and the banks, and, some time after the meeting, and for the purpose of preserving the exact evidence of the real agreement, a stipulation was entered into between the City and the Sinking Fund Commissioners, upon the one side, and the banks and trust companies, upon the other. That agreement is as follows:

"Stipulation between the City of Louisville, the Commissioners of "the Sinking Fund of the City of Louisville, and the Banks, "Trust and Title Companies of the City of Louisville:

"It is agreed between the City of Louisville, the Commis- "sioners of the Sinking Fund of the City of Louisville, repre- "sented by H. S. Barker, City Attorney, acting under the advice "and by the authority of the Board of Sinking Fund Commis- "sioners, given at a regular meeting of said Board, and the

"Mayor of the City of Louisville, on the one part, and the "various banks, trust and title companies of the City of Louis- "ville, acting by Humphrey & Davie and Helm & Bruce, their "attorneys, of the other part—

"First. That in February, 1894, it was agreed between the "City of Louisville and the Board of Sinking Fund Commis- "sioners, acting together in the interest of the said City, and "the various banks, trust and title companies acting through "their Committee, to-wit: Messrs. Thomas L. Barret, John "H. Leathers and George W. Swearingen, and their counsel, "to wit, Messrs. Humphrey & Davie and Helm & Bruce, that "the question of the liability of said banks and trust and title "companies to pay municipal taxes, either license or *ad valorem*, "otherwise than as provided by the revenue law, commonly "known as the 'Hewitt bill,' should be tested by appropriate "litigation looking to that end.

"Second. In order to effectually test the question as to all of "said companies, they were divided into three classes, it being "understood that all who had accepted the provisions of the "said Hewitt bill would fall in one or the other of the classes "named, to-wit:

"A. Banks whose charters had been granted prior to 1856:

"B. Banks whose charters had been granted subsequent to "1856.

"C. National Banks.

"It being understood that the trust and title companies which "had accepted the provisions of the Hewitt bill would fall in "class B, above named.

"Third. In pursuance of that agreement the Sinking Fund "Commissioners caused to be issued warrants against the Bank "of Kentucky, representing Class A, the Louisville Banking "Company, representing Class B, and the Third National Bank, "representing Class C; and these banks, respectively, applied "for writ of prohibition against the City Court of Louisville "proceeding with the hearing, that being the manner pointed "out by the City Charter for testing the validity of city ordi- "nances.

"It was distinctly understood and agreed at that time, and "this agreement was made for the best interest of all parties to "it, that if any bank in any class should eventually fail to estab- "lish the existence and validity of the contract which it was "claimed was made under the Hewitt bill, that all of that class "should thereafter regularly and promptly submit to the exist- "ing laws and pay their taxes. And it was also agreed that if "any bank of any class should succeed in establishing a con- "tract and the validity thereof under the Hewitt bill that that "should exempt all banks and companies falling within that

"class from the payment of taxes, except as provided in the "Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and "companies aforesaid paid into the Sinking Fund the amounts "of taxes claimed against them under the terms and conditions "named in the minutes of the Sinking Fund Commissioners of "February 13, 1894, an attested copy of which is hereto "attached as part hereof, but, at a later date, and in further reli- "ance upon said agreement, all said banks and companies, except "those actually involved in the test cases, paid the whole of the "amount of the taxes claimed as against them by the City of "Louisville, without reservation, until the question thus raised "should be finally disposed of.

"HUMPHREY & DAVIE,
"HELM & BRUCE,
"For the Banks, Trust and Title Companies of the City of Louisville.

"H. S. BARKER,
"City Attorney.

"Approved: C. H. GIBSON,
"President Commissioners Sinking Fund City of Louisville."

The method of enforcing obedience to an ordinance requiring payment of a license tax was by warrant from the Louisville Police Court; but, in pursuance of the agreement above mentioned, the City abandoned its warrants against all of the banks and trust companies, except the Bank of Kentucky, the Louisville Banking Company and the Third National Bank. These represented other institutions as follows: The Bank of Kentucky, whose charter was granted before 1856, represented itself and the Bank of Louisville, whose charter likewise antedated 1856. The Louisville Banking Company, a State institution, whose charter was granted since 1856, represented itself and every other State bank and trust company in the city whose charters were granted since 1856. The Third National Bank represented the National banks of the city. And it was agreed, as heretofore shown, that if any of these banks should succeed, all of its class should stand upon the same footing with reference to taxation, and that if any of these should fail, all of its class should thereafter pay taxes promptly according to the decision. And it was expressly stated in the agreement, just following the classification of the institutions into classes A, B, and C, that the trust companies should be considered as falling within class B, which, as we have just seen, was represented in the litigation by the Louisville Banking Company.

On the faith of this agreement, the various banks and trust companies in the city paid into the sinking fund of the city, about $150,000; no part of which would, in our opinion, have been paid if all of the institutions had sued, as was originally contemplated, and which they would have done, except for the earnest insistance

of the City of Louisville that the question at issue should be decided by test cases instead of by separate litigation upon the part of each institution.

Section 2922, being part of the statute governing cities of the first class, declares that in cases where a fine of $20, or less, may be imposed the defendant may, by writ of prohibition in the Jefferson Circuit Court, test the legality of the ordinance imposing the fine. Under the warrants sued out in the Police Court for the failure to pay the taxes under and in accordance with the ordinance, the fine would have been anywhere from $5 to $100. Accordingly the banks named, representing their several classes, brought suit, pursuant to the agreement heretofore mentioned, in the Jefferson Circuit Court, and sought a prohibition against the Judge of the Police Court, alleging that the court would, unless prohibited, proceed to fine the several banks for the failure to pay their taxes, and that the fine would not be less than $5 nor more than $100. The banks set up their contract under the Hewitt law, and claimed immunity from all taxation, except as provided by that law, and alleged that the ordinance seeking to tax them otherwise was void. The Jefferson Circuit Court, after a full hearing, decided that the ordinance was void so far as it affected the Bank of Kentucky; but that it was valid in so far as it affected the Third National Bank and the Louisville Banking Company. From the judgment in favor of the Bank of Kentucky, the City of Louisville and its representative, Judge Thompson, Judge of the Police Court, took an appeal; and from the judgments dismissing the petitions of the Louisville Banking Company and the Third National Bank they took appeals, making the City of Louisville and Judge Thompson appellees. When the cases came on in the Court of Appeals there were other cases on the docket from other localities than Louisville in which were banks and trust companies, making the same claim as to contract; and in the Court of Appeals the Commonwealth appeared by its Attorney-General, along with the different municipalities, who were represented by their respective official attorneys, and resisted the claim of the several banks and trust companies. Upon the part of the banks and trust companies it was claimed that they had an irrepealable contract to be taxed under and in accordance with the Hewitt act, and not otherwise, and that that contract lasted throughout the corporate existence of the several institutions. The State, through its Attorney-General, and the municipalities, through their several counsel, contended, first, that there never was any contract, and second, that if there was at any time a contract, the State had the right to retire from it at its pleasure, because of the sixth section of the second article of the Hewitt act, which declared: "This act shall be subject to the provisions of section 8, chapter 68, of the General Statutes." The section referred to is as follows:

"All charters and grants of or to corporations, or amend-
"ments thereof, enacted or granted since the 14th of February,
"1856, and all other statutes, shall be subject to amendment or
"repeal at the will of the Legislature, unless a contrary intent
"be therein plainly expressed: *Provided*, That whilst privileges
"and franchises so granted may be changed or repealed, no
"amendment or repeal can impair other rights previously
"vested."

On the part of the banks and trust companies it was insisted, with reference to this claim, first, that their contract was saved under the express reservation of the statute of 1856; and second, that, but for that reservation in the Hewitt act, it might have been contended that the State had disabled itself from repealing the charters of the several banks then subject to its control, and that the reservation was placed in the act in order to prevent the State from surrendering control over the charters; and that therefore there was but one way to terminate the contract, and that was to terminate the existence of the bank itself, which the State reserved the right to do if the public good required it.

The case was elaborately argued and briefed, and perhaps received as much consideration as the Court of Appeals ever gave to any case. It resulted in a decision by a divided court, four of the judges deciding with the banks and trust companies to the full extent of their contention, the opinion being delivered by Judge Pryor, the Chief Justice; and three of the Judges dissented, in an opinion delivered by Judge Paynter. (Bank Tax Cases, 97 Ky., 590.)

There can be no doubt, and it is not denied, that the question at issue between the banks and trust companies, upon the one side, and the State and its municipalities, upon the other, was finally adjudicated in favor of the banks and trust companies; the court holding that all institutions accepting the Hewitt act had contracts irrepealable in their nature and lasting throughout the corporate existence of the several institutions.

This opinion was delivered on June 1, 1895, and thereafter all the banks and trust companies received notice from the Auditor of Public Accounts requiring them to report and pay under the Hewitt act, and they did so for 1895, and under a similar notice for 1896. In addition to this they were called upon by the Auditor to pay, and they did pay, to the State for 1893 and 1894 the difference between the sums theretofore paid by them under the general revenue law of 1892 and the amount necessary to make their payments good under the Hewitt act; and this they did, although in the meantime they had paid under their contract with the City of Louisville about $150,000 into the Sinking Fund of the said City, no part of which, according to this decision of the Court of Appeals, did they in fact owe as taxes to the city.

* The court decided the fifth proposition in the negative, and trust companies now assign that ruling as error.

On the sixth proposition the court decided that the contract with national banks did not continue through the period of extended succession, and the national banks now assign that ruling as error.

The court decided the seventh and eighth propositions in the negative, and the national banks now assign each of these rulings as error.

Nearly two years after the rendition of this decision the Court of Appeals, as differently constituted, on the question being again raised *between other parties*, overruled their first decision and adopted the opposite view of the question.

It coming to the knowledge of the complainants that efforts were about to be made to assess them for the years 1895, 1896, 1897, and 1898 for city purposes, notwithstanding the former decision of the Court of Appeals and their payments thereunder, these suits were instituted.

Allegations were made as heretofore stated, and also sufficient to set out the facts herein recited, upon which a plea of *res adjudicata* was made.

The Circuit Court sustained that plea not only as to the banks actually parties to the former litigation, but as to all brought into privity by the contract with the city, with the exceptions already stated. Several opinions were rendered in the different cases, and all these opinions are reported in 88 Federal Reporter from pages 383 to 427.

ARGUMENT.

The questions of law which we understand will be argued are:

1st. Did the Circuit Court have jurisdiction?

2d. Was there jurisdiction in equity?

3d. Has the question at issue been heretofore adjudged in favor of the complainants?

4th. Does this adjudication protect only the banks actually engaged in the former litigation, or does it extend to the other institutions which entered into the contract with the city to abide the result thereof, and acted on the faith of it?

5th. Have the trust companies an equal right with the banks to avail themselves of the plea of *res adjudicata?*

6th. Does the extension of the charter of a National Bank under the act of Congress of July, 1882, preserve the old corporate existence and the contract made between it and the State, or does it create a new corporate existence?

7th. Is the General Revenue law of Kentucky inconsistent with the National Banking act in levying a tax upon the property of the bank instead of upon the shares of the stockholders?

8th. Does the principle of uniformity guaranteed by the National Banking act protect National Banks in the City of Louisville which, for any reason, can not claim a contract under the Hewitt act? ✱

These in their order.

I.

Did the Court Have Jurisdiction?

The jurisdiction of the court extends, by the act of 1888, to all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and cost, the sum of $2,000, and arising under the Constitution or laws of the United States (Supplement to Revised Stats. 611).

The claim of the bills is that the officers of the State are about to enforce against complainants a law passed by the State since the making of the contract with the State relied upon by the complainants; and this law, it is alleged, impairs the obligation of the pre-existing contract, and is therefore in violation of that provision of the Federal Constitution which forbids any State from passing any law impairing the obligation of a contract, and, as to the National Banks involved, it is further insisted that the tax sought to be enforced against them is in violation of the National Bank act.

It is clear, therefore, that the suits arise under the Constitution and laws of the United States. We do not think it needs further argument to show the jurisdiction of the court.

II.

Was There Jurisdiction in Equity?

We next proceed to consider whether the court had jurisdiction in equity of the bills. It must be remember that in insisting upon this contract the complainants are, in effect, seeking the specific performance of the contract as against the State, and specific performance is essentially of equitable cognizance; and whenever specific performance of such a contract as the one involved is sought, equity will enjoin the collection of the tax attempted to be collected in violation of the contract. Relief by injunction against taxes, in violation of a contract of exemption, has always been allowed in the nature of an exception to the general rule. 1 High on Injunctions, 530; 1 Spelling on Eq. Relief, 672.

In addition to this it is alleged, as has been seen, that, unless the defendants are restrained, attempts will be made by distraint and levy or by suit to collect these taxes from the complainants. It was conceded by the learned counsel for the City of Louisville in the court below, that, even if he did not resort to his right of distraint, but brought a suit to recover on the tax bills, that upon a judgment obtained thereon execution would issue which might be levied upon any property subject to levy, or that judgment might be enforced by the ordinary equitable means, such as a bill of discovery, whereby the creditors of the banks could be restrained from paying their debts to the banks, or whereby execution might be levied upon the money of the bank.

In addition to this, the statute of the State for the government of cities of the first-class contains this provision:

> "Any court of competent jurisdiction, not inferior to a Circuit "Court, may, in the established modes of proceedings, and upon "existing principles of law or equity, give redress against unlaw- "ful distraints or garnishments of rents that may be wrongfully "made or threatened under color of this act, but no injunction "shall be granted in such proceeding, except by the court or its "Judge, nor otherwise than upon notice to said city, and after "a hearing." (Ky. Statutes, Sec. 3008.)

This provision occurs in that part of the statute devoted to revenue and taxation, and it is not denied that it relates to unlawful distraints and garnishments as applied to the collection of taxes.

It will be observed that this statute declares that the court may, in the established modes of proceedings, and upon existing principles of law and equity, give redress, etc. There can be little doubt

that the intention of the Legislature in the use of these terms was simply to recognize what had been regarded in Kentucky as the established modes of proceedings and the existing principles of equity in reference to restraining the collection of taxes.

It will be admitted by counsel for the other side that the law is settled in Kentucky that equity will restrain by injunction either an illegal assessment or the collection of an illegal tax.

In the case of Gates vs. Barret, 79 Ky., 205, in discussing this question, the Court said:

> "The right to have an injunction to restrain the collection "of an illegal tax has been so long recognized and acted upon "in this State, that it is unnecessary to stop to inquire upon "what ground that jurisdiction is exercised by courts of equity."

And this part of the opinion was quoted with approval in the case of Norman vs. Boaz, 85 Ky., 560.

In the case of Baldwin vs. Shine, 84 Ky., 502, the court distinctly held that it was proper for a court of equity to enjoin not only the collection of an illegal tax, but a proposed illegal assessment, and this case was approved in Baldwin vs. Hewitt, 88 Ky., 676, and in Cassidy vs. Young, 92 Ky., 232. Further citation of authority on this question is of course useless.

We concede that this Court has held that equity will not take jurisdiction to restrain the collection of taxes upon the mere ground of invalidity, but that there must be some other ground of equitable cognizance.

But the Court has also held, and we think that is the law as now distinctly recognized by the Court, that where there is a statute of the State—as we have just seen there is in Kentucky—which allows the remedy by injunction to restrain unlawful taxes, the Federal Court sitting in equity will enforce that remedy just as the State courts would.

In Cummings vs. National Bank, 101 U. S., 154, the Court, through Mr. Justice Miller, in speaking upon this question, said:

> "But the statute of the State expressly declares that suits "may be brought to enjoin the illegal levy of taxes and assess- "ments, or the collection of them. Section 5848 of the Re- "vised Statutes of Ohio, 1880, Vol. LIII.; Laws of Ohio, 178, "Sections 1 and 2. And though we have repeatedly decided "in this court that the statute of a State can not control the "mode of procedure in equity cases in Federal Courts, nor "deprive them of their separate equity jurisdiction, we have "also held that, where a statute of a State created a new right "or provided a new remedy, the Federal Courts will enforce "that right, either on the common law or equity side of its "docket, as the nature of the new right or new remedy requires.

"Van Norden vs. Morton, 99 U. S., 378. Here there can be no "doubt that the remedy by injunction against an illegal tax, "expressly granted by the statute is to be enforced, and can only "be appropriately enforced, on the equity side of the court.

"The statute also answers another objection made to the "relief sough, in this suit, namely, that equity will not enjoin "the collection of a tax except under some of the well-known "heads of equity jurisdiction, among which is not a mere over- "valuation, or the illegality of the tax, or in any case where "there is an adequate remedy at law. The statute of Ohio "expressly provides for an injunction against the collection of a "tax illegally assessed, as well as for an action to recover back "such tax when paid, showing clearly an intention to author- "ize both remedies in such cases."

This opinion was expressly recognized as authority in the case of Shelton vs. Platt, 139 U. S., 599, in which the Court distinguished that case from the one under consideration by saying:

"In Cummings vs. National Bank, the jurisdiction was main- "tained upon the ground of preventing multiplicity of suits, as "well as that the remedy by injunction against an illegal tax "was expressly granted by a statute of the State whose levy of "tax was drawn in question."

It was also expressly recognized in the case of Greeley vs. Lowe, 155 U. S., 58. In an opinion by Mr. Justice Brown, page 75, the Court said:

"This court has held in a multitude of cases that where the "laws of a particular State gave a remedy in equity, as, for "instance, a bill by a party in or out of possession, to quiet "title to lands, such remedy would be enforced in the Federal "Courts, if it did not infringe upon the constitutional rights of "the parties to a trial by jury."

Citing as authority, among other cases, the case of Cummings vs. National Bank, *supra*.

Quite an able discussion of the question of how far the Federal Court will enforce, on the equity side of the docket, equitable remedies allowed by the statutes of the State will be found in Darragh vs. H. Wetter Manufacturing Company, etc., 78 Federal Reporter, 7; a decision by the Circuit Court of Appeals for the Eighth Circuit.

In discussing this question, the Circuit Court's opinion in the cases at bar is very full, and we insert it here in lieu of further argument:

"Do the facts stated in the bill bring it within the equity "jurisdiction of the court? It is well settled that in the Federal "courts an action in equity will not lie to restrain the collection "of a tax on the sole ground that it is illegal and void, and "independently of every other consideration. See Rich vs. "Braxton, 158 U. S., 375, 405; 15 Sup. Ct., 1006. It must appear "from the special circumstances averred that there is no adequate "remedy at law, and that there is some recognized ground for "equity jurisdiction, such as that the enforcement of the tax "would lead to a multiplicity of suits or produce irreparable "injury. Ogden City vs. Armstrong, 168 U. S., 224, 236; 18 "Sup. Ct., 98; Express Co. vs. Seibert, 142 U. S., 339, 12 Sup. "Ct., 250; Allen vs. Car Co., 139 U. S., 658, 661; 11 Sup. Ct., 682; "Shelton vs. Platt, 139 U. S., 591; 11 Sup. Ct., 646; Railway Co. "vs. Cheyenne, 113 U. S., 516, 525; 5 Sup. Ct., 601; Hame- "winkle vs. Georgetown, 15 Wall, 547; Dows vs. City of Chi- "cago, 11 Wall, 108. What are the remedies at law which the "complainant has? If the collecting officers proceed to collect "the tax by distraint, the bank may, under the duress of the "threatened trespass, pay the taxes alleged to be illegal, and then "sue the city of Louisville, the county of Franklin, and the city "of Frankfort to recover them back. Railroad Co. vs. Com- "missioners, 98 U. S., 541. It is to be observed, however, "that no such action will lie except upon payment under duress. "The bank could not simply pay under protest, and sue to "recover back. Such a payment would be voluntary. There "is no statute of Kentucky providing such a remedy, as "there was in Tennessee in the case of Shelton vs. Platt. The "remedy of paying and suing to recover back in Kentucky ex- "ists only when the collecting officer resorts to distraint. But "the collecting officers are not obliged to collect the taxes by "distraint; they may resort to a simple suit at law for them. "In that case the bank may defend on the ground of the "invalidity of the law under which the taxes have been assessed. "This remedy, except where the taxes are a cloud upon real "estate, would ordinarily be adequate; but, under the provisions "of the Revenue law of November, 1892, we do not think it is. "By that law, the bank, on failing to pay the taxes assessed, "according to its provisions, within thirty days after notice "from the collecting officer, is subjected to a penalty of 10 per "cent. and to a fine of $50 a day for every day of the delin- "quency, to be enforced by indictment or by civil action. It "follows that the remedy of defending a suit at law for taxes "under this revenue act is attended with the risk of being com- "pelled to pay $50 a day for every day of the time necessarily "consumed in the reasonable litigation of the question of the "validity of the tax. By bill in equity, the bank may enjoin "the assessment, and pending the litigation, however long the

"delay, no fines or penalties can accrue against the unsuccess-
"ful litigant, because, by the terms of the act, they do not
"begin to accrue until thirty days after notice to pay has been
"given by the collecting officer. It is manifest that the remedy
"at law by defending a tax suit in such cases is attended with
"a great and oppressive burden of risk, which is absent in
"an action in equity. The remedy at law is, therefore, entirely
"inadequate. Smythe vs. Ames, 169 U. S., 466, 518; 18 Sup. Ct.,
"418; Express Co. vs. Seibert, 44 Fed. Rep., 315. It is no
"answer to say that the payment of the tax and the action to
"recover it back constitute an adequate remedy, because no
"such action will lie, as already explained, unless there is a dis-
"traint, actual or threatened, and the collecting officer, by not
"distraining, may wholly deprive the taxpayer of this remedy.
"Indeed, the counsel for the city of Louisville vigorously con-
"tends that the collecting officer in that city has no power to
"distrain for bank taxes. However this may be, it would seem
"clear that a court of equity will not withhold relief from a
"suitor merely because he may have an adequate remedy at law
"if his adversary chooses to give it to him. The remedy at
"law can not be adequate if its adequacy depends upon the will
"of the opposing party. To refuse relief in equity upon the
"ground that there is a remedy at law, it must appear that the
"remedy at law is 'as practical and efficient to the ends of jus-
"'tice and its prompt administration as the remedy in equity.'
"Boyce vs. Grundy, 3 Pet., 210, 215; Sullivan vs. Railroad Co.,
"94 U. S., 806, 811. And the application of the rule depends
"upon the circumstances of each case. Watson vs. Sutherland,
"5 Wall., 74, 79.

"The practice of the State Courts of Kentucky in issuing
"injunctions against the collection of taxes can not, of course,
"be a controlling consideration in determining the limits of the
"equity jurisdiction in the Federal Courts in such cases; for it
"is settled that if a case 'in its essence, be one cognizable in
"'equity, the plaintiff (the required value being in dispute) may
"'invoke the equity powers of the proper Circuit Court of the
"'United States whenever jurisdiction attaches by reason of
"'diverse citizenship or upon any other ground of Federal juris-
"'diction.' Smith vs. Ames, 169 U. S., 466, 516; 18 Sup. Ct.,
"418. But it is worthy of note that the Court of Appeals of
"Kentucky has held that, in the absence of a statute allowing
"an action to recover back from the State taxes illegally col-
"lected, the remedy by injunction is the only adequate one.

"In Gates vs. Barnett, 79 Ky., 295, 296, the Court, in a suit
"to enjoin a distraint upon certain tobacco, for the collection of
"taxes, said:

"'The right to have an injunction to restrain the collection
"'of an illegal tax has been so long recognized and acted upon

" ' in this State that it is unnecessary to stop to inquire upon
" ' what ground that jurisdiction is exercised by courts of equity.
" ' The jurisdiction in this case, however, may be placed upon
" ' the ground of the inadequacy of the remedy at law. The
" ' officer, acting in good faith and under color of right, is justi-
" ' fied by this process, and is not liable as a trespasser ; and, as
" ' a suit would not lie against the State directly, the only com-
" ' plete remedy is by injunction.'

" It is by no means clear that distraints or threatened
" distraints against a bank, in view of the character of its busi-
" ness, may not involve such serious detriment to its business,
" and incidentally to the public, as to justify equitable interven-
" tion.

" In the case of Lenawee Co. Sav. Bank vs. City of Adrian,
" 67 Mich., 273, 276 ; 33 N. W., 304, 306, a levy upon and seizure
" of the bank furniture and fixtures was in progress when an
" injunction was issued. Mr. Justice Campbell, speaking for
" the court, said:

" ' No point was made in the pleadings or on the argument
" ' against the jurisdiction of equity in this case. As the bank
" ' was not liable to taxation at all on its personal property, and
" ' the levy was made in such a way as to directly interfere with
" ' its business, the case comes within the analogies of the cases
" ' represented by Osborn vs. Bank, 9 Wheat., 738, from which
" ' it can not be readily distinguished. The court below does
" ' not appear to have doubted the jurisdiction, although decid-
" ' ing in favor of defendants on the merits.'

" In Railway Co. vs. Cheyenne, 113 U. S., 516, 525; 5 Sup.
" Ct., 601, 605, Mr. Justice Bradley said :

" ' It can not be denied that bills in equity to restrain the
" ' collection of taxes illegally imposed have been frequently
" ' sustained. But it is well settled that there ought to be
" ' some equitable ground for relief besides the mere illegality of
" ' the tax ; for it must be presumed that the law furnishes a
" ' remedy for illegal taxation. It often happens, however, that
" ' the case is such that the person illegally taxed would suffer
" ' irremediable damage or be subject to vexatious litigation if
" ' he were compelled to resort to his legal remedy alone. For
" ' example, if the legal remedy consisted only of an action to
" ' recover back the money after it had been collected by dis-
" ' tress and sale of the taxpayer's lands, the loss of his free-
" ' hold by means of a tax sale would be a mischief hard to be
" ' remedied.'

" The interference with the business of a bank and the
" injury to its credit caused by a distress against its personal
" property would seem to be a mischief equally hard to be
" remedied by a mere suit to recover the money back when thus
" collected.

"If it were necessary, we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it?

"In Osborne vs. Bank, 9 Wheat., 738, 842, Chief Justice Marshall said:

"'The single act of levying the tax, in the first instance, is 'the cause of an action at law; but that affords a remedy only 'for the single act, and is not equal to the remedy in chancery, 'which prevents its repetition and protects the privilege.'

"See also, Morris Canal & Banking Co. vs. Mayor, etc. of Jersey City, 12 N. J. Eq., 227; High Inj., Sec. 530.

"In addition to the suits for future taxes, there is also danger of harassing suits for fines and penalties which the law permits to be brought for each days' delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief." (88 Fed. R., 309, &c.)

III.

Has the Question at Issue Been Heretofore Adjudged in Favor of the Complainants?

The facts already stated are sufficient to show that the sole object of the institution of the suits in the State court was to bring to a judicial test the question of whether the complainants had an irrepealable contract under their acceptance of the Hewitt act. That was the question argued by all the parties, and a reading of the opinion of the Court of Appeals, reported in 97 Ky., 599, will conclusively show that that was *the* question considered and decided by the court.

It would now be a work of supererogation to review the authorities on this question of *res adjudicata*. The recent case of the City of New Orleans vs. the Citizens' Bank of Louisiana, 167 U. S., 372, is conclusive of the question. It expressly approves the cases of Cromwell vs. Sac, 94 U. S., 353, and the Last Chance Mining Co. vs. Tyler Mining Co. 157 U. S., 687, and distinctly applies the doctrine of *res adjudicata* to taxes, as was done by the Circuit Court of Appeals for the Eighth Circuit in the case of St. Joseph & G. I. R. Co. vs. Steel, 63 Fed. Rep., 867. The facts of the New Orleans Bank cases so far as it is necessary to state them, are about as follows:

The State of Louisiana had by an act exempted the Citizens Bank of Louisiana from taxation to a certain extent. The bank was chartered for a particular time, and afterwards its charter was extended. Before the extension, attempts under various acts, were made several times by the officers of the State to enforce the prohibited taxes against the bank, and the bank several times appealed to the State courts, and each time received an adjudication that it was not liable to the tax, and the assessment was ordered to be canceled. After the bank had entered upon its extended existence two attempts were made to tax it under another law, and the bank applied on both occasions to the court for an injunction, and in each instance the injunction was granted and the bank exempted from taxation under the extended charter.

From these last decisions no appeal was prosecuted, as had been the case under the old charter. Another act being passed by the Legislature, under which it was thought that this bank could be subjected to the taxation from which it was freed by its contract, another attempt was made to enforce the taxes against it, and this time the bank sought the Federal forum, and filed its bill seeking an injunction in the Circuit Court of the United States for the

Eastern District of Louisiana. In the bill it pleaded its contract of exemption, and that the attempt being made to enforce the taxes would impair the obligation of a contract protected by the Federal Constitution, and the bill also, aside from alleging its contractual exemption, alleged that such exemption was conclusively determined by the presumption of the thing adjudged resulting from judgments previously rendered between the parties. The prayer was for a restraining order and for an injunction enjoining the Board of Assessors from taking the steps necessary to make the assessment, from completing the assessment, and the collectors from collecting any tax thereunder. The court below adjudged in favor of the exemption, and the appeal was prosecuted to this court. We neglected to mention a circumstance noted by the court, that for a period of several years there was no attempt to tax the bank in violation of its charter contract.

The Court, in considering the question of *res adjudicata*, eliminated from consideration the several adjudications made during the existence of the old charter before the extension, and turned its opinion entirely upon the decisions of the court of first instance, which had become final by the failure to prosecute appeals therefrom. The positions of the other side against the plea of *res adjudicata* are stated, as follows, in the language of the Court:

> "The reasons relied on to establish that these judgments do "not constitute the thing adjudged are embodied in three propo- "sitions. First, because although it is true the officials who are "made defendants are the successors in office of the officers who "were impleaded in the judgments relied upon, as they are not "the same natural persons, therefore, there is a want of identity "of parties; second, because the records do not show with suffi- "cient certainty that these judgments were based on the iden- "tical claim of exemption from taxation which is now asserted, "and, therefore, that the judgments do not establish that the "matter here in issue was necessarily therein concluded; third, "because, whatever as a general principle may be the efficacy "of the thing adjudged, that rule has no application to taxes of "different years, since a judgment decreeing a tax of one year "illegal can never be *res adjudicata* as to a tax of a future year, "although the right to tax for a future year is resisted upon the "same facts and between the same parties, and upon the identical "legal grounds held to be conclusive in a judgment previously "rendered between them" (p. 387).

As to the first contention, the Court waives it aside with the statement that it is without merit.

As to the second proposition, the Court devotes more time. The Court takes up the petition filed in the suit to show the ground upon which the judgment was sought, and comments upon the

acts of the officers under the judgment as furnishing evidence of what was included in the judgment, and what the judgment was understood to be. It seems in that case that the complainant not only alleged that the State was without power to tax by virtue of the charter provisions, but it alleged that the tax was excessive; therefore it was necessary for the court to devote some time to show, which it does show quite conclusively, that the judgment was based upon the alleged claim of exemption, and not upon the allegation that the tax was excessive, since it did not order the reduction of the tax, but its cancellation. The Court also comments upon the fact that after these judgments were rendered there was an acquiescence in them by the officers of the State for four or five years, and the banks were not assessed. The Court then proceeded as follows:

"It results from the foregoing, that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive unless the proposition be sound that a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year can not be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defense and of the facts upon which the defense is founded.

"There is a difficulty in meeting the argument by which the foregoing proposition is supported, because the reasoning commingles and treats as one two distinct and different questions. For instance, the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of *res judicata* to demands for taxes, but contends that wherever there are different demands the thing adjudged has no application, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances. On the other hand, the reasoning that this must be the rule, because it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year, has for its basis the proposition that as a matter of public policy and public necessity the principles of the thing adjuged can never apply to taxation. In considering the question we separate at once these two conflicting contentions and examine, first, the proposition that because a tax of one year is a different demand from the tax of a subsequent year, therefore *res adjudicata* as to one can never apply as to the other, and the

" second question of whether as a matter of public policy the " thing adjudged applies to taxes at all.

" The proposition that because a suit for a tax of one year is " a different demand from a suit for a tax for another, therefore " *res judicata* can not apply, whilst admitting in form the princi- " ple of the thing adjudged, in reality substantially denies and " destroys it. The estoppel resulting from the thing adjudged " does not depend upon whether there is the same demand in " both cases, but exists, even although there be different de- " mands, when the question upon which the recovery of the " second demand depends has under identical circumstances and " conditions been previously concluded by a judgment between " the parties or their privies. This is the elemental rule, stated " in the text books and enforced by many decisions of this " court. A brief review of some of the leading cases will make " this perfectly clear.

" In Bank vs. Beverly (1 How., 134-139), it was held that a " construction of a will affecting the rights of the parties must " govern in subsequent controversies between the same parties, " without reference to the different nature of the demands. In " Tioga R. R. Co. vs. Blossbury, &c., R. R. Co. (20 Wall., 137) " Mason Lumber Co. vs. Buchtel (101 U. S., 638), it was held " that when the proper construction of a contract was in contro- " versy, the construction adjudged by the court would bind the " parties in all future disputes.

" In Cromwell vs. Sac (94 U. S., 353), after a full statement " of the nature of the estoppel resulting from the thing adjudged " where the demand was the same in both cases, the court then " considered the extent of the estoppel where the causes of " action were distinct, and said (p. 353):

" ' But where the second action between the same parties is " ' upon a different claim or demand, the judgment in the prior " ' action operates as an estoppel only as to those matters in " ' issue or points controverted upon the determination of which " ' the finding or verdict was rendered. In all cases, therefore, " ' where it is sought to apply the estoppel of a judgment ren- " ' dred upon one cause of action to the matters arising in a suit " ' upon a different cause of action, the inquiry must always be " ' as to the point or question actually litigated and determined " ' in the original action, not what might have been thus liti- " ' gated and determined. Only upon such matters is the judg- " ' ment conclusive in another action.'

" It is unnecessary to multiply citations of authority, as the " subject has been quite recently fully considered and passed " upon by this court. In Last Chance Min. Co. vs. Tyler Min. " Co. (157 U. S., 687), where an estoppel resulting from the " thing adjudged was enforced, this Court said (p. 687):

"'The law in respect to estoppel by judgment is well settled,
"'and the only difficulty lies in the application of the law to
"'the facts. The particular matter in controversy in the
"'adverse suit was the triangular piece of ground, which is not
"'the matter of dispute in this action. The judgment in that
"'case is therefore not conclusive in this as to matters which
"'might have been decided, but only as to matters which were
"'in fact decided. (Hopkins vs. Lee, 6 Wheat., 109; Smith vs.
"'Kernochen, 7 How., 198; Pemington vs. Gibson, 16 How., 65;
"'Stockton vs. Ford, 18 How., 418; Washington & Steam
"'Packet Co. vs. Sickles, 24 How., 333; S. C. 5 Wall., 580;
"'Lessee of Parrish vs. Ferris, 2 Black, 606; Cromwell vs.
"'County of Sac, 94 U. S., 351; Davis vs. Brown, 94 U. S., 423;
"'Russell vs. Place, 94 U. S., 606; Campbell vs. Rankin, 99
"'U. S., 261; Lumber Co. vs. Buchtel, 101 U. S., 638; Stout vs.
"'Lye, 103 U. S., 66; Nesbit vs. Riverside Independent District,
"'144 U. S., 610; Johnson Company vs. Wharton, 152 U. S.,
"'252.)'

"And the law of Louisiana is exactly in accord with the rul-
"ings of this court, for, as said by the Supreme Court of Louis-
"iana in Heroman et al., vs. Louisiana Institute of Deaf and
"Dumb, et al. (34 La. Ann., 814):

"'No principle of the law is more inflexible than that which
"'fixes the absolute conclusiveness of such a judgment upon the
"'parties and their privies. Whether the reasons upon which
"'it was based were sound or not, and even if no reason at all
"'were given, the judgment imports absolute verity, and the
"'parties are forever estopped from disputing its correctness.
"'(Cooley on Const. Lim., p. 47, *et seq.*, and authorities there cited.)

"'Matters once determined in a court of competent jurisdic-
"'tion may never again be called in question by parties or
"'privies against objection, though the judgment may have
"'been erroneous and liable to, and certain of, reversal in a
"'higher court.'
"(Bigelow Est., 3d ed., Outline, pp. lxi, 29, 57, 103.)

"The estoppel extends to every material allegation or state-
"ment which, having been made on one side and denied on the
"other, was at issue in the cause, and was determined therein.
"(Aurora vs. West, 7 Wall., 102; 4 N. Y., 113; 2 An., 462; 14
"An., 576; 19 La., 318; 5 N. S., 664; 11 M., 697; 14 La., 233;
"5 N. S., 170.)

"It follows, then, that the mere fact that the demand in this
"case is for a tax for one year and the demands in the adjudged
"cases were for taxes for other years, does not prevent the
"operation of a thing adjudged, if, in the prior cases, the ques-
"tion of exemption was necessarily presented and determined
"upon identically the same facts upon which the right of exemp-
"tion is now claimed.

"The argument that, as a matter of public policy the princi-
"ple of the thing adjudged should be held not to apply to con-
"troversies as to taxation, if there be merit in it, should be
"addressed to the lawmaking and not to the judicial depart-
"ment. But if the judicial mind could entertain the sugges-
"tion, it seems clear that it is without real merit. In its ulti-
"mate aspect it asserts that no question concerning government
"or public authority ought ever to be submitted to judicial
"investigation. Indeed, the contention is that there is no power
"in courts of justice to consider any question of taxation or ren-
"der any judgment in relation thereto. That this is the result
"of the proposition is manifest from the fact that the very
"essence of judicial power is that when a matter is once ascer-
"tained and determined it is forever concluded when it arises
"again under the same circumstances and conditions between
"parties or their privies. To admit the judicial power on the
"one hand, and to deny on the other the very substance and
"essence of such power, is not only contradictory, but destruc-
"tive of the fundamental conceptions upon which our system of
"government is based. Under this theory the cause under con-
"sideration should not be entertained, but should be dismissed.
"Accepting the argument in its full consequence, every judg-
"ment rendered by this court from the foundation of the gov-
"ernment, declaring a particular tax or burden unconstitutional,
"imports no efficacy whatever. Every decree of this court
"enforcing taxation in order to discharge obligations previously
"contracted, where the right to the tax was a part of the obli-
"gation, is deprived of the sanctity of the thing adjudged, for
"manifestly if the estoppel of the thing adjudged does not arise
"from a judgment preventing taxation, such an estoppel can
"not also result from a judgment enforcing taxation.

"It is contended, however, that the asserted theory finds sup-
"port in two authorities, one a decision of this court, Keokuk &
"Western R. R. vs. Missouri (152 U. S., 301), and the other,
"Davenport vs. Chicago, Rock Island, &c., Railway, (38 Ia., 633,
"640.) But that these authorities do not sustain the contention
"is demonstrable. In the Keokuk case the court held that the
"controversy which it decided was not between the same parties
"as was the controversy in the case wherein the judgment was
"rendered which was relied upon as *res judicata*. The two
"judgments not being between the same parties, there could
"have been and was no necessity for deciding whether, if the
"judgment had been between the same parties or their privies,
"it would have been *res judicata*. True, it is, that in the Keo-
"kuk case the opinion, *arguendo*, discusses the question of whether
"a judgment against the validity of a tax for one year would be
"a bar to a suit for taxes for a subsequent year. But that this
"reasoning was not considered as relating to a case where the

" validity of the tax was resisted on a particular ground, which " particular and special defense had been previously held be- " tween the same parties to be valid under identically the same " conditions and circumstances, becomes clear when the context " of the opinion is examined, and it is discovered that it approves " and quotes the case of Cromwell vs. Sac, the opinion in the " Keokuk case, saying: 'If there were any distinct question lit- "igated and settled in the prior suit, the decision of the court " upon this question might raise an estopel in another suit upon " the principle stated in Cromwell vs. Sac, 94 U. S., 351.' To " seek, then, to avail of the general language used in the opinion " in the Keokuk case without taking note of the circumstance " that it was there said that the estopel would exist even as to " a tax in a case like this, is, in reason, to misinterpret the opinion " and make it cover the very case which it in express language " declared it was not intended to govern. It may also be con- " ceded that language was used in the course of the opinion in " Davenport vs. Chicago, Rock Island, &c., Railway (*supra*), which " is susceptible of the interpretation that under no circumstance, " even between the same parties, would a judgment as to the tax " of one year operate as the thing adjudged as to the tax of a " future year. But that case stands alone, and the language " therein used has been since, if not repudiated, at least qualified, " by the Supreme Court of Iowa to the extent necessary to " bring that case in harmony with the true and universal doc- " trine so often laid down by this court. In Goodnow vs. " Litchfield (59 Ia., 226), where the Davenport case was pressed " as an authority upon the Supreme Court of Iowa, that Court, " in an opinion on a rehearing, said:

" ' It is undoubtedly true that the taxes of each year ordinarily " ' constitute separate and distinct rights or causes of action. But " ' when an action is brought to recover taxes paid in one year, " ' and an action is afterwards brought to recover for the taxes " ' paid in a subsequent year, and the adjudication in the first is " ' pleaded as a bar to the recovery in the second action, the ques- " ' tion whether the estoppel is effectual will depend upon the " ' issues in the two actions.

" ' If the right to recover and the defense thereto are based " ' upon necessarily the same grounds, why litigate again the " ' question that has been determined? In such case the very " ' right of the matter, is determined by a court of competent " ' jurisdiction. It is not essential that the causes of action should " ' be the same, but it is essential the right or title should be; " ' that is, the issue in both actions and the matter on which the " ' estoppel depends must be the same, or substantially so. The " ' very matter or thing which it is sought to litigate must have " ' been adjudicated in the prior action. In such case the bar or

"'estoppel is complete. This rule will not, we think, be dis-
"'puted. Therefore authorities are not required in its support;
"'but see Merrian vs. Whittmore (5 Gray, 316.)'

"It follows, then, that the theory by which it is sought to "take questions of taxation entirely out of the reach of the "rule of the thing adjudged is not only without foundation in "reason, but is also without support of authority, since the "case from this court, which is cited to sustain it, can not prop-"erly be said to maintain the contention, and the other from "the Supreme Court of Iowa has been either overruled or "qualified" (p. 395, &c).

The counsel for the City of Louisville seek to avoid the effect of the judgments heretofore rendered and pleaded in these cases and the effect of the recent decision by contending—

1st. That there is not an identity of person.

2d. That the matter now in dispute is not the same matter as was in dispute in the former adjudication.

Upon the first proposition we have already shown that though the suit is against R. H. Thompson, Judge of the Police Court of the City of Louisville, it is so brought because he is the representative of the City of Louisville pointed out by the statute as the one against whom such a suit shall be brought to test the validity of the asserted right of the city under the ordinance passed by the General Council. It is, of course, very clear that Thompson was sued not in his individual but in his representative capacity, and that in this capacity his principal was the City of Louisville, which would be bound as privy by the judgment; but the fact is, as shown by the record, that when the Bank of Kentucky won its case in the Circuit Court the "City of Louisville," in its own proper name, prosecuted the appeal, and that from the judgments dismissing the petitions of the Louisville Banking Company and the Third National Bank, the appeals were prosecuted against the "City of Louisville" in its own proper name.

It furthermore distinctly appears from the reported case, 97 Ky., 598, and from the record, that the counsel for the city appeared and made his argument in behalf of the city, so that it seems to us that this point is clearly not well taken.

The next point is that the adjudication is not conclusive, because all the judgment did was to prohibit Judge Thompson from proceeding under the ordinance on the ground that the ordinance was void, and that inasmuch as that ordinance was, in another case, held void, for another reason, therefore the judgment presents no bar.

This proposition of the counsel, it seems to us, is most clearly and distinctly answered by the New Orleans Bank Tax case. If we look to the pleadings, we find that the validity of the ordinance

was not challenged in the Bank cases upon any ground except that the banks had an inviolable contract with the State, the obligation of which would be impaired if the ordinance was enforced. The opinion of the court shows, too, that the ordinance was not held void for any ground stated in the case of Reed vs. City of Louisville, 97 Ky., 394, but solely and distinctly upon the ground that the banks had a contract, made under the terms of the Hewitt act, which was beyond the power of the State to repeal or withdraw from.

It will be also noticed that the judgment entered upon the mandate of the Court of Appeals adjudges in so many words that the petition states a good cause of action ; and the only cause of action stated in the petition is the claim of invalidty of the ordinance because of the existence of that very contract.

Again, it may be said here, as was said in the New Orleans Bank case, that the contemporaneous construction placed upon the judgment by the executive officers, including those of the city of Louisville, makes it entirely conclusive that the judgment rested alone upon the claim of contract. For instance, as is alleged in the bills, as soon as the case was decided in June, 1895, the Auditor of the State called upon all the banks and trust companies, including the complainants, to pay into the treasury of the State the difference between what had been exacted under the revenue act of November 11, 1892, and what they should have paid under the Hewitt act; and these complainants and other institutions of similar kind in Kentucky were compelled to pay, and did pay, the taxes for the years of 1893, 1894, and 1895, and have since that date been compelled to pay at the same rate, being the rate prescribed by the Hewitt act.

Again, as conclusively showing that the city officers were not in doubt as to the meaning of the judgment, as the counsel for the city seems now to be, there was no attempt to levy an *ad-valorem* tax after the ordinance had been held to be void, nor to tax the banks in any way at all, except upon their bank building, as *allowed by the Hewitt act.* So that it is just as conclusively settled in this case as it was in the New Orleans Bank Tax case, that the matter in dispute now is the same matter which had been put in dispute before and distinctly adjudged.

The Circuit Court, in the cases at bar, in passing upon the question whether the point adjudged by the Court of Appeals in the former litigation was exactly the same as that now raised in the present litigation, used this language :

> " In the case before us there can be no question, from the " statement of facts and an examination of the records in pre- " vious cases as set forth therein, that the question which was " adjudged in them was the identical question presented in the " same way and for the same purpose as in the case at bar, to

" wit, whether there was a contract between the bank and the " State which forbade the imposition of higher taxes than those " imposed under the Hewitt act. It was distinctly adjudged, in " behalf of the complainant against Franklin county and the " City of Frankfort, by the Court of Appeals, by the decision " rendered in 1895, and by a mandate issued from that Court to " the Franklin Circuit Court, that such a contract in fact " existed, and rendered null and void the provisions of the rev- " enue act of November 11, 1892, under which the defendants " now seek to impose taxes upon the complainant.

" It is vigorously pressed upon us, however, that the judg- " ment in the prohibition suit can not be relied upon by the " complainant bank to establish the existence of a contract of " exemption between it and the city of Louisville, because there " is nothing in the record to show that the issue made by the " demurrer to the petition in that suit was the existence of such " an exemption and its violation. Neither the mandate of the " Court of Appeals nor the judgment of the Jefferson Circuit " Court states the ground for holding the ordinance " void. It is said that some thirty days before the decision of " the prohibition case by the Court of Appeals that court, in " Levi vs. City of Louisville, 97 Ky., 394; 30 S. W., 973, held " that the City of Louisville had no power under the constitu- " tion to substitute a license tax for *ad-valorem* tax on personal " property, and that this ruling must have led to overruling the " demurrer to the petition in the prohibition suit, because it " necessarily rendered the license tax upon the banks void. " The Levi case was a suit by an owner of real estate to enjoin " the collection of an *ad-valorem* tax on his land, on the ground " that the city had not imposed such a tax on personalty, but " had substituted therefor a license tax upon it, and so had " discriminated in favor of personal property and against realty. " The Court of Appeals held that it was the duty of the city to " impose an *ad-valorem* tax on personalty, and that it could only " impose a license tax on a business in addition to an *ad-valorem* " tax on property. We confess, we can not see how this decision " would have determined the question at issue between the com- " plainant bank and the City of Louisville, in the prohibition " suit. There was nothing in the petition for prohibition to " show that the license tax was a substitute for an *ad-valorem* " tax upon the personal property of the bank. There was noth- " ing to show that the city of Louisville had not, under the " revenue act of 1892, assessed an *ad-valorem* tax on the bank's " personalty. The license tax was graduated by a percentage, " not of the bank's personal property, but of the bank's gross " receipts, and did not, therefore, purport to be a taxation on its " personal property. The petition was not therefore, demurra- " ble under the Levi case. When we further consider that the

"sole ground stated in the petition for a prohibition was that "the license tax was void, because it impaired the bank's con- "tract of exemption, and so violated the Constitution of the "United States, and we find that this was the sole ground con- "sidered by the Court of Appeals in its opinion, we can have no "doubt what was the point adjudged" (88 Fed. R., 394 &c).

There seems so little real ground to contend for the reverse of this proposition that it would seem to be the work of supererogation to say anything further on the subject.

It results therefore, we submit, that the judgment of the Circuit Court must be affirmed in cases No. 360 and No. 361 (Stone, etc., vs. Louisville Banking Company, and Louisville vs. same) in which it perpetually enjoined the assessment or collection of any tax against the Louisville Banking Company other than as prescribed by the Hewitt act for any of the years involved. Because it was an actual party of record in the former litigation and its "corporate existence" (during which the contract under the Hewitt act continues) was the same, without even the necessity of an extension of its charter, during all the years in controversy.

It necessarily results further that the judgment of the Circuit Court must be affirmed in case No. 364 (City of Louisville vs. Third National Bank) in which it perpetually enjoined the collection of any tax for the years 1893 or 1894 against the Third National Bank. Because it was also a party of record to the former litigation; and the original term of its charter, its "corporate existence," would have continued, even without any extension, to August, 1894, a period subsequent to the accrual of the tax of 1894.

As to whether or not its corporate existence continued unchanged after the extension of the term of its charter, so as to continue the contract with the State during the extended term, is a question we will discuss hereafter, and is involved in case No. 404, Stone, etc., vs. The Third National Bank.

We now pass to the next branch of the discussion.

IV.

Does the Former Adjudication Protect Only the Banks Actually Engaged in the Litigation, or Does it Extend to the other Institutions which Entered into the Contract with the City to Abide the Result Thereof, and acted on the Faith of it?

If the City had the right, through its attorney and Mayor, or either of them, to make the contract set up in the bill, then there is no doubt about the fact that the benefit of the adjudication extends to all institutions that were intended to be bound by that contract and acted on the faith of it. Nor is there any doubt that the intention was that the contract should extend to all banks and trust companies which had accepted the provisions of the Hewitt act; for the contract expressly so stated, and it is admitted that all of the institutions named in the caption of this brief, except the First National Bank, did accept the provisions of the Hewitt act.

The circumstances under which this contract was made are detailed on pages 10 to 15 of this brief, and need not be repeated. Judge Barker, who was at that time counsel for the city, and signed the contract after full conference with the Mayor and Finance Committee of the City, testifies fully to the circumstances under which the contract was made. See record in case of Stone vs. Bank of Commerce, pages 42 to 47 inclusive. The question then presents itself,

DID THE CITY HAVE A RIGHT TO MAKE THE CONTRACT?

Counsel for the City denies the right of the Mayor, the City Attorney and the Sinking Fund Commissioners to enter into the kind of stipulation made in this case with the banks and trust companies. We have already shown why that stipulation was made, and that it was most distinctly made at the instance of, and for the benefit of, the City itself. And it is alleged in the bills, and will be admitted, that by reason of that stipulation the City now has in its treasury over $150,000 which it could not otherwise have collected, and not one cent of which would it have ever received.

The City, therefore, has in its treasury about $150,000 which it gained wholly and entirely as the result of this agreement. For it now, therefore, to undertake to repudiate its agreement while still holding the benefit, or even to undertake to repudiate the agreement and surrender the benefit, because it has become its

interest to do so, is repugnant to conscience, and will not be tolerated by a court of equity. The facts in relation to this matter are alleged in the bill, and whether the City is estopped by a former adjudication or merely *in pais*, it is equally estopped from attempting to collect taxes from the complainants except according to the method pointed out by the Hewitt bill. We maintain that it is estopped both by the former adjudication and *in pais*. Herman on Estoppel, page 150, thus states the doctrine of *res adjudicata* as applied to privies made so by an agreement to abide the result of a pending litigation:

"A man becomes a privy whenever he agrees to be bound "by the acts of a third person; and where one agrees to be "bound by the result of a judicial proceeding, as against a "stranger or third person, under such circumstances that others "have the right to insist on the fulfillment of his agreement, "he will not be permitted to recede from his promise after the "rendition of the judgment, to their injury."

See, also, Brown vs. Sprague, 5 Denio, 545, and Patten vs. Caldwell, 1 Dall., 442.

There is no principle of the doctrine of *res adjudicata* better settled than that the estoppel must be mutual, and if the institutions, parties to that agreement, are estopped by the judgment to re-litigate the questions, it necessarily follows the City is estopped; and the authority quoted from Herman is direct to the effect that these banks and trust companies, after having made this agreement have made themselves privies, and are estopped by the judgment as such, as completely as the original parties are estopped.

But the city is unquestionably estopped by its conduct, even if the banks and trust companies are not able to plead technically *res adjudicata*. That the city may thus be estopped is clear from the recent opinion of this Court in the case of the City Railway Company vs. the Citizens' Street Railroad Company, 166 U. S., 566. Of course, it can not be denied that *the city* possessed the power to make such an agreement, and that is not questioned, but we understand the position of counsel to be that the *Mayor* and the *City Attorney* had no right to make the contract. If it be assumed, as it must be, that the city had the power to make such an arrangement, then it is estopped after having received the benefit of the agreement to question it upon the ground of lack of formality in its execution.

In the case referred to this Court said:

"All that is necessary to create an estoppel *in pais* is to show "that upon the faith of a certain action on the part of the city, "which it had power to take, the company incurred a new lia- "bility; as, for example, by the negotiation of a new loan, and

" the issue of a new bond and mortgage to secure the same. " Under such circumstances, justice to the bondholders, who " have in good faith invested their money in reliance upon the " validity of such action, demands that the city shall be held to " its contract, notwithstanding there may have been originally " no consideration to support it."

In the case at bar, as we have shown, the contract was made in the interest of, and for the benefit of, the city ; and the consideration which the city has received is over $150,000. Under such circumstances there can be no question, it seems to us, that the city is equitably estopped to now attempt to tax the banks and trust companies otherwise than as indicated by the Hewitt act.

But we maintain that the Mayor and City Attorney, or even the City Attorney alone, under the circumstances as they actually existed, had the power to make the stipulation pleaded in these cases. We do not see how it can be contended with any show of reason that such an agreement requires an ordinance of the General Council ; we have certainly found no statute upon which such a contention can be based ; and the counsel for the city did not claim in his argument at the bar that there was such a statute.

By section 2791, which is applicable to the city of Louisville, the duties to be performed by the Mayor are prescribed. Among others is the duty to be vigilant and active in causing ordinances of the city and the laws of the State to be executed and enforced.

By section 2793 it is declared (referring to the Mayor):

" He shall exercise a general supervision over all the execu- " tive and ministerial officers of the city and see that their offi- " cial duties are honestly performed."

By section 2909, which relates to the duties of the Attorney for the City of Louisville, it is declared :

" There shall be elected by the General Council immediately " upon the assembling of the new Board a City Attorney, whose " duty it shall be to give legal advice to the Mayor and the mem- " bers of the General Council, and all other officers and Boards " of the city in the discharge of their official duties. If " requested, he shall give his opinions in writing, and they shall " be preserved for reference. It shall also be his duty to prose- " cute and defend all suits for and against the city, and to attend " to such other legal business as may be prescribed by the Gen- " eral Council."

Here, by the very terms of the statute creating his office, he alone is given charge of the litigation of the city ; and it was, it

seems to us, a most proper and necessary step, in view of the litigation which was then pending, or about to be brought, that the attorney should agree with the counsel for the banks and trust in reference to the bringing of such suits as would illustrate the different phases of the question as applied to the different institutions, and stipulate that a judgment in these test cases should be binding upon all for whom the test cases were made. Take the present situation. There were filed, at one time, for banks and trust companies, in the city of Louisville, thirty cases. It would not take over four or five of these cases to illustrate every phase of the question which can be raised in every one of them. Can it be, then, that the attorney for the city must prepare every one of these cases and call upon the court to read the record in every one of them, when the judgment of the Court as applied to each can be obtained by the preparation of only a few? Why go to this unnecessary cost? It seems to us a very proper step for the City Attorney to take, and one that ought to be commended.

In the third American and English Encyclopedia of Law, second edition, 353, under the head of "Attorney and Client," it is stated:

> "Subject to the rule that an attorney can not compromise "his client's case, any agreement or stipulation which appears "in the progress of a cause to be necessary or expedient for "the advancement of his client's interests may be made for his "client by an attorney; and this right, it seems, is exclusive so "far as it applies to stipulations relating purely to the manage-"ment of the case in court."

The stipulation here did relate to the management of the litigation. The question which the attorney had to consider was this: Was it proper to subject the city to the cost of twenty-five or thirty cases when every phase of the question could be determined upon presenting two or three of them? Again, was it right for him as the attorney for the city to insist upon all of the cases being brought, when the result would be that the city would collect no taxes at all from the banks for a year or two? Under these circumstances the attorney, in order that the city might realize the taxes, as heretofore shown, from the banks and trust companies not parties to the test cases, made the stipulation in the interest of his client.

It is again stated, in the same work, in the very next section:

> "Thus an attorney employed in several different suits by or "against different parties, but all involving the same issues, and "the interest of his client being of the same character in all, "may stipulate that the trial of one shall determine the issues "in all the others."

In support of these propositions a great many cases are cited. In support of the last proposition there are cited: Ohlquest vs. Farwell, 71 Iowa, 231 (S. C. 32, N. W. Rep., 277); Scarritt Furniture Co. vs. Moser, 48 Mo. App., 543; Eidan vs. Finnegan, 48 Mo., 33 (S. C. 50 N. W. Rep., 933). These cases as well as those cited upon the other propositions amply support the text.

See also on the general authority of an attorney in the conduct of the case and his right to make stipulations with reference to one case abiding the result of the others, sections 190, 191, 192, 193, 194 and 195 of first volume of Thompson on Trials. See also the cases of North Missouri Railroad Co. vs. Stephens, 36 Mo., 150; Gilmore vs. American Central Ins. Co., 67 Cal., 366. The same doctrine is recognized in Lawson's Rights, Remedies and Practice, section 173.

The position that the City Attorney had the right to make the contract was sustained by the Circuit Court after a most painstaking investigation. The Court, in treating of this branch of the question, said:

"We are of opinion that the City Attorney was vested with "ample authority to bind the City of Louisville to the contract "mentioned in so far as it affected the complainant herein. By "section 2909 of the Revised Statutes of Kentucky it is pro-"vided that:

"'There shall be elected by the General Council, immedi-"'ately upon the assembling of the new board, a city attorney, "'whose duty it shall be to give legal advice to the Mayor and "'members of the General Council, and all other officers and "'boards of the city in the discharge of their official duties. "'If requested, he shall give his opinions in writing and they "'shall be preserved for reference. It shall also be his duty to "'prosecute and defend all suits for and against the city, and "'to attend to such other legal business as may be prescribed "'by the General Council.'

"The foregoing section makes this officer the retained "attorney of the city in every suit brought against it. The "question at issue between the banks and the City of Louis-"ville was whether the city could collect license taxes under "one of its ordinances. The banks notified the City Attorney "and the Commissioners of the Sinking Fund, whose duty it was "to receive the money for the benefit of the city, that they in-"tended to resist the collection of the tax by litigation. It "was the duty of the City Attorney, under the statute above "set forth, to take charge of the litigation thus about to be "brought. It was his duty, as the attorney of the city, to save, "so far as he could without prejudice to the city's interests, costs "which might be accumulated should suits to the number of "twenty be brought and won by the banks against the city.

"It seems plain to us that it was within his general authority as "attorney to make an arrangement with the intended litigants, "by which the litigation to be brought should be reduced in "volume to as few cases as possible by means of a stipulation "that all the suits involving the same questions should abide the "result in one suit to be brought. We think that such a stipu- "lation was a mere step in the management of the litigation, "and was entirely under the control of the attorney retained for "the suits. It did not work to the prejudice of the city in the "slightest. Had the suits actually been brought, a stipulation "between the city attorney and the attorneys for the banks of "this character would have been clearly part of the ordinary "management of the suits as any other arrangement for expe- "diting their trial. No material distinction can be suggested "between the power of the city attorney to make an agreement "of this character with respect to intended suits and suits actu- "ally filed. The control that an attorney has by virtue of his "office over the suit in which he is employed is very wide in "respect to those matters that relate to the progress of the suit "and the mode of reaching a conclusion, and which do not "deprive the client of a full opportunity to be heard by his "attorney on the issues raised in the case. Such authority "inheres in the relation between an attorney and client in re- "spect to litigation, and the authorities fully sustain this con- "clusion.

"In Railroad Co. vs. Stephens, 36 Mo., 150, the plaintiff rail- "road company brought several suits against different stock- "holders in which the questions were precisely the same. The "attorneys for the respective parties entered into a written "agreement stating that, as the same facts arose in all the cases, "they would abide by the judgment that should be rendered in "one of them, and that a like judgment should be rendered in "each of the several cases. It was contended in that case that "the attorneys who made the agreement had no authority to "make the agreement, and that it was void. The court sus- "tained the agreement as within the authority of the attorney. "It said:

"'The agreement in this case is not a "compromise" accord- "'ing to the usual acceptation of that term, for that generally "'applies to releasing the part of the debt, taking land instead "'of money, or changing the nature and character of the thing "'to be recovered. It comes nearer within the general manage- "'ment of the case.'

"In Ohlquest vs. Farwell, 71 Iowa, 231; 32 N. W., 277, a "client was a party to two suits involving substantially the "same question. It was held competent for his attorney to "bind him by an agreement that only one of the cases should

"be tried, and that the judgment resulting from such trial should "determine the kind of judgment to be entered in the other "case. In delivering the opinion of the court, Judge Beck said:

"'It is undoubtedly true that an attorney can not consent to "'a judgment against his client, or waive any cause of action "'or defense in the case; neither can he settle or compromise "'it without special authority. But he is, by his general em- "'ployment, authorized to do all acts necessary or incidental to "'the prosecution or defense which pertain to the remedy pur- "'sued. The choice of proceedings, the manner of trial, and "'the like, are all within the sphere of his general authority, "'and, as to these matters, his client is bound by his action. "'These rules are conceded by counsel in this case. It can not "'be doubted that, under them, counsel for parties in several "'suits, involving the same issues, may, in the exercise of their "'general authority, consent to the consolidation of all for trial, "'or stipulate that the trial of one shall determine the others. "'This pertains to the remedy pursued—to the manner of trial— "'and it is not an agreement for judgment or a compromise. "'The parties are not deprived of a trial, nor is judgment ren- "'dered by consent. The counsel simply assent to a trial in a "'particular manner; that one trial shall settle the same issues "'in several cases. This is just what was done by the counsel "'for Becker in this case. The form of agreement is that judg- "'ment in his case should follow a trial in another action. "'This is not an agreement for a judgment, but in effect an "'agreement for a manner of trial.'

"See, also, Eidan vs. Finnegan, 48 Minn., 53; 50 N. W., 933; "Gilmore vs. Insurance Co., 67 Cal., 366; 7 Pac., 787."

"In Thompson on Trials (Volume 1, Sec. 195,) the author "says:

"'Where several cases are pending in Court, depending "'upon the same facts or questions of law, it is competent for "'the attorneys, in virtue of their general retainers, to stipulate "'that only one shall be tried, and that the others shall abide "'the result of that one'."

"We think, therefore, that, in so far as the issues arising "between the banks not actually engaged in the litigation and "the City of Louisville were the same as in the three suits "which were brought as test cases, the contract made by the "City Attorney was binding upon the city" (88 Fed. R., 403, &c).

The Court then proceeds to consider the question whether the contract made enables the parties to it to claim the benefit of the estoppel of the judgments thereafter rendered, and reaches the conclusion that it does. In this discussion the opinion of the

Court is so clear that, in lieu of an argument, we quote from it as fully covering the question.

"The next question is whether the contract made enables "the complainant bank to claim the benefit of the estoppel of "the judgments thereafter rendered. We think it does. In "Batton vs. Caldwell, reported in 1 Dall., 419, the action was on "a policy of insurance. Counsel for plaintiff offered to read in "evidence a special verdict that had been given in another "action against a different underwriter. This was objected to "on the ground that the verdict was given between other "parties, and therefore not admissible, upon which an agree- "ment of all the underwriters to be bound by one verdict was "proven. McKean, C. J., said:

"'The defendant had no opportunity of cross-examining "'upon the former trial, and the answer is that he, with the "'rest of the underwriters, had agreed to be bound by one ver- "'dict, which is certainly the only ground for offering the "'evidence proposed by the plaintiff's counsel. Whether this "'agreement was made in person, or by a broker mutually em- "'ployed, it is equally binding on the parties; and under the "'agreement, all the underwriters were fully entitled to inter- "'fere upon the former trial, and to cross-examine the witnesses "'then produced. Although, therefore, we should not have "'allowed the special verdict to be read, without full proof of "'the agreement, yet, on receiving that satisfaction, we think "'it would be unfair to suppress it; and, for the future, we "'desire that all such agreements may be entered on the records "'of the Court.'

"The Court then held that the verdict thus offered was not "conclusive. As the latter proposition, however, is in conflict "with the rule laid down by the Supreme Court of the United "States in a recent case of Southern Pac. R. Co. vs. U. S., 168; "U. S., 1; 18 Sup. Ct., 18, that part of the decision can not be "regarded as authority here.

"In Brown vs. Sprague, 5 Denio, 545, several ejectments "were pending between one claiming title and persons having "only the naked possession of the lands. An agreement was "made between all the parties that the suits should be stayed "and await the event of a suit between other parties in which "the same questions arose. It was held that a judgment in that "suit would operate as an estoppel between the parties to the "agreement.

"Mr. Freeman, in his work on Judgments, says (Section "174):

"'Neither the benefit of judgments, on the one side, nor the "'obligations, on the other, are limited exclusively to parties "'and their privies. Or, in other words, there is a numerous

"'and important class of persons who, being neither parties upon "'the record, nor acquirers of interest from those parties after "'the commencement of the suit, are, nevertheless, bound by "'the judgment. Prominent among these are persons on whose "'behalf and under whose direction the suit is prosecuted or "'defended in the name of some other person. * * * The fact "'that an action is prosecuted in the names of nominal parties "'can not divest the case of its real character, but the issues "'made by the real parties, and the actual interests involved, "'must determine what persons are precluded from again "'agitating the question, and who are estopped by the "'previous decision. Whenever one has an interest in the "'prosecution or defense of an action, and he, in the advance-"'ment or protection of such interest, openly takes substan-"'tial control of such prosecution or defense, the judgment, "'when recovered therein, is conclusive for and against him "'to the same extent as if he were the nominal as well as the "'real party to the action. * * * Where one seeks the benefit "'of an estoppel by judgment, on the ground that he was the "'real party in interest in an action, he must show that he con-"'ducted the action or defense openly, to the knowledge of the "'adverse party, and for the protection of his own interests.'"

"These principles are sustained by the cases cited by the "learned author. See Cole vs. Favorite, 69 Ill., 457; Wood vs. "Ensel, 63 Mo., 193; Tate's Ex'rs. vs. Hunter, 3 Strob. Eq., "136-140; Palmer vs. Hayes, 112 Ind., 289; 13 N. E., 882; Gill "vs. U. S., 7 Ct. Cl., 522, 526. See also, Herm. Estop., Sec. 139.

"In 1 Greenl. Ev., Sec. 523, the principle is stated as follows:

"'But, to give full effect to the principle by which parties "'are held bound by a judgment, all persons who are repre-"'sented by the parties, and claim under them or in privity "'with them, are equally concluded by the same proceedings. "'We have already seen that the term 'privity' denotes mutual "'or successive relationship to the same rights of property. "'The ground, therefore, upon which persons standing in this "'relation to the litigating party, are bound by the proceedings "'to which he was a party, is that they are identified with them "'in interest; and, wherever this identity is found to exist, all "'are alike concluded. Hence all privies, whether in estate, in "'blood, or in law, are estopped from litigating that which is "'conclusive upon them with whom they are in privity. And "'if one covenants for the results or consequences of a suit "'between others, as if he covenants that a certain mortgage "'assigned by him shall produce a specified sum, he thereby "'connects himself in privity with the proceedings, and the "'record of the judgment in that suit will be conclusive evi-"'dence against him.'

"In the case of Rapelye vs. Prince, 4 Hill, 119, Mr. Justice "Bronson, speaking for the Supreme Court of New York, said:

"'When one covenants for the results or consequences of a "'suit between other parties, the decree or judgment in such "suit is evidence against him, although he was not a party.'

"In the present case there can be no doubt from an exami- "nation of the contract and the averments of the bill that the "three suits which were conducted were openly conducted in "the interest of all the parties to the agreement with the knowl- "edge and by the consent of the City of Louisville, and that the "counsel who appeared for the parties to the records were at "the same time discharging their duties as counsel for the other "banks who had made the agreement. If any one can be boun "by a judgment to which he is not a party, it would seem that "the banks here must have been so bound. Had the result "gone the other way, and a judgment been rendered in favor of "the City of Louisville in the cases referred to, it can not admit "of doubt that all the banks would have been bound by the "decision. As part of the consideration for the settlement of "the litigation in the manner fixed by the agreement, the banks "paid to the Sinking Fund Commissioners for the City of Louis- "ville the substantial sum of $150,000. Had the agreement "not been entered into, it is certain that the complainant would "have obtained formal judgment in a prohibition suit, and "would now have been in the same position as the Louisville "Banking Company. Relying on the binding character of the "agreement, however, judgment was not taken in the name of "complainant. Equity and justice require that effect should "be given to an agreement upon the faith of which $150,000 was "immediately paid to the City, and a formal judgment was not "taken. It is just that, inasmuch as the banks would have been "bound by a diverse judgment, they shall have the benefit of a "judgment which was rendered in favor of their colleagues "selected to represent them in the suit" (88 Fed. R., 405, &c).

If we are correct in the position taken by us in this division of our brief, to-wit, that the banks which agreed with the city to abide the result of the test cases are entitled to the protection of the adjudication therein made, then it follows that the judgment of the Circuit Court in the cases of Stone, &c., vs. Bank of Commerce, No. 362, and City of Louisville vs. Bank of Commerce, No. 363, in which the court enjoined the assessment or collection of any taxes against the Bank of Commerce, other than as provided in the Hewitt act, must be affirmed. For that bank was a party to the agreement mentioned; and its corporate existence during all of the years involved was exactly the same as when the Hewitt act was passed, there not having been any necessity even for an extension of the charter.

It must also result that the judgment of the Circuit Court in the case of City of Louisville vs. Citizens National Bank, No. 365, must be affirmed, in which the Court enjoined the collection of any taxes for the years 1893 and 1894 against the Citizens National Bank, other than as provided for by the Hewitt act. For that bank also was a party to the agreement with the City of Louisville; and the term of its charter as originally granted would not have expired until August, 1894, which was a date subsequent to the accrual of the taxes of 1894.

Whether or not the corporate existence of the Citizens National Bank was the same during the extended term of its corporate existence, so as to give it the benefit of its contract with the State during this extended term, is a question which we will hereafter discuss, and which is involved in the case of Citizens National Bank vs. Stone, &c., No. 405.

V.

Have the Trust Companies an Equal Right with the Banks to Avail Themselves of the Plea of Res Adjudicata?

The Circuit Court held that they had not.

First. Because the difference between a trust company and a bank was such that the city attorney had no right to make the agreement extend to trust companies, as the test cases were made entirely in the names of the banks.

Second. Because, irrespective of the city attorney's power, the point adjudged being that banks which had accepted the provisions of the Hewitt act had an irrepealable contract, that adjudication could not be made to extend to or protect the trust company, which was not a bank.

These questions, though stated as two distinct questions, are yet so interdependent that a discussion of either will necessarily almost entirely cover the other, and we shall therefore consider them together.

The important question to be considered is whether it was intended by the statute relied upon by each institution as the basis of its contract, to make any distinction between banks and trust companies. If it was not, then we submit that the only remaining question is whether the legislature possessed the power to make such a contract with the trust companies; for, if the legislature possessed the power, and intended to treat banks and trust companies exactly alike, no reason is perceived, assuming the power of the city, by its attorney or otherwise, to make the contract with *banks* for a test case, why the contract should not be extended to *trust companies*, which, for the purpose of taxation, stood exactly in the same situation as banks.

It will not be denied that it was the intention of the contract with the city to include trust companies, and that on the faith of the contract the trust companies actually carried out the contract.

With reference to the first of these propositions, the contract itself, after dividing the banks into classes "A," "B," and "C," declares: "It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall into class 'B,' above named." (Louisville Trust Company, Record, page 14.) And the attorney for the city, Judge Barker, speaking of this question in his deposition in these cases, and of the view taken by the attorneys for both sides, said: "When this conference of February 13, 1894, was held we were brought face to face with the fact that all the banks and trust companies claimed immunity; also that they were divisible into three classes. One class was those banks whose charters had been granted them prior

to the act of 1856, with which the court is familiar; those State banks whose charters had been granted them subsequent to the act of 1856, and the National Banks, and it was supposed by counsel that the trust companies went into the class of the State banks, whose charters had been granted subsequent to the act of 1856." (Stone, &c., vs. Bank of Commerce, p. 44.)

Again this question was asked Judge Barker:

Q. If this arrangement had not been made as indicated in the resolution, a copy of which you have referred to, were you given to understand that each one of these institutions would refuse to pay anything and bring its separate suit?

A. "Undoubtedly, I was given so to understand, and that result would have been unavoidable, as I would have taken out an ordinance warrant against each one of them, which would have forced them into the Police Court, and they would have been bound to have defended as many suits as there were institutions delinquent. Now, to save all this, the agreement in regard to the classes was made." (Stone vs. Bank of Commerce, p. 44.)

On the other question, viz., whether the contract was carried out by the trust companies, Judge Barker testifies that it was carried out to the letter. (Stone vs. Bank of Commerce, p. 46.)

DID THE STATUTE INTEND TO MAKE ANY DISTINCTION BETWEEN TRUST COMPANIES AND BANKS?

The first section of Article 2 of the Hewitt Act (Appendix) settles this question beyond dispute. The language shows it was not intended to apply to banks alone, nor to make of them a distinct class. The language is that "shares of stock in State and National Banks, *and* other institutions of loan or discount, *and* in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, *institutions, and corporations* shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal.

It thus appears that the institutions to be so taxed and put in the same class are designated in three ways:

A. Banks.

B. Institutions of loan or discount.

C. Institutions required by law to be taxed on their capital stock.

In the amended bill filed by the Fidelity Trust & Safety Vault Company it is alleged that "the complainant, Fidelity Trust & Safety Vault Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks and other institutions of loan or discount and to all corporations required by law to be taxed on their capital stock. And your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed, and has always been taxed, on its capital stock." (Fidelity Trust Co. vs. Louisville, p. 27.)

Again in the same pleading it is alleged, "Your orator says that at the time it entered into the contract with the City of Louisville to abide the result of the decision in the case of the Louisville Banking Company vs. R. H. Thompson and the City of Louisville, it and the city and the counsel for said city, all in good faith, believed that the decision of that case would settle every question which could be raised either by it or the City of Louisville, and your orator shows that at that time the case of the Louisville Trust Company vs. City of Louisville had not been decided." (Same record and page.)

The same pleading sets up some amendments to the charter, with the view of showing the powers possessed by it similar to those possessed by banks. The language of the pleading in this respect is as follows:

"Your orator further shows that, by an amendment to its "charter adopted by the General Assembly of the Common- "wealth of Kentucky and approved April 12, 1888, it was pro- "vided as follows:

"'Section 1. That the charter of the Fidelity Trust & "'Safety Vault Company, of Louisville, Kentucky, be and the "'same is so amended that promissory notes payable to any "'person or persons, or to a corporation, and payable and nego- "'tiable at the office of said company, in Louisville, Kentucky, "'which shall be endorsed to and discounted by any bank "'incorporated under any law of this Commonwealth, or organ- "'ized in this Commonwealth under any law of the United "'States, shall be and they are hereby placed on the same foot- "'ing as foreign bills of exchange.'

"And by an amendment adopted the 15th day of May, "1890, it was provided as follows:

"'Section 2. That said company may receive money on "'deposit subject to check or payable at an agreed time.

"'Section 3. That all promissory notes, secured by lien on "'real estate or collateral, made negotiable and payable at a "'chartered bank or at the office of said company, shall, when

" ' endorsed to, and purchased by said company, be placed on
" ' the footing of foreign bills of exchange.'
" Your orator further shows that since the adoption of
" said amendment it has regularly done a savings bank business,
" and has received deposits and paid interest on the same, in
" every respect doing the same character of business as done by
" the Louisville Trust Company, under its power to do a savings
" bank business; and your orator submits that, for the purposes
" of taxation, and so far as the performance of a public service
" is concerned, it should be deemed and treated as a bank."
(Same record, p. 28.)

In the amendment filed by the Louisville Trust Company it is alleged that "the complainant, The Louisville Trust Company, amends its bill herein and says that the Hewitt law, the effect of which is set out in the original bill, did not apply to banks merely, but to banks *and* other institutions of loan or discount *and* to all corporations required by law to be taxed on their capital stock; and your orator respectfully shows that it is and always has been an institution of loan, and always since its organization has been required by law to be taxed, and has always been taxed, on it capital stock."

Again, in the same pleading, it is alleged as follows:

" Your orator further says that at the time it entered into
" the contract with the City of Louisville to abide the result of
" the decision in the case of the Louisville Banking Company
" vs. R. H. Thompson and the City of Louisville, it and the
" city and the counsel for said city, all in good faith, believed
" that the decision of that case would settle every question
" which could be raised either by it or the City of Louisville,
" and your orator shows that at that time the case of the Louis-
" ville Trust Company vs. City of Louisville had not been
" decided."

The same pleading sets up the amendments to its charters granting it banking privileges as follows:

" Your orator further shows that by an amendment to its
" charter, adopted by the General Assembly of the Common-
" wealth of Kentucky, and approved May 15, 1886, it was ex-
" pressly provided by sections 5, 6 and 7 as follows:
" ' Section 5. *For purposes of taxation this company shall be*
" ' *classed and treated as one of the banks of this State*, and shall be
" ' subject to and pay the same rate of taxes, to same parties, at
" ' same time, in same manner and for the same purposes only,

" ' as may be provided by law from time to time as the banks
" ' doing business in this State.

" ' Section 6. The said company, in the prosecution of its
" ' business as provided in its charter, shall have power to buy
" ' and sell notes secured by lien on real estate, also to loan
" ' money and take such notes in pledge as security for such
" ' loan; and all such notes bought by or pledged to said com-
" ' pany as would be placed on same footing as foreign bills of
" ' exchange, if discounted by any of the banks of this State,
" ' shall be, and they are hereby, placed on same footing as for-
" ' eign bills of exchange, provided said notes are given in fulfill-
" ' ment of contracts that have been fully executed at the time
" ' of such purchase or pledge.

" ' Section 7. Said company is hereby authorized to establish
" ' a "savings department" in connection with its business, and
" ' carry on business in such departments as a savings bank, and
" ' shall receive on deposit, during business hours, any sum not
" ' less than one dollar, and shall allow interest on same at such
" ' rate as may be fixed by the by-laws, not exceeding four per
" ' cent. per annum. The business of this department shall be
" ' kept distinct and separate from the other business of the
" ' company, and in a separate set of books. All sums deposited
" ' in the savings department by a workingman, married woman
" ' or infant, shall be, and they are hereby, exempted from tax-
" ' ation of any kind whatever, but the sum so exempted from
" ' taxation shall not exceed the sum of $500. Married women
" ' and infants may make deposits in this department in their
" ' own names, and withdraw same as if of full age or unmar-
" ' ried.'

" And your orator shows that from and after the adoption of
" said amendment to its charter, which was just two days before
" the adoption of the Hewitt law, it did, and still does, a sav-
" ings bank business, and is for all purposes of taxation, and so
" far as the performance of a public service is concerned, a bank,
" and it is respectfully submitted that it should be so deemed
" and treated." (Record Louisville Trust Co., No. 409, p. 31.)

This amendment was adopted just two days before the adoption of the Hewitt act, so it must be treated as practically a part of the Hewitt act, and the two must be construed together. Henderson vs. Lambert, 8 Bush 609.

We think we have shown quite clearly that the Legislature did not mean to make any discrimination between the corporations mentioned in the provision of the Hewitt act quoted, but meant to put them all in one class, and to treat them exactly alike. We think we have also shown that the trust companies necessarily come within the classes mentioned, it being conceded by the

demurrer both that they are companies of loan, and that they are companies which, under the law, were compelled to pay taxes upon their stock.

DID THE LEGISLATURE HAVE POWER TO CONTRACT WITH TRUST COMPANIES?

We are now brought to the consideration of the second branch of the question, viz., as to the power of the Legislature to make such a contract with the trust companies.

The Circuit Court, in considering this question, seems to hold that because Judge Grace, in the course of his opinion in the case of the Louisville Trust Company vs. City of Louisville, 30 Southwestern Rep., 991, expressed the view that the Trust Company was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, necessarily required or at least justified that court in limiting the power of the attorney for the city to extend the contract heretofore spoken of to trust companies, or, in other words, that the City Attorney had not the right to agree with the trust companies, that the case of the Louisville Banking Company should be a test case for the trust companies, there being that difference between the two suggested by this opinion of Judge Grace's.

We most respectfully suggest that the Circuit Court in so holding, in the first place, missed the spirit of the Hewitt act entirely in assuming that that act was passed in recognition of any public service performed by any of the companies coming within its purview. We shall discuss this question a little later; for the present, we desire to call the Court's attention to the fact that this statement by Judge Grace was not a decision, but was a pure dictum. This appears conclusively from the fact that the attempt in that case to hold the Louisville Trust Company liable to taxes was under the Hewitt act itself, and the court held it liable under the Hewitt act. There was no attempt to hold it otherwise than under the authority of the Hewitt act, and it was not contended that the Hewitt act did not apply to trust companies. On the other hand, as clearly shown by the opinion, the City of Louisville was claiming, not the right to tax all of the property of the trust companies in the city, but the right to tax the buildings in which they did business, which was pointed out by the Court of Appeals to be clearly authorized by the proviso contained in the seventh section of the Hewitt bill. The question involved was one of construction, and the tax was actually collected under the authority of the Hewitt act, and was not levied as it might have been levied if the Hewitt act did not apply to trust companies, but was levied in recognition of the application of the

Hewitt act to the Trust Companies. After the Court had so decided and enforced the tax under the Hewitt act, the opinion proceeds:

> "We are not impressed with the equity of the act of the Leg-
> "islature in declaring that this corporation should be classed as
> "one of the banks of the State for the purposes of taxation.
> "It is not a bank, and it was by express provisions of its
> "charter declared that nothing contained in it should authorize
> "it to do a banking business, and this restriction has never
> "been removed. Whatever may have been the considerations
> "of public policy that induced the Legislature ever in Ken-
> "tucky to adopt a different rate of taxation for banks to that
> "applied to private individuals and to other corporations
> "(which has always been of questionable propriety) they did
> "not apply to appellant in any just and fair sense. But as the
> "City of Louisville is not complaining of any restriction of
> "this right of taxation, but is only attempting to tax as author-
> "ized under the Hewitt law, there is no question raised by the
> "city claiming any other right."

Here is not only a statement of the Court of Appeals that the Legislature did not mean to make a distinction between trust companies and banks, but there is the further distinct statement that the city was not complaining of any restriction of this right of taxation, but was only attempting to tax as authorized under the Hewitt law, which clearly shows that this expression of opinion or of doubt as to the propriety of classifying trust companies with banks was pure dictum.

We therefore submit that this dictum ought not in the slightest to have influenced the Circuit Court, and ought not to influence this Court, because if the rendition of public service is necessary to such a contract, then the trust companies do render a public service quite as much as the banks. It cannot be said that the public service rendered by the banks was the issuing of circulating notes by the banks, because at the time this act was passed, and for a long time before that, none of the State banks had availed themselves of their power to issue circulating notes, and it was known to all of the Legislature that they probably never would, because of the act of Congress levying the tax of ten per cent.

But, furthermore, we do not believe that a considerable proportion of the State banks in the State at the time this Hewitt act was passed had the power to issue circulating notes. So far as the Louisville Banking Company is concerned, which, by agreement of counsel, was selected to test the right of the city to tax the trust companies, its charter *expressly forbade* its issuing of notes to circulate as money. By the twelfth section of that charter it is provided as follows:

"In no case shall this corporation exercise the business of "banking by issuing notes to circulate as money, but they may "make advances and receive in pledge for money loaned or "debts due them public and private securities, goods, wares and "merchandise."

This restriction upon its power has never been removed. If, then, we eliminate from consideration the function of issuing notes to circulate as money, there is not a substantial difference between the banks selected to test the trust companies' right and the trust companies themselves. The bank furnishes money to the public by means of discounting paper. The trust company advances money also to carry on the business of the public, but does so through a direct loan, not technically a discount. If there be any rendition of public service so far as the matter of furnishing money is concerned, it can not be possible that the law would draw such a distinction as to say that money furnished by means of discount is the rendition of public service, and money furnished by direct loan, not technically a discount, is not. The banks had the right to receive money on deposit and pay it out on checks, and so have the trust companies. And so far as we can see, the trust companies have the power to do, and actually do, everything which the Louisville Banking Company could do that might be called a rendition of public service.

Furthermore, the trust companies perform a function which the banks do not perform, and which we respectfully submit, is of itself a sufficient consideration for the State making a contract with such institutions for a commutation of their tax, and that is this: The trust companies, by their charters, have the power, and they undertake to become and to execute the duties of public administrators, executors of wills, guardians of infants, trustees of married women and committees of lunatics, assignees for the benefit of creditors, and generally to take the control and management of the estates of people *non sui juris*, and who need protection from the State as far as it can give it in the control and management of their affairs. It is an important object to the State to have some company of undoubted responsibility, with its skilled officers trained in these particular duties, to manage the estates of the infants, married women, widows and the people generally *non sui juris* of the Commonwealth, rather than to have these estates managed by inexperienced private persons, of whom it may be said that experience has taught that their appointment too frequently results in the dissipation of the estates entrusted to their charge. We suggest that these functions performed by the trust companies are just as strong, if not a stronger, justification for the State in making such a contract as that involved in this case than the mere furnishing of money to carry on the business of the Commonwealth or of the country.

We confess ourselves incapable of clearly comprehending what is meant by this general term of public service, and what comes within it, and what does not come within it. The field seems to be too vague and too cloudy for any clear perception or understanding of it. The principle does not seem to be bound by any rules, nor is there any guide to go by in ascertaining what service may be said to be a public service and what is not. Thus it has been held that a grist mill performs a public service because it is the means of furnishing food to the people; but that can not be any more a public service than the man performs who raises the grain to be ground, or than is performed by the shoemaker, or the clothier, or indeed than is performed by any person or corporation engaged in a pursuit upon which the public may be said to in any measure depend.

PUBLIC SERVICE WAS NOT THE CONSIDERATION FOR THE CONTRACT.

But we respectfully submit that the consideration for this contract was not the rendition of public service by any of the corporations coming within the purview of the act, but this contract was made in the exercise of the clear power of the State, recognized under the Constitution of Kentucky in force at the date of the act, and often in different forms of expression recognized not only by this Court, but by nearly every court of last resort in the Union, viz., the right of *classification of the subjects of taxation*, and in the exercise of a public policy of which the Legislature of Kentucky was the exclusive judge.

Up to the date of the passage of this act known as the Hewitt act, institutions similar to those involved in this litigation never paid any local taxes at all. They paid a specific tax on each share of stock to the State of Kentucky, which was in lieu of all other taxes of all kinds, and the statutes in force limiting the tax to fifty cents a share had been sustained by the Court of Appeals of Kentucky. The Legislature of 1886—the general tax rate having somewhat increased, and being at that time forty-two and one-half cents on the $100—seemed to feel that fifty cents on the share of stock was not enough for the banks and other institutions of loan and discount, or which were by law required to pay on their capital stock, to pay to the State. The Legislature was also somewhat hampered by the fact that there were several old banks in the State, which claimed to have an inviolable right to discharge all of their tax burdens by the payment of fifty cents on the share of stock, and this right claimed by the banks had then been decided in their favor by the local courts and was subsequently affirmed by the Court of Appeals in the case of Franklin County Court vs. The Banks, 87 Ky., 370. The Legislature had the further matter to consider, viz., that the Court of Appeals had held

that National Banks could not be made to pay more taxes than these old banks. See the case of City National Bank vs. Paducah, 9 S. W. Rep., 218.

Under these circumstances the Legislature of Kentucky, dealing with all the institutions coming within the purview of this act located within the borders of the State of Kentucky, and not with any particular bank or institution located in any particular place in Kentucky, made a general proposition applicable to all, and that proposition is contained in the fourth section of the Hewitt act, to be found in the appendix. Now, in many places in the State, the tax required by the Hewitt act to be paid was a greater burden at that time than would have rested upon the particular bank if it had paid under the general law. There were other instances where the burden paid under the Hewitt act would be less than banks located in other places in the State would have to pay under the general law if it paid municipal taxes. Surely the State was not bound to appoint a roving commission to ascertain in which particular places the contract at that time would be more favorable to the banks, and in which particular places the contract would be less favorable to the banks than if they paid under the general law, including local taxes. But the State had the right to deal with the whole mass of these institutions within its borders, and thus dealing with them it said in substance: If you will consent to pay as provided in this act, which is nearly double as much, and in some instances more than double as much, as you would have to pay to the State under the general law, as an equivalent for this additional amount paid to the State your local taxes will be, presumptively, at least, correspondingly abated, and thus the State will accomplish its various objects, which, primarily and in importance, above all the rest secure uniformity of burden upon capital employed by institutions of loan or discount, a most desirable object to be accomplished by the State. And, second, it will relieve the State from the embarrassment and possible litigation in the future in settling the rights of the old banks chartered before the act of 1856 and of National Banks, held by the Court of Appeals to be entitled to the same rate of taxation as that fixed by the charters of the old banks.

These being the considerations which influenced the State to make this contract, we insist that neither the Legislature nor the Court of Appeals, ever for a moment, considered the question as to whether all of these institutions, or any of them, rendered a service which might be technically called a public service. *This is not an exemption from taxation, but it is a contract prescribing the method and rate of taxation.* In such cases the inquiry is not whether the consideration rendered is such as would justify an exemption, but whether the consideration is such as would support a contract; and the considerations already mentioned are ample, we submit, to support a contract.

The question as to whether the State reserved the power to retire from this contract is not the question now under discussion, for if there be no distinction in the statute between trust companies and banks, and if the State had the power to extend the contract to trust companies, then we submit that the other question, to-wit, as to whether or not the State has the power to withdraw from the contract, has become a thing adjudged; because these considerations show that the attorney for the city had the right to make the contract on the part of the city extend to the trust companies, as well as to the banks, as they stood in the same position.

In some of the States of the Union, as we are informed, corporations are required, by general law, to pay all the tax required of them to the State, and are exempt from local burdens; while other classes of property pay local taxes. We are not advised that the right to do this has ever been disputed, but it seems always to have been conceded under the right of classification possessed by the State. That this right of classification was possessed by Kentucky when the Hewitt act was passed, and certainly until the adoption of the present Constitution, does not admit of question. It was clearly stated in the City of Lexington vs. McQuillan's Heirs, 9 Dana, 513, in language which can not be mistaken, as follows:

> "When shall the tax be levied? To what amount? Shall "it be a capitation or property tax? Direct or indirect? "Ad valorem or specific? And what classes of property are the "fittest subjects of taxation? Are all questions wisely confided "by our Constitution to the discretion of the legislative depart- "ment, subject to no other limitation than that of the moral "influence of public virtue and responsibility to public opinion."

So this Court, in Pacific Express Co. vs. Seibert, 142 U. S.,339, 351, said:

> "This Court has repeatedly laid down the doctrine that "diversity of taxation, both with respect to the amount imposed "and the various species of property selected either for bearing "its burdens or for being exempt from them, is not inconsistent "with a perfect uniformity and equality of taxation in the "proper sense of those terms; and that a system which imposes "the same tax upon every species of property, irrespective of its "nature or condition or class, will be destructive of the principle "of uniformity and equality in taxation and of a just adaptation "of property to its burdens."

So, in the case of Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S., 233, 237, this Court in referring to the State's power of classification for taxation, said:

"It may, if it chooses, exempt certain classes of property "from any taxation at all, such as churches, libraries and the "property of charitable institutions. It may impose different "specific taxes upon different trades and professions, and may "vary the rates of excise upon various products; it may tax real "estate and personal property in a different manner; it may tax "visible property only, and not tax securities for payment of "money; it may allow deductions for indebtedness, or not allow "them. All such regulations, and those of like character, so "long as they proceed within reasonable limits and general "usage, are within the discretion of the State Legislature, or "the people of the State in framing their Constitution."

It would be a mere waste of time to cite the numerous other instances in which this Court has again and again recognized the right of classification for the purpose of taxation. And we conclude this part of our argument with the statement that the State possessed the power to pass this Hewitt act and to make the contract therein provided for under its general power of classifying the subjects of taxation. Whatever may be said under the new Constitution (of 1891) of that power, as construed by the Court of Appeals, that Court never questioned the existence of this right prior to the adoption of this present Constitution.

We respectfully submit, therefore, that there is every reason for including the trust companies within the contract made by the city of Louisville which the trust companies have carried out in good faith, and for giving to these companies the benefit of the plea of *res adjudicata*, just as is given to those banks which united in the agreement to abide by the result of the test cases; and no good reason exists for excluding the trust companies from this contract entered into in good faith by both parties.

If we are right in these views, then it results that the judgments of the Circuit Court in the cases of Fidelity Trust, &c., Co. vs. City of Louisville, No. 406; Fidelity Trust, &c., Co. vs. Samuel H. Stone, &c., No. 407; Louisville Trust Co. vs. City of Louisville, No. 408, and Louisville Trust Co. vs. Samuel H. Stone, &c., No. 409, must each be reversed; for each of these trust companies was a party to the agreement with the city of Louisville, by which it was agreed to abide by the result of the test cases, and in which it was expressly provided that the trust companies came within the class of institutions represented by the Louisville Banking Company; yet the Circuit Court denied to each of these Trust Companies the benefit of the plea of *res adjudicata*, and dismissed each of their bills.

VI.

Extension of National Bank Charters.

As has been heretofore shown, the Circuit Court held that the acceptance by the banks of the provisions of the Hewitt act constituted a contract; though its ruling to that effect was based upon the ground that this question as between the parties now before this court was *res adjudicata.*

Among the banks affected by this decision, and which the Circuit Court held to be entitled to the benefit of the plea of *res adjudicata*, were certain National banks; and among these National banks were two (Citizens National Bank and Third National Bank, the latter being one of the litigating banks selected under the agreement with the city), whose terms of existence had been extended under the provisions of the act of Congress of July 12th, 1882. (1 Sup. Rev. Stats., 353).

The question arose as to whether or not the contract with the State expired at what would have been the expiration of the original term of the bank's corporate existence, or whether it continued after the expiration of that period and into the period of its existence as extended.

The Circuit Court held that the contract expired on the date at which the bank's original corporate existence would have expired if it had not been extended. Accordingly, it enjoined the collection of any taxes by the city of Louisville which accrued prior to the date just mentioned, but refused to enjoin the assessment or collection of any taxes accruing subsequent to that date; and as to the latter it dismissed the bills of the complainant banks.

We submit that this was clearly erroneous.

The decision of the question involved depends simply upon the construction of the act of Congress of July 12, 1882, providing for the extension of National bank charters, and of the act of the Legislature of Kentucky which we have heretofore denominated the Hewitt act. In the present discussion we assume that the Circuit Court was right in holding that it must be accepted as true—because *res adjudicata*—that the acceptance of the Hewitt act constituted a valid, irrepealable contract between the bank and the State; and the question now under discussion becomes therefore simply a question of construction as to the *duration* of that contract.

The question is then reduced simply to this:

What was the period of duration fixed by the Hewitt act?

The Hewitt act, after setting forth the terms of the proposed scheme of taxation, and after providing how the State's proposition on this subject might be accepted by the institutions to which it was offered, then says:

"And upon such agreement and consent being delivered, "and in consideration thereof, such bank and its shares of stock "shall be exempt from all other taxation whatsoever so long as "said tax shall be paid *during the corporate existence of such "bank.*"

This certainly seems very plain, and it seems to us we are only left to consider the question as to whether "the corporate existence" of the bank with which this contract was made has ceased, or whether it still continues. If that corporate existence still continues, then it seems but a repetition of the terms of the act itself to say that the contract with the State has not yet expired. On the other hand, of course, if the corporate existence has ceased, then the contract has expired.

At the time this Hewitt act was passed, to-wit, May 17, 1886, the act of Congress of July 12, 1882, was in force authorizing the extension of National bank charters. The first section of the act, even if it stood alone and unexplained, would seem to be sufficiently clear to the effect that the extension of the term as therein provided for, was not to be the grant of a new charter or the creation of a new corporate existence, but simply an extension of the life of a corporate existence then in being. This first section provides:

"That any National Banking Association organized under "the acts of February 25, 1863, June 3, 1864, and February 14, "1880, or under sections 5133, 5134, 5135, 5136, and 5154 of "the Revised Statutes of the United States, may at any time "within two years next previous to the date of the expiration of "its corporate existence under the present law, and with the "approval of the Comptroller of the Currency, to be granted as "hereinafter provided, *extend its period of succession* by amend- "ing its articles of association for a term of not more than twenty "years from the expiration of the period of succession named in "said articles of association, and shall have succession for such "extended period, unless sooner dissolved by the act of share- "holders owning two-thirds of its stock, or unless its franchise "becomes forfeited by some violation of law, or unless hereafter "modified or repealed." (1 Sup. R. S., 353.)

But in order that there might be no possible room for doubt as to the effect of this extension, Congress added the fourth section of this statute, as follows:

"That any association so extending the period of its success- "ion shall continue to enjoy all the rights and privileges and "immunities granted, and shall continue to be subject to all "the duties, liabilities and restrictions imposed by the Revised

"Statutes of the United States and other acts having reference "to National Banking Associations, *and it shall continue to be in* "*all respects the identical association it was before the extension* "*of its period of succession.*"

This section of the statute, which, it must be remembered, was *in effect when the Hewitt act was passed*, seems to us almost so plain as to close the discussion upon the question as to what is "the corporate existence of such bank" as is covered by the Hewitt act, when that bank is a National bank. When the State made its contract with the Third National Bank, for example, the State knew that its corporate existence might cease on August 22, 1894 (it having been originally chartered on August 22, 1874), but that under the provisions of existing law this corporate existence might be continued for twenty years beyond the date just mentioned; and the State knew that the existing law provided that the bank, in the event of such extension, "shall continue to be in all respects the identical association it was before the extension of its period of succession." And, with this knowledge, the State made its contract with the bank and provided that this should continue "during the corporate existence of such bank." To say that the corporate existence of the Third National Bank, with which the State made this contract, has never ceased; that the Third National Bank which the city and State are now seeking to tax in disregard of the Hewitt act, is "in all respects the identical association" with which the contract under the Hewitt act was made, is simply to repeat the language of the act of Congress. We do not believe any character of reasoning can make this proposition any clearer than it is made by the simple statement of it.

While the question has never been decided, so far as we know, by this Court, yet it has been decided by several State courts, whose decisions stand as high as any in this land, to-wit: Those of New York, New Jersey and Connecticut.

In Trustees of First Presbyterian Church vs. National State Bank of Newark, 57 N. J. L., 27 (29 Atl. Rep. 320), there was involved the question of the duration of a contract with a national bank, which did not, by its terms, limit its duration. It was simply a continuing contract by which the bank agreed to pay certain money quarterly to the owner of an adjoining lot, if he would abstain from erecting certain obstructions thereon, which would darken the windows of the bank. The contract was made in 1872, before the passage of the act of July 12, 1882, authorizing the extension of national bank charters. At the time, therefore, of making the contract the corporate existence of the bank was limited by existing law to twenty years from the date of its original corporation, which had been August 1, 1865. The bank subsequently procured an extension of its term under the act of 1882, and subsequent to that time gave notice to the effect that it would no longer

perform the terms of the contract above recited. It was sued upon the contract, and one of its grounds of defense was "because the defendant's liability ceased with its corporate term of life, to-wit: August 1, 1885, and did not survive with the extension of its charter by the act of July, 1882." This was the defendant's second plea, and in speaking of this the Supreme Court of New Jersey said:

"The second is likewise bad, because, by the extension of its "term of being the legal identity of the defendant corporation "remained unchanged; it was not a new life that it received. It "was simply the power to continue the old life beyond the "period first fixed for its expiration.

"It is entirely settled that these acts of succession do not "have the effect of canceling the continuing obligations of the "corporation, nor can they be pleaded in repudiation of any "outstanding obligation whatsoever. Bank vs. Gay, 57 Conn., "224; 17 Atl., 555; People vs. Backus, 117 N. Y., 196; 22 N. "E., 759; Bank vs. Phelps, 97 N. Y., 44."

The foregoing case was affirmed on appeal by the Court of Errors and Appeals of New Jersey, without the delivery of any opinion. The announcement "*per curiam*," being simply "The judgment of the Supreme Court is unanimously affirmed for the reasons given by the Court." 36 Atl. Rep., 1129.

In National Exchange Bank vs. Gay, 57 Conn., 224; 17 Atl. Rep. 555, referred to above, there was involved a continuing contract of guaranty, which had been given to a national bank in 1872, at which time, as heretofore noted, there was no statute authorizing the extension of the term of a national bank's existence. Thereafter, however, the statute was passed and the particular national bank in question did procure an extension of its term of life, and the question arose as to whether or not this contract of guaranty continued as to paper executed subsequent to the extension of the term. The Supreme Court of Connecticut held that it did, and in speaking of the effect of this extension said:

"The power which created the plaintiff put a limit to its "existence. Before that limit had been reached, while the "plaintiff was in full corporate life, the creating power moved "that limit further into the future. The power which can "create, can prolong. *It was not the substitution of one legal "entity for another; it was not the change of a State into a "National corporation; it was not even the restorationof a spent "corporate life. The identical corporation which received the "breath of life in 1863 has been in uninterrupted, unchanged "existence to this present, having the same rights, bearing the "same obligations.*"

So in the case of People vs. Backus, 117 N. Y., 196; 22 N. E. Rep., 759, the Court of Appeals of New York had occasion to consider the effect of the extension of a national bank charter upon a guaranty which had been given by certain parties to the State, guaranteeing the payment of the State's money deposited in the bank; and the Court held that the guaranty continued after the termination of the time fixed in the original charter, as well as before, and, on that subject, said:

> "Here a new corporation was not formed, but there was a "mere prolongation of the existence of the same corporation, "whose corporate identity was not changed or lost. The bank "which defaulted was the same bank for which the defendants "became bound. *They were not two banks in succession, but all "the time one bank.*"

So far as we know, this Court has never passed on the question now under discussion, but it has twice construed section 5154 of the Revised Statutes, which provides that "any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a National association under this title by the name prescribed in its organization certificate"; and in each case has held that the National bank is the same corporation as the State bank out of which it has grown.

In Michigan Insurance Bank vs. Eldred, 143 U. S., 293, a State bank called the Michigan Insurance Bank was converted into a National bank by the name of the National Insurance Bank of Detroit. Subsequent to this conversion it brought a suit on an obligation incurred to it while it was a State bank, and brought the suit uuder its old State bank name. The defendant pleaded *nul tiel corporation*, and introduced in evidence the papers showing the conversion into a National bank. But, on this subject this Court said:

> "The evidence offered by the defendant on this point "wholly failed to support this defense, and at most only "proved that the plaintiff sued by the wrong name. It "showed no more than that the plaintiff corporation, having "been originally created by the laws of Michigan had, in "accordance with the National Banking act, become a "National bank, and its name been changed accordingly "*without affecting its identity* or its right to sue upon obliga- "tions or liabilities incurred to it by its former name."

A similar ruling had previously been made in the case of Metropolitan Bank vs. Claggett, 141 U. S., 520, where this Court, on a motion to dismiss or affirm, affirmed, as too manifestly correct to need argument, the decision of the Court of Appeals of New York to the effect that the change from a State bank to a

National bank did not "destroy its identity or its corporate existence, but simply resulted in a continuation of the same body, with the same officers and stockholders, the same property, assets, and banking business, under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly."

The proposition that a State bank when changed into a National bank continues to be the same corporation, is nothing like so clear as the proposition that a National bank whose term of existence has simply been lengthened, is the same corporate existence after the original period of time named in the law has been passed as it was before; for in the latter case there is an express declaration to this effect in the statute, whereas in the former case there is not.

These cases simply enforce by judicial authority that which seems to us to be absolutely plain on the face of the statute itself; and the application of them to the case at bar seems to lead irresistibly to the conclusion maintained by the banks. The State made its contract with the Third National Bank, for example, saying in express terms that contract should last "during the corporate existence of such bank"; and the corporation involved in the present litigation, to use the language of the Supreme Court of Connecticut, "was not the substitution of one legal entity for another. * * * It was not even the restoration of a spent corporate life," or to use the language of the Court of Appeals of New York, the corporation involved in this litigation and that which made the contract with the State "were not two banks in succession, but all the time one bank." The bank now in existence, and which the State is now seeking to tax, regardless of the Hewitt act is, in the language of the act of Congress itself, "in all respects the identical association it was before the extension of its period of succession." And it is, therefore, the identical corporation with which the State contracted to the effect that it should not be taxed otherwise than therein provided, "during the corporate existence of such bank," a contract made by the State when it knew, as we are bound to assume, that under the law as it then existed the corporate existence of this bank would exist certainly for twenty years from its original incorporation with a right of extension for twenty years longer, the corporation during the extended period to be "in all respects the identical association it was before."

We submit, therefore, with great confidence, that the corporate existence of the Third National Bank, with which the State made the contract which the Circuit Court upheld as an irrepealable contract, which, by its own terms, was to continue "*during the corporate existence*" of the bank, has not ceased; and that the bank is, therefore, still entitled to the benefit of that contract.

And the same is true as to the Citizens National Bank. The Legislature did not use the expression during its "present charter life," or any similar expression, but used the words of the act of Congress during its "corporate existence." If the draftsman of the Hewitt act had intended so to word it as to bring the contract within the purview of the act of Congress, he could scarcely have used more apt language to have accomplished his purpose. This is a much stronger case than the extension of a charter life by legislation after the date of the contract, which could not have been within the contemplation of the contracting parties.

It must be assumed that the act of Congress was known to the contracting parties. We know that it was within the knowledge of the banks, and, besides the ordinary presumption that it was known to the Legislature, the use of the words employed in the act of Congress indicates quite clearly that the draftsman of the Hewitt act had his eye on the Federal statute when he used the particular expression referred to.

If we then assume that the parties knew of the act of Congress, they knew that no further legislation was needed, and that it rested entirely with the bank, by complying with the act of Congress, to continue for twenty years from the expiration of the original grant, its corporate existence, and remain the identical corporate entity which made the contract, merely extending "*its period of succession.*"

Again, it is said that the Legislature would not have made such a contract, because it would then rest with National banks to continue indefinitely the period of the contract; but this we submit is unsound, since the act of Congress does not contemplate but one extension, and if every one of the National banks availed themselves of the statutory permission to continue its corporate existence, the period of succession as extended, would still fall short of the expiration of many State bank charters.

We therefore submit, that under proper construction of the act of Congress, the Third National Bank and the Citizens National Bank are the identical corporations which made the contracts with the State of Kentucky, and that as the contract by its terms extends throughout their corporate existence, respectively, it is still in full force.

And we further submit that it is no more than fair to assume that the Legislature of Kentucky used the words employed in the Hewitt act intelligently, and with the purpose of accomplishing what they obviously do accomplish, if given their ordinary grammatical signification.

If we are right in these views, then it results that the judgment of the Circuit Court in the case of the Third National Bank vs. Samuel H. Stone, &c., No. 404, and Citizens National Bank vs. Samuel H. Stone, &c., No. 405, must each be reversed; because in these cases the Circuit Court held that the corporation, being a

national bank, the term of whose charter had been extended, was not entitled to the benefit of the contract under the Hewitt act during its extended term; although the court held that it was entitled to the benefit of such contract during the original term fixed in its original charter.

VII.

Is the General Revenue Law of Kentucky Inconsistent with the National Banking Act in Levying a Tax Upon the Property of the Bank, Instead of Upon the Shares of Stockholders.

The National banks in Louisville, with the exception of the First National Bank, all formally accepted the Hewitt act; and the First National Bank accepted the same tacitly by paying taxes under it. These banks were all willing to be taxed by the State according to the provisions of that act, which operated uniformly upon all the banks in the State; and accordingly they waived their privileges as National banks in this respect and to this extent. But, if for any reason, they, or any of them, are not to be taxed under the Hewitt act, then they object and protest against being taxed under the present Revenue law of November 11, 1892, and rely upon their rights as National banks in resisting that tax.

That these instrumentalities of the Federal Government can not be taxed by the State except as Congress consents thereto, and then only to the extent to which the consent goes, was settled by this Court in the case of McCullough vs. Maryland, 4 Wheaton, 316, 431. And the proposition has never since been doubted.

The provision of the act of Congress relating to the taxation of National banks by the States is contained in section 5219, of the Revised Statutes, which is as follows:

> "Sec. 5219. Nothing herein shall prevent all the shares in "any association from being included in the valuation of the "personal property of the owner or holder of such shares, in "assessing taxes imposed by authority of the State within "which the association is located; but the Legislature of each "State may determine and direct the manner and place of tax- "ing all the shares of National Banking Associations located "within the State, subject only to the two restrictions, that the "taxation shall not be at a greater rate than is assessed upon "other moneyed capital in the hands of individual citizens of "such State, and that the shares of any National Banking "Association owned by non-residents of any State shall be taxed "in the city or town where the bank is located, and not else- "where. Nothing herein shall be construed to exempt the real "property of associations from either State, county, or munici- "pal taxes, to the same extent, according to its value, as other "real property is taxed."

It thus appears (1) that the *real property* of National banks may be taxed by the State; (2) that the *personal property* of

National banks *can not* be taxed by the State; but (3) that the shares of stock in National banks may be taxed as against the owners and holders thereof, provided that the taxation thereon shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, and that the shares of non-residents shall be taxed in the city or town where the bank is located.

That the second proposition above is true (as to the non-taxability of the personal property of a National bank) is apparent from the statute itself; but it has, moreover, been expressly affirmed by this court. (Rosenblatt vs. Johnson, 104 U. S., 462).

We must therefore consider the nature of this tax by the State of Kentucky which the National banks are now resisting. Of course, if it is a tax upon the *shares of stock* in the bank as *against the holders* and owners thereof, it is valid unless there is a discrimination against such capital contrary to the restriction in the section quoted. But if it is a tax upon the *personal property*, whether tangible or intangible, *of the bank*, then it is not valid, although it may be that the tax on the personal property of the bank will raise no more revenue than a tax of similar character on the shares of the stockholders would raise. Of course, there is no pretense that it is a tax on the real property of the bank, as the assessed value of the real property and of all other tangible property of the bank is deducted, under this law, from the total valuation of all the assets before the tax now in dispute is laid.

Is this tax then a tax upon the shares of stock of the stockholders, or is it a tax upon the personal property of the bank?

This being a matter of construction of a State statute, we must look to see if the court of last resort of the State has answered the question suggested. That this court will follow the State court in such construction seems to be put beyond further dispute by the previous adjudications of this court.

In Provident Institution vs. Massachusetts, 6 Wall, 611, the question was as to whether the tax was a tax on the franchise of a corporation or upon its property. If upon the latter, then so much of its property as was invested in United States bonds was non-taxable; but if upon the former, then it made no difference in what the assets of the corporation were invested. The Supreme Court of Massachusetts had held on two occasions that the tax was upon the franchise of the corporation, and not upon its property, and this court held that these decisions "must be regarded as conclusive authorities that the tax in this case is a tax on the privileges and franchises of the corporation, and not a tax on property as contended by the original defendants" (p. 628).

In the late case of Aberdeen Bank vs. Chehallis County, 166 U. S., 440, one of the questions was as to whether a tax of the State of Washington was a tax on the property of the bank or a tax upon the shares of stock of its stockholders. The Supreme Court of

Washington, reading two sections of the statute together, had construed them to impose a tax upon the shares of stock of the stockholders; and, following that decision, this Court said:

> "The Supreme Court of Washington held in this case that "these two sections are to be read together, and that, so read, "their provisions are not inconsistent with those of the Federal "statute. That the two sections of the State law should be "read together is obviously proper, and, at any rate, *we are "bound by the judgment of the Supreme Court of the State in "the mere matter of the construction of that law*" (p. 444).

We must turn then to the decisions of the Court of Appeals to determine the nature of the tax now involved, and we find it has been distinctly held, in a very elaborate opinion by that Court, to be a tax upon "all the intangible property of the corporation." And we will presently see that this Court has concurred in that view.

In Henderson Bridge Company vs. Commonwealth, 99 Ky., 623, the principal question involved was, as to how to arrive at the value of the so-called "franchise," which was required to be taxed by the statute now in question, and which is the same character of tax now sought to be collected from the banks and trust companies involved in this litigation. The statute provided that the Board of Valuation and Assessment, as a mode of arriving at the value of this franchise, should "fix the value of the capital stock of the corporation, * * * and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated," and that the remainder thus found should be the value of the corporate franchise subject to taxation. Ky. Stats., sec. 4079. This, therefore, involved a consideration and determination of what was intended by the term "capital stock" as used in this statute, because the franchise to be taxed was the value of this capital stock less the assessed value of the tangible property of the corporation. This question received a very careful consideration by the Court of Appeals, and its views thereon were expressed in an elaborate opinion. We ask the indulgence of the Court in quoting quite liberally from that opinion, as it shows so unmistakably the determination of the Court to the effect that this franchise tax is a tax upon *the property of the corporation.* After quoting quite freely from different authorities as to the meaning of the words "stock" and "capital stock," the Court says:

> "Thus we see what a varied meaning this term capital stock "may have. So that it becomes necessary to examine and see "what was the object and meaning of the Legislature when "using this term in the clause before quoted from section 4079 "of our statutes.

"In this examination it becomes important to notice those "clauses of the Constitution in reference to revenue and taxa- "tion, and see what was contemplated and enjoined by that "instrument in reference to taxation.

"Section 172 provides 'that all *property* not exempt from "'taxation by this Constitution shall be assessed at its fair cash "'value, estimated at the price it would bring at a fair voluntary "'sale. . .'

"Section 174 provides 'that all property, whether owned "'by natural persons or by corporations, shall be taxed in pro- "'portion to its value, unless exempted by this Constitution, "'and all corporate property shall pay the same rate of taxa- "'tion paid by individual property. Nothing in this Consti- "'tution shall be construed to prevent the General Assembly "'from providing for taxation, based on income, licenses, or "'franchises.

"Then it is manifest that what the Constitution intended to "be taxed was property, all property. And as to corporations, "not only all tangible property, but that it intended to leave "the Legislature of the State free to tax the franchises of cor- "porations if it so desired.

"That the property of a corporation should be taxed as the "property of an individual, it will be observed that in these "several sections quoted 'capital stock,' 'stock,' and 'shares of "stock,' are not mentioned as being appropriate terms to desig- "nate the subjects of taxation, but it says property, all prop- "erty, so that there might be no confusion as to what that "instrument intended (p. 638). * * *

"We find that the Legislature, in framing the first Revenue "law under this new Constitution declared that all property, "both real and personal, should be assessed for taxation at its "fair cash value; at a fair voluntary sale, etc.

"We find that by section 4020, the Legislature, for the "purposes of taxation of corporations, divided their property "into tangible and intangible, leaving the tangible to be "assessed by the officers of the county where the same was "situated, but that as to the intangible (which term was used as "synonymous with franchises) directed that that should be "valued and taxed as provided in section 4077 (p. 639). * * *

"All this indicating, as clearly as it is possible for language "to indicate, that the object of the Legislature was that the "Board of Valuation and Assessment should then be enabled "to form a correct estimate of the *value of the entire property "of the company or corporation* whose case they were investi- "gating.

"Then follows the clause in section 4079, before quoted, "requiring the board from the statement and from all other "evidence before it, to proceed to fix the value of the capital

" stock (*meaning the entire property*), of the company or corpo-
" ration, and that from the amount thus fixed, that they shall
" deduct the assessed value of the tangible property of the com-
" pany or corporation assessed in the State or in the county
" where situated and that the balance thus found should be the
" value of the corporate franchise subject to taxation as afore-
" said.

" So that the question returns, Did the Legislature mean by
" the expression 'capital stock,' only the amount of money that
" may have been paid in by the stockholders, or did it mean to
" embrace and include by that term the entire property of every
" kind and description, tangible and intangible, embracing not
" only capital stock originally paid, but all property afterwards
" acquired and then owned by the company, as well as any
" surplus undivided profits then on hand and all other assets, as
" well as the franchise?

" In the light of the foregoing provisions of the Constitution,
" and of the act of the Legislature, and of the instructions given
" to the Board of Valuation and Assessment and of the sworn
" statement demanded of the president of the company, on
" which, with other testimony to make this valuation, we are
" constrained to say that by this term capital stock, the Legisla-
" ture meant to include *the entire property, real and personal,*
" *tangible and intangible, all assets on hand, and its franchise as*
" *well*, and that when so embraced and construed and valued as an
" entirety, then to take off the tangible property already assessed,
" and that the net balance will show, and shall be the value of
" the franchise to be taxed under section 4077 " (p. 640, 641).

Thus we see how clearly and emphatically the Court expresses its opinion that this franchise tax is a tax upon the intangible property of the corporation, including its franchise properly so called.

But there is still another portion of the opinion which shows with equal clearness that the tax is upon the property of the corporation, and not upon the shares of the stockholders. If upon the property of the corporation, there would be no reason for deducting the debts of the corporation, because indebtedness is not deducted from the assessed value of property for taxation, according to the laws of Kentucky. But if the tax should be considered a tax on the value of the shares of stock of the corporation, then, manifestly, it would be necessary to deduct the debts of the corporation from the total assets of the corporation, in order to ascertain the value of the shares of stock. But, in speaking upon the question as to whether or not there could be a deduction of indebtedness in arriving at the value of the franchise to be assessed under the law in question, the Court of Appeals, in the case under consideration, said:

"But defendants argue that they should not be taxed on the "debt that it owes. It is not so taxed. Of course a debt can "not be made the subject of taxation, as against the one who "owes it.

"But, on the other hand, neither can an outstanding debt be "deducted from the value of any property in assessing same for "taxation. It can not be done in behalf of an individual; is "never done. And when the Constitution requires that the "property (not stock or capital stock, but property of all cor- "porations) must be taxed in the same manner as the property "of an individual, then it is manifest that neither can a corpo- "ration, in an assessment of its property for taxation, obtain any "credit for any debt that it may owe. This proposition we "think absolutely clear" (p. 642).

It seems to us we might rest with the simple reference to, and quotation from, this opinion of the Court of Appeals as to the nature of the tax now under consideration. But the case just referred to was carried to this Court by writ of error, and the judgment of the State Court was here affirmed. The very first sentence in the opinion of this Court being as follows:

"This was an action brought by the Commonwealth of "Kentucky against the Henderson Bridge Company to recover "the sum of $3,675.91, *taxes levied against that company on an* "*assessment made of its intangible property* by the Kentucky "Board of Valuation and Assessment for the year 1893." (Henderson Bridge Co. vs. Ky., 166 U. S., 150, 152.)

And again, in the same opinion, in the conclusion thereof, the Court said:

"The tax in controversy was nothing more than a *tax on the* "*intangible property of the company* in Kentucky, and was "sustained as such by the Court of Appeals, as consistent with "the provisions of the Constitution of Kentucky in reference to "taxation." (Page 154.)

Again, in the case of Adams Express Company vs. Kentucky, which involved a tax upon the Adams Express Company under the same statute now under consideration, this Court, in speaking of this so-called franchise tax, said:

"But, taking the whole act together, and in view of the "provisions of sections 4078 and 4081, we agree with the Cir- "cuit Court that it is evident that the word 'franchise' was not "employed in a technical sense, and that the legislative inten- "tion is plain that *the entire property, tangible and intangible,*

"*of all foreign and domestic corporations*, and all foreign "and domestic companies possessing no franchise, *should be* "*valued as an entirety, the value of the tangible property be* "*deducted*, and *the value of the intangible property thus* "*ascertained be taxed under these provisions.* . . . And *con-* "*sidered as a property tax, as in our opinion the prescribed* "*exaction must be held to be*, we regard it as in harmony with "the provisions of the Constitution of the Commonwealth of "Kentucky. The property, tangible and intangible, owned by "corporations is subjected to like taxation, and so is the tan- "gible and intangible property of individuals associated together "in companies," etc. (Adams Express Co. vs. Ky., 166 U. S., "171, 180.)

So the opinion of Mr. Justice Brewer in delivering the court's response to a petition for rehearing in the case of Adams Express Company vs. Ohio, in which the Court reviews a number of tax cases then pending before it, including the Henderson Bridge case and the Adams Express Company case from Kentucky, shows clearly that the court treats the tax as *a property tax upon the corporation.* One portion, in particular, of the opinion of Mr. Justice Brewer shows this very clearly, for it practically concedes that if any part of the property embraced in the assessment upon which the tax is based consists in United States bonds or other non-taxable property, it should be deducted from the amount of the assessment; thus clearly showing that the Court treated the tax as a property tax; for if it were a tax upon the shares of stock there would be no right to make any deduction on account of the particular character of property in which any part of the company's assets might be invested, as has been often held by this Court. (Adams Express Co. vs. Ohio, 166 U. S., 185, 222.)

In view of these decisions by the Court of Appeals of Kentucky, and by this court, as to the nature of this tax, it would seem indefensible for us to proceed with an original examination of the statute in question for the purpose of demonstrating the correctness of what the courts mentioned have held. And we think we have a right to assume that it has been settled by these decisions that, in the language of this Court in the Henderson Bridge case, the taxes involved are taxes levied *against the corporation on an assessment made of its intangible property.*

The opinion of the Circuit Court in the cases at bar (First National Bank vs. Stone, 88 Fed. Rep., 409) seems to concede in express terms what we here contend for as to the nature of this tax, but attempts to defend it, as we will presently state. The Court says:

"The question is whether the provision for taxing banks "under the revenue act of November, 1892, is a violation of

" this section" (referring to section 5219 of the Revised Statutes). " The provisions of that act are that all banks shall be taxed " upon their real property *and personal property*, and also taxed " upon their *franchises*, to be assessed by subtracting the value " of the tangible property from the value of the capital stock " of the company." (Our Italics.)

The Court then says that it is argued that the State has no right to tax the *franchises* conferred by the government of the United States; though if the Court means by this to state that our argument was limited to this proposition, it is in error, for we not only argued that the State had no right to tax the franchise, but also that it had no right to tax the personal property of the bank. The Court then proceeds:

" But it has been decided in the cases of Henderson Bridge " Company vs. Ky., 166 U. S., 150, and Adams Express Com- " pany vs. Ky., 166 U. S., 171, that the word 'franchise' in the " revenue act of 1892 was not employed in the technical sense, " and that the legislative intention was plain that the entire " property, tangible and intangible, of all foreign and domestic " corporations and all foreign and domestic companies possess- " ing no franchise should be valued as an entirety, that the value " of the tangible property should be deducted, and that the " value of the intangible property thus ascertained should be " taxed under these provisions. It will be seen, therefore, that " the taxation upon all banks is nothing but a tax upon the " value of its capital stock."

If by the last sentence above quoted the Court means that the tax is simply a tax upon all the assets of the bank, then the proposition is manifestly true. The Court's statement of the effect of the law shows, with absolute clearness, that the tax is a tax *upon the property of the bank.*

The Court then proceeds to state that there is no " discrimination " against National Banks in favor of State Banks. But that is a question which we will consider under the next heading of this brief. We are now considering the simple question as to whether the tax is a tax upon the property of the bank or upon the shares of stock in the hands of the stockholders. On this question the Court, in its opinion, refers to the case of Henderson Bridge Company vs. Kentucky, and to the manner in which the value of the franchise to be taxed was reached in that case; alluding, among other things, to the fact that the bonded debt of the corporation, amounting to $2,000,000, was not deducted, but was considered, in connection with the market value of its capital stock, in arriving at the total assets of the corporation to be taxed, and then says:

"In such a case, of course, the assessment for taxation would "be more than the value of the shares of the capital stock."

The Court then proceeds to say, however, that National Banks are not authorized to create a bonded debt, and that, therefore, the conditions existing in the Henderson Bridge case could not arise in a National Bank case. But, surely, the question of whether the tax imposed by this act is a tax upon the property of the corporation or a tax upon the shares of stock of the stockholders can not be made to depend, in case of each corporation, upon the question of whether or not it has a bonded debt. It can not be that the tax against corporation A, which has a bonded debt, is a tax upon the property of the corporation, while the tax imposed by the same statute upon corporation B, which has no bonded debt, is a tax upon the shares of its stockholders. The same statute, the same section and the same language which impose this tax upon one corporation impose it upon all of them. And the same statute, the same section and the same language which fix the mode of arriving at the value of the thing to be taxed, apply to all of the corporations alike. It seems to us, therefore, it can not be said with candor that this tax is a property tax against the corporation, as applied to one corporation, but a tax upon the shares of stock as against the stockholders in case of another corporation, when all are covered by exactly the same language. Whatever that language means as to one corporation, that same language must mean as to all the other corporations covered by it. In the case of Philadelphia Steamship Co. vs. Pennsylvania, 122 U. S., 342, where it was contended that a certain tax was upon the franchise of the corporation granted to it by the State, this Court, speaking through Mr. Justice Bradley, said: "It certainly could not have been intended as a tax upon the corporation franchise, because by the terms of the act it was laid equally on the corporations of other States doing business in Pennsylvania."

The Circuit Court, however, upholds this tax because "it is not averred in the bill and it does not appear that the assessment of valuation for taxation against these complainant banks exceeds the market value of their shares of capital stock." In other words, the Court seems to be of the opinion that it makes no difference whether the tax be levied upon the property of the bank or upon the shares of stock in the hands of the stockholders, provided the State collects no more taxes than it could lawfully collect under section 5219 of the Revised Statutes by a tax on the shares of stock. This is certainly not our understanding of the law, and we know of no authority to support such a proposition. It seems to us directly contrary to the statute itself and to all the adjudications of this court, beginning with McCullough vs. Maryland, 4 Wheaton. The Court refers to no authority to support this

proposition except Supervisors vs. Stanley, 105 U. S., 311. But that case has no bearing upon the question, because it was there admitted that the tax in controversy was a tax upon the shares of stock in the bank, and the only question at issue was whether or not the holder of such shares should be allowed to deduct his indebtedness from the value of these shares, as the owners of other moneyed capital were allowed to deduct their indebtedness from the amount of such capital. There was certainly no question involved nor decided as to whether or not a tax *upon the property of the bank* would be upheld, provided no more revenue was raised thereby than might have been raised under section 5219 by a tax upon the shares of stock in the hands of the stockholders. This Court seems to us to have gone quite a long way in construing different State statutes as imposing taxes on the shares of stock in a corporation rather than upon the property of the corporation; but it has certainly never yet held that a tax which has been determined to be a tax upon the property of a National bank can be upheld because no more revenue is thereby raised than might have been raised by a lawful tax upon the shares of stock. To so hold would, as it seems to us, be to disregard the plain terms of the statute and all the previous decisions of this Court.

We confidently submit, therefore, that if the National banks, or any of them, are not to be taxed under the Hewitt act, then plainly they can not be taxed under the present revenue law of Kentucky of November 11, 1892, because the latter is plainly a tax upon the property of the bank, and not upon the shares of stock of the stockholders.

The Citizens National Bank and the Third National Bank, both of which accepted the Hewitt act, and as to both of which it has been adjudged that this constituted a contract between them and the State, are perfectly willing to be taxed under that act, and have no desire to withdraw from their agreement. And the First National Bank, though it did not accept the Hewitt act, yet it paid under it, and is perfectly willing now to be taxed under it, uniformly with other banks in the city. But all of these banks object and protest against being taxed under the revenue law of November 11, 1892.

VIII.

Does the Principle of Uniformity Guaranteed by the National Banking Act Protect National Banks in the City of Louisville, Which, for Any Reason, Can Not Claim a Contract Under the Hewitt Act?

In the immediately preceding portion of this brief we have discussed the proposition that the act of November 11, 1892, is not valid against National Banks for the reasons that it is a tax upon the property of the bank, and not upon the shares of stock of the stockholders. But, if by any possible process of reasoning, it should be concluded that National banks can be severed out of the midst of all the corporations by which they are surrounded in this act, and the tax, as to them, be construed to be a tax upon their shares of stock, while, as to all other corporations, it is a tax upon the corporation, yet we insist that, even considered as a tax upon the shares of stock, it is invalid, because it disregards one of the "restrictions" imposed by section 5219 of the Revised Statutes, to-wit, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."

While the prohibition here is against "a greater rate" of taxation, yet it is perfectly plain from a consideration of the reason of the law, which has been so often explained by this Court, that what is intended to be here prohibited is the imposition of a greater burden upon such moneyed capital than is imposed upon other moneyed capital in the hands of individuals; and it makes no difference whether this greater burden is imposed by levying a greater rate of taxation upon the same valuation of property, or whether it is imposed by applying the same rate to a greater valuation of property. In other words, the amount of tax to be paid is arrived at by multiplying the assessed value by the rate of taxation, and this burden can be increased by increasing either one of these factors. And, so far as the taxpayer is concerned, it makes no difference which factor is increased. And such we understand to have been the express ruling of this Court in the case of People vs. Weaver, 100 U. S., 539.

Then does the act of November 11, 1892, impose a greater burden of taxation upon the shares of stock in National banks than is imposed upon other moneyed capital in the hands of individuals?

By the Hewitt act, and the acceptance thereof by practically all the banks of the State, including the National banks and including all the four old banks which were chartered prior to the

passage of the general reservation act of 1856, the State had a uniform system of taxation upon banks and banking capital. It was entirely within the power of the State to preserve this status. It voluntarily departed from it, repealed the Hewitt act so far as it had the power to do so, and has attempted to enforce a new system of taxation which has produced all of the trouble out of which the present complex litigation arises. As a result, it was determined by the highest court of the State, in the year 1895, in litigation to which nearly all of the banks of Louisville were either parties or privies, that the acceptance of the Hewitt act by these various institutions constituted contracts between them and the State lasting during the corporate existence of each institution. And, as a result of this, many of the largest financial institutions of the city can only be taxed under the terms of the Hewitt act, which means a tax of *seventy-five cents* on the $100 of par value of their capital stock, and the ordinary rate of State taxation on their surplus above ten per cent, and a tax on the houses in which they do business; while the tax under the present law and according to the current rates, including both State and municipal tax, in Louisville, is about $2.30 on $100 of value.

It cannot be contended that the amount of the capital protected by the Hewitt act is inconsiderable in comparison with the capital invested in National banks. On the contrary, the amended bill in the several cases of the First National Bank, the Citizens National Bank and the Third National Bank expressly states, among other things, that "The principal office of said bank of Kentucky" (one of the protected banks) "is in Louisville, Ky. It has a capital and surplus of $2,716,550, whereas the total capital and surplus of all the National banks, seven in number, doing business in the city of Louisville, is only $3,811,343" (see record in First National Bank vs. Samuel H. Stone, &c., No. 634, p. 291). The amount of the capital invested in the other banks in the city of Louisville, which were held by the Circuit Court to be protected under the Hewitt act, is not stated in the records of these National Bank cases, though, of course, the amounts do appear in the records in the other cases which are now pending before this court, and swell the amount of capital invested in State banks in the city of Louisville and enjoying the protection of the Hewitt act to a sum far exceeding the total amount of capital invested in all of the National Banks in the city put together.

It was held in Mercantile Bank vs. New York, 121 U. S., 138, that "the main purpose of Congress in fixing limits to State taxation on investments in shares of National banks was to render it impossible for the State in levying such a tax to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character."

And this statement was approved by this Court in Palmer vs. McMahon, 133 U. S., 667.

We are not unmindful of the case of Lionberger vs. Rouse, reported in 9 Wall., 468; on the contrary, we rely upon that case as authority, for it will be seen that the decision rested upon two points:

First. The comparatively small proportion which the capital of the two exempted banks bore to the total banking capital.

Second. That the National Banking act simply required that the States should, so far as it was within their power to do so at the time of the adoption of the act, abstain from discriminating in their taxation against National banks, but that it was not bound to exempt them simply because the State had disqualified itself by contract long before the passage of the National Banking act from taxing two of the banks in the State. It was held that if the State, so far as it had the power to do so, treated the National banks with the same fairness as it did the other banking capital, it was all that could be expected, but it held with equal distinctness that the State must, so far as it is possible for it to do so, treat all capital similarly invested with the same degree of fairness.

Now, in the case at bar, as we have seen, the State had succeeded in making an arrangement with the banks by which they were all, old and new, National and State, placed upon precisely the same footing. After this object had been accomplished, and after the banks had thus been taxed for a number of years (and of course the State had the power to continue that situation), the State, by its own action, voluntarily has passed laws, which, if any effect is given to them, will result in discriminating in the most unjust manner in favor of the old banks as against the National Banks, the discrimination being so gross and unjust that it will not be possible for the National Banks in the city of Louisville to do business in competition with the old State banks, if this Court should reach the conclusion that the old banks are entitled to their old rate of fifty cents on each share of stock, and the other banks are not, or if it should reach the conclusion that the old banks are entitled to the rate of taxation provided in the Hewitt act, and the other banks are not.

Therefore, we insist that, upon this ground, the National Banks are entitled, under the circumstances of this case, to a footing equally favored with the old banks.

Upon this question the Court of Appeals, in the Bank Tax cases, decided in 1895, *supra*, in its opinion by Judge Pryor, said:

> "The case of Lionberger vs. Rouse, 9 Wall, 468, has no "bearing on this question of contract. Here the State was not "powerless to remedy the evil, or prevent the discrimination "complained of in the Missouri case. The Legislature devised a "mode by which this discrimination could be removed, however

"great, or even insignificant, the difference in taxation might "have been. The National Banks, recognizing the fact they "could be taxed as other moneyed capital, and desiring uni- "formity of taxation, and not one rate for one bank and a dif- "ferent rate for another, surrendered their right, or claim, to "be taxed as the old banks were taxed, and entered into this "agreement by which a uniform system of taxation was adopted "for all banks, such as the State desired.

"The claim of the old banks and the National banks, as to "the mode of taxing them, was, certainly, not without founda- "tion, for the reasons already given, and the proposition by the "Legislature to settle these differences, and its acceptance, was "a wise and just solution of the whole question.

"The case presented by the legislative repeal is the opposite "of the legislation in the Missouri bank cases. In the one "case there was no legislation making the discrimination, while "in the case before us the State, after placing the banks, State "and National, on the same footing as to taxation, by the con- "sent and agreement of all the parties to the contract, is now "insisting upon a legislative rescission of the contract, and "placing the old banks at least in a position where they are to "pay only fifty cents on the shares of a hundred dollars, and "leaving the National banks subject to a greater rate of taxa- "tion.

"This repeal, if sustained, is in effect the creation of three "or more new banks with a rate of taxation much less than "that imposed on the National Banks, and making a discrimi- "nation in favor of the old banks and their branches that gives "them a monopoly of the banking business of the State."

In conclusion, therefore, we submit that, even if this tax should be treated as a tax on the shares of stock in the hands of the stockholders of National Banks, it is invalid, because it fails to observe the restriction in the act of Congress forbidding discrimination against such moneyed capital.

If the foregoing views expressed in this (8th) division of this brief be correct, then it follows that the present revenue law of November 11, 1892, in so far as it seeks to tax National banks, is invalid. And the same result necessarily follows, if our views expressed in the next preceding (7th) division of our brief be correct.

If these views be correct, it will necessarily follow that the judgment of the Circuit Court in the cases of First National Bank vs. City of Louisville, No. 635, and First National Bank vs. Stone and others, No. 634, in which the Court refused to enjoin the tax on the First National Bank under the act of November 11, 1892, must be reversed, with instructions to grant such injunction.

And it also follows that the judgments of the Circuit Court in the cases of Citizens National Bank vs. Stone, No. 405, and Third National Bank vs. Stone, &c., No. 404, in which the court refused to grant injunctions against the assessment or collection of taxes under the act of November 11th, 1892, for any years subsequent to 1894, must also be reversed, with instructions to grant such injunctions.

And it further follows that the judgments of the Circuit Court in the cases of the City of Louisville vs. Citizens National Bank, No. 365, and City of Louisville vs. Third National Bank, No. 364, must be affirmed, in which the court enjoined the collection of taxes against those banks under the act of November 11th, 1892, for the years 1893 and 1894; for, although the judgment of the court in those cases was based upon the idea that those banks had accepted the Hewitt act, and were protected by it from taxation under the act of November 11th, 1892, for the years named; yet even independent of the acceptance of the Hewitt act, if the attempt to tax those banks under the act of November 11th, 1892, is invalid *for any reason*, the judgments should be affirmed. A proper judgment, though given for an erroneous reason, must be affirmed.

CONCLUSION.

For the foregoing reasons, without attempting to recapitulate, we submit that the judgments of the Circuit Court in the first six cases enumerated in the caption to this brief should be affirmed; and that the judgments in the last eight cases enumerated should be reversed, with directions as heretofore suggested.

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January 11, 1899.

APPENDIX.

THE HEWITT ACT.

General Statutes of Kentucky, Ed. 1888, Chap. 92, Art 2.

Section 1. That shares of stock in State and National Banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the Auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

Sec. 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of the surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and 20 per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths: "I_____, swear (or affirm) that I am the_____ of_____, and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulation of said _____, and how, or in what said surplus, undivided profits, or undivided accumulatious is invested."

Sec. 3. If any such bank, institution, or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its

surplus, undivided profits, or undivided accumulations than an amount equal to 10 per cent. of such capital stock, the excess of the amount so invested over the amount equal to 10 per cent. of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

Sec. 4. That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

Sec. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

Sec. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.

Sec. 7. If any bank, State or National, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation, for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

PRESENT REVENUE LAW OF NOVEMBER 11, 1892.

Kentucky Statutes, Secs. 4077–4092, inclusive.

Sec. 4077. FRANCHISE TAXED—BOARD OF VALUATION TO DETERMINE WHERE TAX SHALL BE PAID.—Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company, or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessmeut for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

Sec. 4078. FRANCHISE—REPORTS BY CORPORATIONS TO DERMINE VALUE.—In order to determine the value of the franchise mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer, or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona-fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is

required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

Sec. 4079. FRANCHISE—REPORTS IF LINES EXTEND BEYOND STATE OR COUNTY.—Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized and under the laws of any other State or Government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

Sec. 4080. FOREIGN CORPORATION—VALUE OF FRANCHISE, HOW DETERMINED.—If the corporation, company, or association be organized under the laws of any other State, or government, except as provided in the next section, the Board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amounts of the gross receipts of such corporation, company, or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this State.

Sec. 4081. FRANCHISE OF CARRIER—WHEN TAXED IN EACH DISTRICT THROUGH WHICH LINE PASSES.—If the corporation organized under the laws of this State, or of some other State, or government, be a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair-car company, the lines of which extend beyond the limits of this State, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the

capital stock, which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased, or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State, and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town, or taxing district.

Sec. 4082. FRANCHISE OF PERSONS ENGAGED IN CERTAIN BUSINESS — HOW VALUE DETERMINED. — Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed, therein, shall be deemed and treated as the capital stock of such person or association of persons, for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

Sec. 4083. NOTICE TO CORPORATIONS OF VALUE OF FRANCHISE— BOARD MAY CHANGE.—It shall be the duty of the Auditor, immediately after fixing such values by said Board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such Board and ask a change of the valuation, and may introduce evidence, and the chairman of the Board is hereby authorized to summon and swear witnesses, and after hearing such evidence the Board may change the valuation as it may deem proper, and the action of the Board shall be final.

Sec. 4084. VALUE OF FRANCHISE TO BE REPORTED TO COUNTIES ENTITLED TO TAX.—The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the County Clerk of the counties when any portion of the corporate franchise of any such corporation, company, or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

Sec. 4085. PROPERTY ASSESSED IN NAME OF CORPORATION— PENALTY FOR FAILURE TO REPORT—STOCKHOLDERS, WHEN EXEMPT.—The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.

Sec 4086. CORPORATIONS TO PAY TAXES AS INDIVIDUALS.—All corporations and other persons who are required to make reports to the Auditor of Public Accounts, shall pay all the taxes due the State from

them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

Sec. 4087. PENALTY FOR FAILURE OF CORPORATION TO MAKE REPORT.—Any corporation or officer thereof, willfully failing or refusing to make reports, as required by this chapter, shall be deemed guilty of a misdemeanor, and for each offense shall be fined $1,000, and $50 for each day the same is not made after October first of each year.

Sec. 4088. STOCKHOLDERS EXEMPT FROM TAX ON STOCK WHEN CORPORATION PAYS. The individual stockholders of the corp ration which are, by this article, required to report and pay taxes upon the corporate franchise shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchises as herein provided.

Sec. 4089. RECEIVER OF CORPORATION TO REPORT. Should any corporation required to make the report as hereinbefore provided be in the hands of, or under the control of, a receiver or other persons, it shall be the duty of such receiver or other person to make the returns and valuations as hereinbefore required.

Sec. 4090. CORPORATION FAILING TO REPORT, BOARD SHALL FIX VALUE. Should any corporation fail to make the reports as required herein on or before the first day of October each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

Sec. 4091. TAXES, EXCEPT OF BANKS AND TRUST COMPANIES, WHEN DUE—PENALTY. All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the Auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

Sec. 4092. BANKS AND TRUST COMPANIES—WHEN TO REPORT—TAXES—WHEN DUE—PENALTY.—All banks and trust companies shall file the reports herein required by section four thousand and seventy-eight of this article, on or before the first day of March, one thousand eight hundred and ninety-three, and annually on or before March first thereafter. Said reports shall be made up to and including the thirty-first day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports, or to pay said taxes as herein required, said banks and trust companies shall be subject to the same fines and penalties as prescribed in section four thousand and ninety-one of this article.

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FEB 17 1899
JAMES H. McKENNEY

Filed Feb. 17, 1899.

Supreme Court of the United States.

360 vc.

Samuel H. Stone, Etc., - - - - - - Appellant,

versus

Louisville Banking Company, Etc., - - Appellees.

BANK TAX CASES.

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Supreme Court of the United States.

SAMUEL H. STONE, ETC., ... *Appellants*,

vs.

LOUISVILLE BANKING COMPANY, ETC., . . *Appellees.*

BANK TAX CASES.

We ask the indulgence of the Court to respond briefly to some of the points made by counsel for the city.

I.

He maintains that the Court has no jurisdiction to entertain these cases because in another case it found that as an original proposition there was no contract between the State and the banks and trust companies, that having so found as an original proposition in another case the only question which the Circuit Court had to decide in these cases was the effect of the former judgment as evidence. In support of this contention he cites the case of Phoenix Fire & Marine Ins. Co., vs. Tennessee, 161 U. S., 183. But the facts stated in that opinion clearly distinguish it from the case at bar. In

the case cited a former judgment affecting the years named was pleaded at bar; the suit was in the State Court. That Court held (1) that there was in fact no contract irrepealable in its nature, and (2) it refused to receive the former judgment as conclusive evidence of the existence of the contract beyond the particular years involved. This Court having held with the State Court on the first proposition, it held upon the second that no federal question was presented. In the case at bar the Circuit Court held that there was the contract claimed, which was conclusively established by the former adjudication. Therefore, so far as these cases are concerned, it was held that there was an irrepealable contract, and that the enforcement of the statute would impair its obligation.

The other cases cited by counsel upon this point bear no more directly upon it than the one last mentioned.

II.

Counsel also makes the point that there is no federal question involved because the statute complained of was adopted prior to and not subsequent to the decision of the Court of Appeals on June 1, 1895. We submit with deference that a little confusion has crept into the mind of the learned counsel. He seems to consider the judgment of the Court as the contract, and therefore assumes that there must be subsequent legislation. But while we have sometimes heard disappointed lawyers in trying to explain "why they lost their case" speak of a decision as "judicial legislation" we do not now remember to have heard the contention so seriously urged before. The decision is not the contract, but the judicial fixing of the rights of the parties under a pre-existing contract.

III.

Counsel urges the objection that these suits are against the State and come within the prohibition of the eleventh amendment to the Federal Constitution.

This question has been so often and so recently before this Court and has been so fully considered that it can not be necessary to do more than to refer to some of the cases which we think conclusively settle the proposition against the contention of the learned counsel. See Pennoyer vs. McConnaughy, 140 U. S. 1; *In Re* Tyler, 149 U. S. 190; Regan vs. Farmers' Loan & Trust Co. 154 U. S. 388; Belknap vs. Schild 161 U. S. 18; Scott vs. Donald, 165 U. S. 112; Tindell vs. Wesley, 167 U. S. 219; Smythe vs. Ames, 169 U. S. 519.

In the Regan case this Court, through Mr. Justice Brewer, commented upon the fact that the State had no pecuniary interest involved.

In the cases at bar the Court will not lose sight of the fact that the real controversy is between the banks and trust companies on the one side and the city of Louisville on the other. The State will get very much more revenue if the banks and trust companies succeed in their contention than if they fail.

On the other phase of the question it may be said that if we are right in our contention that the statute sought to be enforced by the State officers is, as against our clients, unconstitutional, then we come clearly within the reasoning of the cases cited, *supra*. If we are not right in our contention that we have a contract adjudged to be inviolate, the obligation of which is impaired by the enforcement of the statute of November 11th, 1892, then in the language of Bret Harte we can say "subsequent proceedings interest us no more."

IV.

Counsel makes the point that in some of the bills it is not shown that the amount in controversy exceeds $2,000, though he quotes from the bill criticised, this language: "As applied to your orator the tax under the act of November 11, 1892, before referred to, will exceed the tax which it would have to pay under the Hewitt bill by $20,000." Again, "Your orator shows that the State taxes, based on the assessment of your orator's franchise, exceeds the sum of $2,000, exclusive of interest and costs, and the taxes claimed by the city of Louisville, based on the assessment of your orator's franchise, exceeds the sum of $2,000, exclusive of interest and costs." He attempts to support this contention upon the theory that a proper construction of the pleading would make it mean no more than if the allegation had been that the amount stated would be involved if the whole corporate existence of the complainant should be considered.

It seems to us hardly necessary to respond to this point. Each of the bills shows the years in controversy, and seeks to enjoin in one class of cases, the collection of taxes for the named years, and in the other class of cases, the assessment and certification for the years named. Therefore, the construction of the pleading contended for is not in the least admissible. The language stating the amount in controversy must of necessity be referred to the particular years involved. And it is an inexcusable construction to claim that it may be referred to the whole corporate existence of the complainant. Counsel, however, cites in support of this construction the case of Citizens' Bank vs. Cannon, 164 U. S., 319, which is authority directly against his position, for it is there stated that the pleading, in stating the amount involved, should be construed as referring to the particular years in controversy, which, of course, is the only natural and proper construction.

V.

Counsel further criticises some of the bills because they do not allege in set terms that the State Courts (which rendered the former judgments relied on in the plea of *res adjudicata*) had jurisdiction of the parties or of the subject-matter. But it must be admitted that facts are alleged which show jurisdiction in both respects.

It is further stated that the bills are defective in not alleging that the judgments are in full force and effect and have not been superseded or annulled, but it is alleged that the judgments in the lower Court were entered in pursuance (i. e. in conformity) to the mandate of the Court of Appeals, and it is of course erroneous to state that any appeal would lie from a judgment pursuant to the final mandate in the case, or that the lower Court would have any right to refuse to enter a judgment confessedly pursuant to the mandate. There must be an end to litigation, and when that litigation is ended by the mandate of the Court of last resort, it may not be continued in the manner suggested by counsel.

Aside from these considerations, the lower Court did take jurisdiction and rendered judgment. Appeals were prosecuted. The Court of Appeals took jurisdiction and rendered its judgments upon which mandates issued. Final judgments were entered thereon and pursuant thereto. Copies of the records are exhibited from which it will be seen that no objection to jurisdiction was at any time suggested.

Both of these State Courts are Courts of general jurisdiction, therefore, we maintain that the presumption is in favor of jurisdiction, and no averment of jurisdiction was necessary. (Brown on Jurisdiction, Sec. 20*a*, and the authorities there cited.)

Again, if the judgments are not in full force, that is a matter of defense.

VI.

Counsel in several places in his brief states, or at least broadly intimates, that the stipulation filed with the bills was not executed until after the decision of the Court of Appeals on June 1, 1895. We confess to a feeling of surprise and disappointment upon reading these portions of counsel's brief. There were four persons who signed that paper: H. S. Barker, then counsel for the city and the Sinking Fund Commissioners of the city, now one of the presiding judges of the Jefferson Circuit Court; C. H. Gibson, President of the Board of Sinking Fund Commissioners, A. P. Humphrey and James P. Helm.

We put on the stand Judge Barker because he represented the other side (and even learned counsel, his successor in office, concedes that he is far above reproach). He testified that the stipulation was signed immediately after the second payment by the banks and trust companies to the Sinking Fund, which was in December, 1894. (Bank of Commerce, Rec. p. 46.) Again on cross-examination this question was asked him by counsel for the city.

Q. "I will ask you to state, if you can state now positively, if this original agreement, which you did sign was executed before the decision of the Court of Appeals by Judge Pryor, June 1, 1895." To which he answered: "Most assuredly it was, and before Mr. Tyler died." (Same record p. 50.)

Learned counsel knowing the delicacy which counsel feel in volunteering to testify in cases in which they are engaged, abstained from asking either of them to testify, and also abstained from putting Mr. Gibson, the President of the

Board, on the stand, and apparently prefers, by mere suggestion, unsupported by the record, to cast a doubt upon the good faith of the transaction.

The statement of counsel on page 64 of his brief that the Mayor had not authorized "any agreement whatever on the subject matter embodied in said alleged stipulation" is expressly contradicted by the only witness who testified on the subject. (See Judge Barker's deposition—Bank of Commerce, Rec., p. 45.) He there states that he had many conferences with the Mayor and with the Finance Committee of the General Council, and also that this stipulation between the city and the banks and trust companies was the subject of many earnest conferences between himself, the Mayor and the other officers of the City of Louisville. And he further says that the Mayor and Finance Committee of the General Counsel concurred "most fully" in the propriety of entering into the agreement.

The agreement here referred to was the agreement signed by Barker. This is clearly shown on page 49 of the same record, where he says that the Mayor could not be present, and told him (Barker) to sign it. That this agreement was fully carried out by the banks and trust companies is admitted; that it was done by them on the faith of this agreement goes without saying. It clearly appears from Judge Barker's testimony that, but for the agreement, every bank and trust company would have sued, and in that event, the city would not have received one cent of the large amount paid in on the faith of the agreement. (Bank of Commerce, Rec. 44–5.)

So far as we understand counsel's brief, other points made by him are anticipated and fully answered in our original brief.

JAMES P. HELM,
HELM BRUCE,
Counsel.

AUTHORITIES CITED.

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Scott vs. Donald, 165 U. S., 112.
Tindell vs. Wesley, 167 U. S., 219.
Smythe vs. Ames, 169 U. S., 519.
Citizens' Bank vs. Cannon, 164 U. S., 319.
Brown on Jurisdiction, Sec. 20 *a*.

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No. 386.

Brief of Ira Julian for Appt. in 385.

Filed Feb. 17, 1899.

SUPREME COURT OF THE UNITED STATES.

NO. 386

The Farmers Bank of Kentucky, Appellants.

VERSUS

Samuel H. Stone, Auditor, &c., and
The City of Georgetown, Appellees.

BRIEF OF THE CITY OF GEORGETOWN AND SCOTT COUNTY, KY.

L. L. BRISTOW,
City Attorney for City of Georgetown.

J. C. B. SEBREE,
County Attorney for Scott County.

IRA & W. H. JULIAN,
For said City and County.

Georgetown Times Print.

Supreme Court of the United States.

The Farmers Bank of Kentucky, *Appellants.*

vs. } NO. 386

Samuel H. Stone, Auditor, &c.,
and The City of Georgetown, &c., *Appellees.*

BRIEF FOR CITY OF GEORGETOWN AND SCOTT COUNTY, KENTUCKY.

STATEMENT OF THE CASE.

By act of the Kentucky Legislature approved ~~May~~ Feby 16, 1850, the appellant, Farmers Bank of Ky., was incorporated and created a body politic, its charter extending until the first day of May, 1880. It was authorized by its charter to create, and did create branches at Henderson, Ky., and Georgetown, Ky., the charter privileges extending to said branches. By an act of said Legislature approved March 10, 1876, it was provided that the charter privileges of said Bank and its branches should continue for 25 years from the first day of May, 1880, which would make its charter life expire May 1, 1905.

By the original charter of 1850 it was provided that on the first day of July, 1851, and on the first day of July in each succeeding year during the continuance of its charter, the cashier of the principal bank should pay to the Treasurer of the State of Kentucky *fifty cents* on each one hundred dollars of stock, which should be in full for all tax or bonus due the State of Kentucky. It is admitted that the appellant paid this tax of fifty cents on each one hundred dollars of stock down to July 1, 1886. Since that time, such taxes as it has paid have been under and by virtue of what is known as the Hewitt law. (Article 2, chap. 92 General Statutes of Kentucky.)

This "Hewitt law" was an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky." The first section provides as follows: "That shares of stock in State and National banks and other institutions of loan or discount, and in all corporations required by the law to be taxed on their capital stock shall be taxed *seventy-five*

cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10% of their capital stock, which shall be in full of all tax, State, county and municipal."

Section 4 of said act provides that "each of said banks, institutions and corporations by its corporate authority with the consent of a majority in interest of a quorum of its stock holders at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all right under the Acts of Congress or under the charters of the State Bank to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered and in consideration thereof, such Bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

Section 5 of said act provides "the said banks may take proceeding authorized by section four of this act at any time until the next meeting of the next general assembly: Provided they pay the tax provided in section one, from the passage of this act."

Section 6 provides "this act shall be subject to the provisions of section eight, chapter 68 of the General Statutes."

Section 7 provides that "if any bank, State or National, shall pay or refuse to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section four, the shares of stock of such bank, institution or corporation, and its surplus undivided accumulation and undivided profits shall be assessed as directed by section two of this act, and the taxes, State county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided

profits, undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: Provided that nothing herein contained shall be construed as exempting the taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The appellant claims to have accepted the provisions of this Hewitt law at a meeting of its stockholders on the 6th day of December, 1887, and files a copy of its acceptance marked exhibit "C" (page 62 of record), and by reason of said acceptance claims to have an irrevocable contract with the State of Kentucky to be taxed at the rate of seventy-five cents on each share equal to one hundred dollars, in full of all tax, state, county and municipal (except as to real estate, surplus, etc.)

But by the new Constitution of Kentucky, section 174, passed in 1891, it is provided that "all property, whether owned by natural persons or corporations shall be taxed in proportion to its value unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license or franchise." And section 175 provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

In pursuance of these provisions of the constitution the legislature of Kentucky passed a new revenue law which went into force Nov. 11th, 1892. It provides in substance that an incorporated bank shall, in addition to other taxes imposed on it by law annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, or taxing district where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are by said act constituted a Board of Valuation and Assessment for fixing the value of said franchise, and the banks are required to file reports before the first of March in each year giving the data upon which said valuation shall be made. Upon this information, and such other

information as the Board can obtain it is authorized and directed to fix the value of the capital stock of the bank and from the amount thus fixed to deduct the assessed value of all tangible property assessed in the State, or in the counties where situated, and the remainder thus found is to be the value of the corporate franchise subject to taxation under said act. The Board shall then apportion the value of such franchise among the several taxing jurisdictions entitled to a share of said tax, and at the expiration of 30 days after determining such value, shall certify to the County Clerk of the counties where any portion of such franchise shall be liable to local taxation the amount thereof liable for county, City or State taxes and such certificate being filed by the County Clerk in his office is certified to the collecting officer of said county and city for collection.

Banks by reason of their claim of an irrevocable contract under the Hewitt law contended that the provisions of the Constitution and act of 1892 above set out were null and void as to them because in violation of that clause of the Constitution of the United States which prohibits any State from passing a law which shall impair the obligation of a contract, and further that it was void because violative of the Constitution of the State of Kentucky in that said Constitution provides that the legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by general laws confer on the proper authorities thereof the power to assess and collect taxes, and that the apppointment of a State Board of Valuation for making such assessment and valuation was not in conformity with this clause of the Constitution of Kentucky.

The appellant instituted injunction suits against the City of Frankfort and the County of Franklin, and also against the City of Henderson to enjoin them from collecting taxes under this new revenue law of 1892. These cases all went to the Ky. Court of Appeals, and on the first day of June, 1895, the Court through Chief Justice Pryor rendered its decision to the effect that the acceptance of the provisions of the Hewitt law by the banks constituted a contract between the banks and the State of Kentucky which the latter could not alter or change without the consent of the former, and that the State Board of Valuation and

Assessment had no authority in law to assess or value the plaintiff's franchise for taxation.

Under the mandate in said suits, orders of injunction were rendered in the lower Courts, from which orders appeals are now pending in the Kentucky Court of Appeals. In March, 1897, in the cases of the Deposit Bank of Owensboro vs. Daviess county, &c., the Court of Appeals through Judge Paynter rendered an opinion of the Kentucky Court of Appeals which reversed the opinion as rendered by Judge Pryor and decided that the Hewitt law was repealable and the contracts of the banks under said law had been abrogated by the Kentucky constitution and the revenue act of 1892 above referred to.

On the 17th day of April, 1897, the appellant instituted suits in the United States Circuit Court for the District of Kentucky asking for an injunction against the appellee and others, and claiming contracts under the Hewitt Bill and pleading that by virtue of the decision rendered by Judge Pryor that it had been finally adjudicated that said bank had an irrevocable contract with the State of Kentucky, exempting it from taxation, except as provided in said Hewitt Bill. On June 28, 1898, Judge Taft, rendering the decision for the United States Circuit Court, while deciding that the banks did not have such an irrevocable contract under the Hewitt law, yet that by reason of the plea of *res judicata*, the Pryor judgment was an estoppel as to all parties and privies to the suits pending before said Court. By virtue of this judgment the Board of Councilmen of the City of Frankfort, County of Franklin, the City of Henderson and the County of Henderson were enjoined and estopped from the collection of taxes against appellant. But the Court further decided that the plea of *res judicata* did not hold as against the City of Georgetown and the County of Scott, and as to said City and County the bill was dismissed. From that judgment, this appeal is prosecuted, being case No. 386 herein.

SPECIFICATION OF ERRORS.

The appellant assigns the following specifications of errors to the decree of the Circuit Court of the United States for the sixth circuit and district of Kentucky rendered by Judge Taft on the 25th day of June, 1898, for said Court, to-wit:

And the said complainant further says that said decree is erroneous and against the rights of the complainant, because the court erred in dismissing the complainant's bill as to the County of Scott and the City of Henderson.

2nd. Because the court erred in not deciding that complainant's contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to the City of Georgetown or the County of Scott for any purpose whatever.

2. Because the court erred in not issuing an order of injunction against the defendants, Sam'l Stone, Chas. Finley & George Long, enjoining them from making an assessment in any way upon any of the stock of complainant at its bank, at Georgetown, for municipal or county taxation, and it erred in not enjoining the said Stone from making any apportionment of complainant's capital stock to the bank at Georgetown for taxation for any purpose whatever.

BRIEF OF ARGUMENT.

The decision of the Court below so far as it affects the appellee, the City of Georgetown and Scott county (see page 182 of record) is as follows: "The Court further finds that there is no irrevocable contract established by judgment or otherwise binding the county of Scott or the City of Georgetown to a compliance with the Hewitt Act in respect to the collection of taxes upon the property or stock of the Farmers Bank of Ky. taxable therein, and therefore that as to such property, and as to so much of said stock as is apportioned for taxation to Scott County or the City of Georgetown under the revenue act of 1892, said act applies and is in force, and the Hewitt act has no application thereto. Wherefore it is adjudged that as to the County of Scott and the City of Georgetown the plaintiff's bill be, and the same is hereby dismissed." And again (see page 232 of record) Judge Taft holds as follows: "There was no adjudication however between the Farmers Bank and either Scott County or Henderson County. It therefore follows from what has already been decided that as to Scott County and Henderson County the demurrers to the bill should be sustained and the bill must be dismissed."

In discussing the assignment of errors above set out we will

first consider the question as to whether the appellant had an irrevocable contract under the Hewitt Act exempting it from taxation (except as provided in said act;) and secondly, if it had no such contract whether the appellees the City of Georgetown and County of Scott are bound by the decision of Chief Justice Pryor under the plea of *res judicata*.

1.—HAD APPELLANT AN IRREVOCABLE CONTRACT.

The 6th section of the Hewitt Act provides that said act shall be subject to the provisions of section 8, chapter 68 of the General Statutes. Said section 8 is as follows: "All charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature unless a contrary intent be therein plainly expressed, provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." This is known as the act of 1856 and has been in force as a part of the charter of all corporations since 1856. When the charter of the appellant was extended for 25 years by the act of March 10, 1876, the act of 1856 became a part of said charter, and when said appellant accepted the terms of the Hewitt Act it was especially provided as above shown that said act of 1856 should be a part of said act. It would therefore seem plain that the State of Kentucky reserved the right to repeal the said Hewitt Act whenever the legislature saw fit so to do. The act of 1892 was unquestionably a repeal of the Hewitt Act. Did the legislature have a right to repeal said Act? Quoting from Judge Paynter in the case of the Deposit Bank of Owensboro vs. Daviess County, 19 Ky. Law Reporter, page 254: "It must be conceded from authorities the Supreme Court of the United States has repeatedly held that the legislatures of the states have the power when reserved in the charter, or by general law, to change or repeal acts granting corporate privileges or franchises, (citing Tomlinson vs. Jessup 15 Wall, 454. Railroad Co. vs. Maine, 96 U. S., 499, Railroad Co. vs. Georgia, 98 U. S. 359; Hoge vs. R. R. Co. 99 U. S., 348; Greenwood vs. Freight Co. 105 U. S. 13, 21; Water Works vs. Schottler 110 U. S. 347, 352; Close vs. Cemetery Co. 107

U. S. 466, 476; Louisville Gas Co. vs. The Citizens Gas Light Co. 115 U. S. 683, 696; Gibbs vs. Gas Co. 130 U. S. 396-408; Sioux City St. Ry. Co. vs. Sioux City, 138 U. S. 98-108).

In the Hamilton Gas Light and Coke Co. vs Hamilton City 146 U. S. 271, it was held "This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the General Statute providing for the formation of corporations. The legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract, but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke the exclusive character of such privileges cannot be regarded as one impairing the obligation of the contract whatever may be the motive of the legislature, or however harshly such legislation may operate in the particular case upon the corporation or parties affected by it. The corporation by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation. The decisions of the Court of Appeals of Kentucky are in accord with these opinions. (See case of Griffin vs. Insurance Co., 3 Bush., 592; Cumberland & Ohio R. R. Co., vs. Barren County Court, 10 Bush., 604; in Water Co. vs. Clark 143 U. S., the Court held as follows: "But in respect to all the acts passed after 1856 amending the charter of or relating to the Water Co., &c., each must be read as if all the provisions of the act of 1856 were incorporated in it, because in no one of them is plainly expressed an intent to waive the right of amendment or repeal, at the will of the legislature." How much, therefore should the power to repeal or amend the charter of appellant be construed to be a part of said charter when by the terms of section 6 of said Hewitt Act, the act of 1856 is specifically made a part of said Hewitt Act. But as Judge Paynter, in rendering his opinion, has well said,—"To simply quote the act extending the Charter is a sufficient denial of and answer to the claim of an irrevocable contract:" It reads as follows: "That the Charter of the Farmers Bank of Kentucky as amended be extended for a period of twenty-five years from the termination of its charter as

therein fixed: *Provided* that said charter and amendments shall be subject to amendment or repeal by the General Assembly either by general or special act; and, *proviced, further*, that whilst the privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested."

What is meant by "other rights previously vested" referred to in extension of appellant's charter, and also referred to in section 6 of the Hewitt Act? In Judge Pryor's decision, before mentioned, he holds that the contract to pay 75 cents on each one hundred dollar share of stock, &c., as provided in the Hewitt Act included such "other rights." On the other hand, Judge Paynter in his decision above referred to holds that this privilege of being exempted from general taxation by the payment of a less amount than other tax payers is one of those "privileges and franchises" which it is expressly declared in said Hewitt Act may be changed or repealed, and that "other rights" are such as the beneficiaries under the charter or general laws may have in property, contracts, choses in action, real and personal property, in fact every interest which they could acquire in operating under the charter or law, and such other rights or interests as other persons may have previously acquired by contract, mortgage, judgment or otherwise in property belonging to the corporation, for said he, "To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted, and still leave the banks in its enjoinment (as is the effect of the opinion of the Court in the Bank Tax cases), is to disobey a plain statute, to ignore the authority of the opinions of the Supreme Court, and is a failure to follow sound reasoning in the settlement of a question of vast importance to the state and the people. The former opinion on this question gave the banks the substance and the State the shadow. Had section 6 of article 2 (Hewitt Act) provided that the act of 1856 should not be considered part of it, we do not doubt the representatives of the bank would have easily seen the meaning of the provision. As it is plainly written that the act of 1856 is to be considered a part of the article they have the very greatest difficulty in seeing the purpose of the provision."

Surely the view taken by Judge Paynter is more logical than that of Judge Pryor. It is in conformity with section 174 of the Constitution of Kentucky which provides that "All property, whether owned by persons or corporations should be taxed in proportion to its value unless exempted thereby; and that all corporate property should pay the same rate of taxation paid by individual property." Why is not Judge Paynter's a just and equitable construction? Do not banks receive the benefits of municipal and county government? Are they not protected by the local authorities, and do they not obtain their share of the benefits of public improvements? It is said that the increased burden upon the banks under the act of 1892, with an arbitrary 6% interest rate, will force them out of business. That may be true but it does not help the argument. It may prove that taxes are too high, or that the legal rate of interest is too low, but it shows no reason why a corporation should be partially exempted from taxation any more than the ordinary citizen.

Moreover the law of the State of Kentucky does not favor such exemptions. In addition to sections 174 and 175 above quoted, section 3 of the Kentucky Constitution (page 87 Ky. Statutes) provides: "No grant of exclusive, separate, public emoluments or privileges shall be made to any man or set of men except in consideration of public services, but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

In the Commonwealth vs. Masonic Temple 87, Ky., 349, it was held that "immunity from taxation is from its nature a personal privilege which can be granted by the legislature *only in consideration of public service to be rendered by the beneficiary*, or to religious bodies, charitable institutions or schools." And in the case of the Commonwealth vs. McKibben, 90 Ky., 384, it is laid down as the established doctrine of the State under its Bill of Rights that "No man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, *but in consideration of public services*," and citing with approval Bailey vs. New York 3 Hill, 531. In that case, after laying down the doctrine that exemption from taxation should

be conferred only on public corporations that render some public service, and not on corporations created for private emolument it declares: "If (the powers conferred are) granted for public services exclusively they belong to the corporate body in its public, political, municipal character; but if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quo ad hoc* is to be regarded as a private company." Said case of the McKibben vs. The Commonwealth also cites with approval the case of Barbour vs. Board 82 Ky., 649, and declared: "Judge Hines announces the correct doctrine on this subject in the following strong and comprehensive language: 'The power of taxation grows out of the necessity to preserve the government by laying the common burden upon every citizen enjoying its protection of life, liberty and property, and is limited in its nature to objects that are public, as distinguished from those that are personal or private in their character. Taxation immediately for the benefit of an individual is a contradiction in terms which is prohibited by the fundamental law unless it is granted as a public privilege in consideration of public services. If the legislature were to authorize the payment of a person's expenses in the performance of any enterprise not a public service, there can be no doubt that such an act would be declared unhesitatingly unconstitutional; and to exempt a person's property from taxation in consideration of the same service would be equally unconstitutional. To exempt a person's property from taxation is to increase the burden of taxation upon all other tax payers. The true test in such case is, has the legislature the constitutional power to authorize the direct payment for the services? If not, she cannot exempt the person's property from taxation'." (14 S. W., 502).

In the case of Clarke vs. The Louisville Water Co., the Water Company as in the case at bar, claimed "vested rights." The following was declared to be the doctrine of the Court in its opinion given adversely to said Company's claim:—"It is claimed for the Company that it has a vested right to the exemption resting in contract; as the exemption of one person from taxation places an additional burden upon the other tax payers

of the State, *it will not be presumed but must appear by clear grant.* It is true, that the exemption is the exception and not the rule."

This doctrine, as enunciated by the Kentucky Court of Appeals, is declared by Judge Taft in his decision in these cases (page 224 of the record) to be also the doctrine of the Supreme Court of the United States. Citing the case of the Ohio Life Insurance & Trust Co. vs. Debolt, 15 How. 435 he says: "It is well settled by the Supreme Court of the United States that tax exemptions are not favored and are to be given the strictest construction; and it may well follow, as a corallary to these principles, that laws passed by the legislature to prevent irrevocable tax exemptions are to be liberally construed."

It is true that the appellant is not claiming total exemption from taxation, but it is claiming an irrevocable right to a lower rate of taxation, which is in effect a partial exemption whereby the burdens of taxation are made greater on other tax payers. The appellant, The Farmers Bank of Ky, performs no public service to entitle it to even partial exemption, and it is therefore against the policy of the Commonwealth to admit such a right. May it not therefore be well to hold in the case at bar as Judge Pryor announces in his oft quoted opinion: "The rule is,—if a statute is susceptible of two constructions, that which is consistent with public policy will be followed." (Page 108 of record.) And as it is not consistent with public policy, as stated in Clarke vs. The Louisville Water Co., to exempt one person from taxation and thereby place additional burdens upon other tax payers, it cannot be conceived that the State meant in passing the Hewitt Act to give banks irrevocable contracts for partial exemption from taxation. Or as Judge Taft expresses it in his decision in the Court below, (page 224 of record): "We are unable to perceive any plain expression of the intention to make the rights and privileges granted irrevocable. They are granted for 20 years (Franklin County Bank vs. Deposit Bank), and without the rule of construction enjoined in the act of 1856 this would be held to imply an intention that they should not be subject to amendment or repeal during that period. *But the act of 1856 was for the precise purpose of avoiding the usual im-*

plications, and of requiring affirmative language to sustain the claim, that rights and privileges granted for any length of time could not be revoked before its expiration. Griffin vs. Ky. Insurance Co. 3 Bush, 592; Cumberland & Ohio R. R. Co. vs. Barren County, 10 Bush, 609. We find no such affirmative language in this act."

For the above reasons, and the much more weighty ones set out in other briefs filed in this case, we can but believe that this Court will hold with Judge Paynter, (Ky. Law Reporter, page 263): "We conclude that the obligations of no contracts were impaired by the action of the Constitutional Convention or of the succeeding legislature. Some of the best lawyers in the State were members of the Convention which framed our Constitution, who gave an earnest consideration to the questions involved in these cases, and the conclusions which they reached were crystalized in section 174 of the Constitution. We believe that their conclusions are correct."

The complainant in this case is like a favored and spoiled member of a large household, whose too partial parents have for a long time permitted him much greater privileges than his less fortunate brethren, yet always with the distinct understanding that these privileges may be taken from him at the will of those who granted them. When after a prolonged indulgence, he is at length called upon to give up his special privileges, and become an equal sharer with his brothers and sisters in the common burdens of the family, should he be heard to come into Court, like the Appellant, with the cry of "vested rights" on his lips, and the claim that it will work a great hardship on him to put him on a common footing with the other members of the household? Surely it would be a complete answer to such a plea to say: "Yes, it is a hardship, but no greater than your brethren bear, and if you have been provident in the use of your former privileges, you should be all the better prepared to undergo the deprivation of them. If, on the contrary, you, with the distinct reservation in your grant ever staring you in the face, have not foreseen and anticipated the present situation, it is your own fault, and the court will not listen to so childish a plea."

2—THE PLEA OF RES JUDICATA.

Judge Taft, in rendering his decision in the court below, while holding that the former adjudications of the Ky. Court of Appeals to the effect that the banks had an irrevocable contract under the Hewitt Act, bound *the parties to the suit*, yet that: "The court further finds that there is no irrevocable contract established, by judgment or otherwise, binding the county of Scott or the city of Georgetown to a compliance with the Hewitt Act in respect to the collection of taxes upon the property or stock of the Farmers' Bank of Kentucky taxable therein, and therefore that as to such property and as to so much of the said stock as is apportioned for taxation to Scott county or the city of Georgetown under the revenue act of 1892 said act applies and is in force, and the Hewitt act has no application thereto. Wherefore it is adjudged that as to the county of Scott and the city of Georgetown the complainants bill be, and the same is hereby, dismissed." (See page 182 of Record).

The reasons for the above holding are clearly set forth in the case of President, Directors and Company of the Northern Bank of Ky. vs. Samuel H. Stone, etc. (page of Record 217-220). The Defendants in that case were the City of Lexington, County of Fayette, City of Paris, County of Bourbon, and the City of Covington. The complainant in that case contended that because the County of Bourbon, a municipal corporation under the State, was bound by a former adjudication against it, that therefore the State itself and every subdivision of it (including the other defendants) were equally bound. Judge Taft answers this in the following conclusive language:

"The argument of counsel assumes that as the county derives its power to tax from the State * * * it is, in levying taxes, the mere agent of the State and therefore a judgment against the county on a tax question is a judgment against the agent in respect of the business of the principal and is binding upon the latter as a privy. Indeed the argument goes further. It assumes that a county is a part of the State government and therefore a judgment against the county is a judgment in fact against the State.. This is applying the doctrines of agency and privity under circumstances to which they

have but little application. The source of all political power including the power to tax is in the people of the State. By a constitution they create a State government and a legislature and confer upon the legislature power to organize local municipal governments and to give such governments the power to levy taxes in order to discharge their other appointed functions. *The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest.* Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some other State function, there is no relation between the one and the other of principal and agent as that relation is usually understood in the law. * * * In the present case the subject-matter of the former litigation was the taxes due from the complainant bank to Bourbon county—taxes which were to be expended by Bourbon county for county purposes and for the benefit of the people living in Bourbon county. The subject-matter of the present action which it is sought to conclude by the former action, (Franklin county vs. Deposit Bank 87, Ky., 382,) is the taxes due from the complainant bank to the city of Paris to be expended for the benefit of the people of that city, to the county of Fayette to be expended for the benefit of the people of Fayette, to the city of Lexington to be expended for the benefit of the people of Lexington, and to the city of Covington to be expended for the benefit of the people of the city of Covington. *The rights of these various municipal corporations to the taxes claimed grow out of the same revenue act of November 1892, but the parties and the persons in interest are different.*"

The last sentence of above opinion declares what are the indispensable requirements of a successful plea of *res judicata*; to-wit: The former adjudication upon which the plea is rested, must have been upon the same issues and between the same parties, as in the case in which it is pleaded. In fact there are four essentials to a successful plea of *res judicata*. (See Freeman on Judgments sec. 252.)

1. Identity in the subject matter.

2. Identity of the cause of action.

3. Identity of persons and parties.

4. Identity in the quality of the persons for or against whom the claim is made.

Benz vs. Hines 3 Kansas 397; 89 Amer. Dec., 594; State vs. June 1 30 La. Ann. 861; Slocumb vs. De Lizardi 91 Amer. Dec., 740. See also to same effect Bouvier Law Dictionary,—subject, Res Judicata, citing (1) 5 Mees & W. Exch. 109; 3 East, 346; 7 Johns N. Y., 20; 1 Hen. & M. Va., 449; 1 Dana Ky., 434; (2) 6 Wheat 109; 2 Gall. C. C. 216; 17 Mass. 237; 2 Leigh Va. 474; 8 Conn. 268; 1 Nott & M. C. So. C. 239; 16 Serg. & R. Penn. 282; (3) 7 Cranch 271 1 Wheat 6; 14 Serg. & R. Penn. 435; 4 Mass. 441; 2 Yerg. Tenn. 10; 5 Me. 410; 8 Gratt. Va. 68; 16 Mo. 168; 12 Ga. 271; 21 Ala. N. S. 813; 4 Den. N. Y. 302; 23 Barh. N. Y. 464; (4) 5 Coke 326; 4 Tenn. 490; 6 Mann & G. 164; 4 C. B. 884.

The complainant claims that the Circuit Court erred in dismissing its bill as to the County of Scott in not holding that its so-called contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to said County and the City of Georgetown; and suggests in his brief that Judge Taft was acting under a misapprehension as to the facts in the case. He further claims in said brief that the City of Georgetown and County of Scott were necessarily privies to the former judication because the same questions were decided in the Franklin and Henderson cases; and that their not making any attempt to tax the bank until now is tantamount to their acquiescing in and consenting to the status of the bank as fixed in said former decision. As to the latter suggestion it is sufficient to say that there was no compulsion upon either of said appellees to test the questions involved and it was good policy to await the action of the Court of Appeals in the Franklin and Henderson cases to which they were not parties. It is difficult to see upon what ground the appellant arrives at the conclusion that the City of Georgetown, and County of Scott were "necessarily privies." They do not come under any of the definitions laid down in the text books or decisions of the Courts defining the word "privies." (See Van Fleet's former Adjudication vol.

2, page 910 and notes.) The same authority, page 909-10 says as follows: In section 459: "In order to conclude any right, title or interest of a person by an adjudication, it is essential that he be a party to the proceeding, or represented by one. In the latter case he is said to be a privy."

The City of Georgetown and County of Scott were neither parties to the decision known as the Pryor decision, nor were they represented by any one in said cases. It is difficult, therefore, to see how that decision can be pleaded as *res judicata* so far as said City and County are concerned. The principles and rules which govern the doctrine of *res judicata*, formulated in the Duchess of Kingston's case (20 Howell's State trial, 355-652) as laid down by the Judges in that case over 100 years ago, and the basis of all subsequent decisions, are as follows: "A transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, nor to examine witnesses, nor to appeal from a judgment he might think erroneous. * * * From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that the judgment of a Court of concurrent jurisdiction, directly upon a point, is, as a plea, a bar, or as evidence, conclusive *between the same parties upon the same matter directly in question* in another Court. Secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive *upon the same matter, between the same parties*, coming, incidentally in question in another Court for a different purpose."

The above several opinions and quotations from text books would seem to furnish a conclusive answer to the appellant's claim of *res judicata*, so far as the City of Georgetown and County of Scott are concerned. And as to his claim that because the State of Kentucky was "practically" a party to the old suits, that therefore said County and City are parties or privies, it will be sufficient refutation to refer to Judge Taft's clear and logical discussion of this point herein above quoted in the case of the Northern Bank of Ky. vs. Stone et al.

Referring again to the appellant's claim in its brief, that by ason of the Appellees, City of Georgetown and County of ott, "not making any attempt to tax the bank until now is ntamount to their acquiescing in and consenting to the status the bank as fixed by these decisions," we would respectfully ggest that there is *nothing in the record to show that said two pellees have not made attempts to collect such taxes each year nce the passage of the act of 1892;* and we especially deny that ey have not made attempts to collect such taxes.

Wherefore, we respetfully submit that the judgment of the rcuit Court in the case of Farmers Bank vs. Stone, etc., that ere "is no irrevocable contract established by Judgment or herwise binding the County of Scott and the City of George-wn to a compliance with the Hewitt Act in respect to the col-ction of taxes upon the property or stock of the Farmers Bank Kentucky, and therefore that as to such property and so much said stock as is apportioned for taxation to Scott County or e City of Georgetown under the revenue act of 1892 said act f 1892) applies and is in force, and the Hewitt Act has no plication thereto," be affirmed; and that the bill of complaint rein so far as it applies to said city and county, be dismissed.

L. L. BRISTOW, City Attorney
For the City of Georgetown.
J. C. B. SEBREE, County Attorney
For the County of Scott.
IRA & W. H. JULIAN,
For said City and County.

Supreme Court of the United States.

SAMUEL H. STONE, Etc., ... *Appellants,*

vs. **No. 385.**

THE FARMERS BANK OF KENTUCKY, ... *Appellee.*

THE FARMERS BANK OF KENTUCKY, ... *Appellants,*

vs. **No. 386.**

SAMUEL H. STONE, Auditor, Etc. and the City of Georgetown, Etc., ... *Appellees.*

BRIEF OF THE FARMERS BANK OF KENTUCKY IN BOTH CASES.

STATEMENT OF CASE.

On May 8, 1897, the appellee, the Farmers Bank of Kentucky, filed its Bill of Complaint in the Circuit Court, Sixth District of Kentucky, against the defendants, S. H. Stone, Auditor, and others. The Bill, after setting forth the status of the different defendans, states:

That the Farmers Bank of Kentucky was incorporated February 16, 1850, and defines its corporate powers, etc. That in accordance with its charter it established the mother bank at Frankfort, and a branch at Henderson and one branch at Georgetown, in Scott County, Kentucky. That the original charter was for thirty years and expired May 1, 1880. On March 10, 1876, its charter was extended for twenty-five years longer by an act of the Legislature. The charter also provides that the bank shall pay fifty cents on each share of its stock of $100.00 a share in full of all tax or bonus. It is alleged that the rights of the bank have been fixed and determined by a settled line of decisions of the Supreme Court of Kentucky. That in 1869 it was decided by said court in the case of the Farmers Bank vs. Greenup County, reported in 6th

Bush, page 127, that real estate purchased by the bank for debt could not be taxed for municipal purposes. That in 1884 the Farmers Bank filed an injunction suit against the county of Franklin (see exhibit A., p. 17, of record), and also filed a suit against the Board of Councilmen of the City of Frankfort (see record page 41). Both of these cases raised the question whether the bank had contract rights under its charter, and the lower court decided that it had, and that it extended during the life of its charter under the Extension Act.

These cases were both affirmed by the Appellate Court. The records of these cases are fully set forth in the record in this case. The Bill also set forth the Hewitt Act, and that it complied with and accepted its provisions, and that after the passage of the Act of 1892 the City of Frankfort and County of Franklin attempted to tax the mother Bank for municipal purposes, and that the City of Henderson also attempted to tax the Bank of Henderson. Injunction suits were filed by the Bank against all of the above named parties, and the court below decided against the Bank. The cases were taken to the Kentucky Court of Appeals, and that Court on the first day of June, 1895, decided that the acceptance of the Hewitt Act by the Farmers Bank of Kentucky constituted the irrevocable contract between the Bank and the State, and that the Bank could not be taxed for any purposes except as authorized and empowered to do so under said Hewitt Act, and directed the lower court to render judgment in accordance with that opinion or decision of the Appellate Court, which was accordingly done. (See record of the case of Farmers Bank vs. Franklin County on page 63 of record, it being exhibit "D.") On page 79 is the judgment in accordance with the mandate of the Appellate Court. The record of the Farmers Bank vs. The Board of Councilmen of the City of Frankfort is exhibit "F," and is on page 80 of the record. The judgment in conformity with the opinion in this case is on page 127 of the record. The record in the case of the Farmers Bank vs. the City of Henderson is exhibit "H," and is on page 128 of record. The judgment rendered by the Henderson Circuit Court in conformity with the opinion of the Court of Appeals is on page 136 of the record.

The Farmers Bank filed an Amended Bill setting up a judgment and plea of *res judicata* against the County of Henderson. This Amended Bill is on page 161 of the record, and the record of the case in the Henderson Circuit Court is exhibit "N," and is on page 164 of record, and on page 171 there is a copy of the judgment rendered in that case in conformity with the opinion of the Appellate Court, rendered by Justice Pryor. There is also a second record filed with the Amended Bill of the Farmers Bank vs. the County of Henderson, it being exhibit "M.," and is on page 173 of record, and the judgement is on page 178. These records and judgements were all pleaded and relied upon as *res judicata.*

The Bill also sets up and relies upon the acceptance of the Hewitt Act as constituting a valid and irrevocable contract, and also claims that if the acceptance of the Hewitt Act is not a valid contract and that the State has the right to retire from it, then and in that event the Bank is remitted to its rights as adjudicated under its charter and can only be made to pay fifty cents on each share of its capital stock.

Demurrers, answers and replications were filed by the parties, and the issues all made up, which are all issues of law, no issues of facts having been raised, and by agreement of parties the case was submitted for final judgment before Justice Harlan, Judges Lurton and Taft, and Judge Taft delivered the opinion of the Court, and decided that by reason of the Pleas of *res judicata*, the Farmers Bank of Kentucky had an irrevocable contract with the State of Kentucky which applied to the City of Frankfort and the County of Franklin, the City of Henderson and the County of Henderson, but did not apply to the City of Georgetown or the County of Scott, and sustained and made perpetual the injunction as to all of the defendants to the Bill except as to the City of Georgetown and the County of Scott, and dismissed the Bill as to the said City of Georgetown and County of Scott.

The appellants rely upon the following assignment of errors:

First. Because the Court erred in overruling the demurrers of each of said defendants to the complainants petition.

Second. Because the Court erred in overrulling the plea of the Board of Councilmen of the City of Frankfort and County of Franklin to the jurisdiction therein.

Third. Because the Court erred in refusing to permit defendants the Board of Councilmen of the City of Frankfort to file the amended answer offered by them herein on the 25th day of June, 1898.

Fourth. Because the Court erred (after deciding that complaintant did not have any irrevocable contract under and by virtue of Article 2 of the Act of the General Assembly of the Commonwealth of Kentucky entitled "An Act to amend the Revenue Laws of the Commonwealth of Kentucky," approved May 17, 1886), in adjudging and decreeing, nevertheless, that by reason of the several pleas *res judicata* relied on by complainant in its bill the complainant has established a contract with the Commonwealth of Kentucky under the provisions of the Act aforesaid.

Fifth. Because the Court erred in enjoining and restraining the defendants, Samuel H. Stone, Auditor; Charles Finley, and Geo. W. Long, from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898 and for all subsequent years until the expiration of complainants charter, and also erred in enjoining and restraining the County of Franklin and Board of Councilmen of

the City of Frankfort from endeavoring to collect any tax upon any valuation from the complainant, and also erred in adjudging that complainant, by making payment of taxes to the State only in accordance with the Hewitt Law, is discharged in full of all taxes, and also erred in adjudging that the present Constitution of Kentucky and the Act of November 11, 1892, in so far as intended to provide or do provide for any assessment or taxation of complainant's property, or franchise except under said Hewitt Bill, are repugnant to the Federal Constitution and void.

I.

FIRST AS TO THE JURISDICTION.

The Bill attacks the Revenue Act of 1892, and seeks relief from its enforcement against the appellee upon the ground that it violates that clause of the Federal Constitution which forbids a State from passing a law impairing the obligation of contracts. The court below had jurisdiction by virtue of the Act of August 13, 1888, which reads as follows:

"That the Circuit Court of the United States shall have "original cognizance, concurrent with the courts of the several "States, of all suits of a civil nature at common law, or in "Equity, or in which the matter in dispute exceeds, exculsive "of interest and costs, the sum of $2,000, and arise under the "Constitution or laws of the United States."

This case is one arising under the Constitution of the United States, and as it involves more than $2,000, it was within the jurisdiction of the Circuit Court.

The law is also clear that this court has equitable jurisdiction and that an injunction will lie. This jurisdiction is pointedly recognized by this court in the case of City of New Orleans vs. Citizens Bank of Louisiana, reported in 167 United States, p. 371, and in the case of Shelby County vs. Union Bank, reported in 161st U. S., p. 156. In these cases the court distinctly holds that the existence of a contract as alleged in the Bill of Complaint gives the court jurisdiction in equity to enjoin the collection of a tax that would impair the obligation of the contract set forth in the bill.

Section 530, High on Injunctions, reads as follows:

"An important exception to the general doctrine of non-inter- "ference by injunction against the collection of revenue, because "of illegality of the tax, is recognized in that class of cases where "the relief is sought against a tax assessed upon property which "has been exempted by law from taxation. Indeed, the exception

"has been so uniformly recognized as to become, of itself, "a governing rule in the class of cases now under consideration. "And it may be laid down as the established doctrine of the "courts, that the attempted enforcement of a tax upon a property "which has been exempted by proper legislative authority from "the burdens of taxation, constitute a grievance of so irreparable a nature as to merit preventive relief by injunction, and "where an act of the legislature, held by the court to be constitutional, exempts certain property from taxation, an injunction "will be allowed against the enforcement of a tax upon such "property. *So, an injunction may be granted against the assessment of the property of a corporation where, under the terms of its charter as construed by the court of last resort of the State, the property is exempt from taxation.*"

Citing Morris Canal and Banking Co. vs. Jersey City, 1 Beas., 227. To the same effect see Spelling on extraordinary relief, Vol. 1, Sec. 672. In Union Telegraph Co. vs. Norman, 77 Fed. Rep., p. 21, equitable jurisdiction was taken by the court, and one of the grounds specified by the court was the uniform practice in Kentucky to allow the remedy of injunction to restrain the assessment or collection of an illegal tax.

In the case of Gates vs. Barrett, 79 Kentucky, page 296, upon this question of injunction to restrain the collection of a tax, the Court says:

"The right to have an injunction to restrain the collection of "an illegal tax has been so long recognized and acted upon in "this State that it is unnecessary to stop to inquire upon what "ground that jurisdiction is exercised by courts of equity."

Also see Baldwin vs. Shire, in 84 Ky., 510, and Norman vs. Boaz, 85 Ky., p. 560, to the same effect.

We also refer the Court to the opinion of Judge Taft on this subject on pages 190, 191 and 192; the reasoning of the judge and the authorities cited by him show conclusively that the Court has jurisdiction of the Bill. We deem it unnecessary to quote this part of the opinion of Judge Taft, as it will be carefully read by the Court. This opinion was delivered in the case of the President, Directors and Company of the Bank of Kentucky vs. Stone, etc., but it applies equally and just as forcibly to the Farmers Bank of Kentucky case.

II.

AMENDED ANSWER.

The assignment of error that the Court erred in refusing to permit the defendant the Board of Councilmen of the City of

Frankfort to file the amended answer offered by them on the 25th day of June, 1898, is not well taken, because the exhibit filed with the amended answer shows that the judgment pleaded and relied on by the complainant in this case was rendered as alleged in the Bill in comfority with the opinion and mandate of the Court of Appeals, and stands unreversed, and as a matter of law, the Kentucky Court of Appeals had no power to reverse a judgment rendered in accordance with its own mandate. To do so would be to stultify itself and go outside of its jurisdiction; furthermore, this Court passes upon the record as it finds it, and will not hold its decision in obeyance by reason of any appeal that may have been taken from the judgment. The only available plea would be a plea that the judgment had been lawfully reversed. Whenever that judgment is reversed, if ever, it can be then set up, and proceedings had to collect the tax, to which the bank could respond and set up the judgment in this court, and it would then be for the State Court to decide the question raised just as stated by Judge Taft in regard to the pendency of the mandamus suit in the Franklin Circuit Court, the Court will note, from the record filed with the amended answer, page 237 of record, that the appeal was not filed until the 21st day of January, 1898, long after this case had been submitted. As Judge Taft said, upon refusing to permit it to be filed, 'it can cut no figure in this case. The judgment pleaded is a bar and an estoppel until it is reversed, and it is time enough for appellant to make the plea when the judgment is reversed. This court has held in the following cases, that a judgment of a court on a matter within its jurisdiction, is binding until it is reversed or modified. State v. Neuer, 9 Pet. 8. Cock v. Halsy, 16 Pet., 71; Huff v. Hutchinson, 14 Howard, 586; Bryan v. Kenntt, 113 U. S., 179; also in 18 Howard, 497; 3 Wall., 744; 4 Wall 435; 10 Wall., 308 and 16 Wall., 352. These authorities are conclusive upon this point, as long as the judgment stands unreversed it is a complete estoppel. The record shows that no supercedeas bond was executed. Section 747 Civil Code provides:

"An appeal shall not stay proceedings on judgments, unless "a supercedeas is issued."

The quotation in the brief of appellant from Freeman on Judgments, section 328, does not show the law on the subject; we ask the Court to read all of that section, and it will find that the pendency of an appeal does not and should not deprive the party of the benefit of the judgment as an estoppel.

In Parkhurst v. Burdell, reported in 6th Am. St. Rep., page 384, the New York Supreme Court decided that:

"An appeal from a judgment does not suspend its operation "as an estoppel."

And on page 389, there are notes, from which we quote as follows:

"Judgment is conclusive upon points involved until annulled "or reversed by a proper proceeding. Ellis vs. Clark, 19 Ark., "420; 70 Am. St. 603; Tadlock vs. Accles, 20 Tax., 782; 73 "Am. Dec., 213; and see the extended notes to Lea vs. Lea, 96 "Id. 775 et seq."

"The effect of an appeal is, in a majority of the states, "limited to bringing the judgment before the Appellate Court "for review; and if a proper stay bond has been given, to sus- "pend the right to enforce it by execution. In other respects, it "may be relied on as an estoppel; Nill vs. Compant, 16 Ind., "107; 79 Am. Dec., 411; Bank of N. A. vs. Wheeler, 28 Conn., "433; 73 Am. Dec., 683; Taber vs. Hovey, 117 Mass., 108; "Planters Bank vs. Calvit, 3 Smedes, etc., M. 143; 41 Am. Dec., "616; Scheibel vs. Slagel, 89 Ind., 328."

The Kentucky authorities referred to in appellant's brief, neither of them, sustain the proposition urged by him.

On page 287, of Biglow on Estoppel, 5th edition, the author, after commenting on cases, states the rule as follows.

"As the result of the cases, the construction placed upon "the Constitution and acts of Congress relating to judgments of "courts of record of the sister American States, of the District "of Columbia, and of the Federal courts, may be thus stated:"

1. "Such judgments are to be regarded as record evidence "throughout the Union."

2. "Such judgments, if final, and conclusive when rendered, "are to be regarded as conclusive throughout the Union upon "all issues that were tried in the sister State, even though the "proceedings were irregular and erroneous, and it may be *added* "*though an appeal or a proceeding to* vacate the same be pend- "ing unless the effect of the appeal be to abrogate or suspend "the judgment. Citing Embry v. Palmer, 107 U. S., 3, 10. "Merchants Insurance Co. v. DeWolf, 33 Penn. St., 45."

The Kentucky Statute does not suspend the judgement by reason of an appeal, but expressly says it shall not be suspended; the Code provides a mode of procuring a suspension or modification of the order of injunction by the party taking proper steps within

twenty days after the rendition of the judgment. But no such steps were taken in this case. See Act of 1894, copied in Code as part of section 747.

On page 60 Mr. Biglow, in writing on the subject of *res judicata*, says:

"While if, notwithstanding any subsequent proceedings, it " (the judgement) remains in full force and vigor, as in the case " of a writ of error, there is a case of *res judicata*, citing Hughes " vs. Dundee Mortgage Co., 28 Federal Reporter, p. 40. "

III.

RES JUDICATA.

This question involves a consideration of assignment of errors number four, holding the plea of *res judicata* to be good, and number five, in awarding an injunction against the defendant Stone, etc., restraining them from valuing the franchise, and it also involves the sufficiency of the petition.

There was quite a number of cases submitted together, and the opinion delivered by Judge Taft takes a case applying to each class of cases and makes it cover or apply to all the cases of that class. The case of the President, Directors and Company of the Bank of Kentucky vs. Samuel H. Stone, etc, and the case of the Bank of Kentucky vs. Samuel H. Stone, and the case of the Farmers Bank of Kentucky vs. Samuel H. Stone, etc, on all of the same class, and the opinion in the case of the President, Directors and Company of the Bank of Kentucky vs. Samuel H. Stone, etc., which is on page 183, applies to the Farmers Bank case just the same as if delivered in that case.

On page 232 of the record the opinion in the Farmers Bank case is as follows:

" This case is controlled by the points already decided. The " Farmers Bank in prior adjudication with the County of Frank- " lin, the City of Frankfort and the City of Henderson, was con- " clusively adjudged to have an irrevocable contract under the " Hewitt Act, exempting it from any taxation in excess of that " provided therein. There was no adjudication, however, be- " tween the Farmers Bank and either Scott County or Hender- " son County. It therefore follows, from what has already been " decided, that as to Scott County and Henderson County, the " demurrers to the Bill should be sustained, and the Bill must " be dismissed; while as to the other defendants, the demurrers " will be overruled, and the motion for a preliminary injunction " granted. "

The opinion was as a matter of fact read to the attorneys some time in May, and the 25th day of June was fixed by the Court for all of the parties to meet, and judgment was to be entered in all of the cases.

The Farmers Bank of Kentucky served notice on the County of Henderson on the 22d day of June, 1898, that it would file an amended bill on the 25th day of June, 1898, (see pages 160, 161 of record), and it did file its amended bill on that day setting up two records in which judgment had been rendered in its favor in accordance with the opinion of Chief Justice Pryor, holding that the acceptance of the Hewitt Act constituted an irrevocable contract, and these records were filed with the amended bill and both contain judgments in favor of the bank holding that the bank had an irrevocable contract, and enjoining the County and the Sheriff from collecting taxes, etc. (See amended bill on page 161 of record.)

The records are exhibit "N" on page 164 and exhibit "M" on page 173. The judgments on these records are on page 171 and page 178. The Court, by Judge Taft, held that these records presented a good plea of *res judicata* as to Henderson County, and permitted them to be filed by order on page 160 of record. By consent of parties, as fully appears in the judgment, the case was submitted for final decree, and the Court rendered judgment which is on page 180 of the record.

By an act of the General Assembly of the State of Kentucky, entitled "An Act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the court," approved March 8, 1876, it was provided that the property of all banks should be assessed for taxation and made to pay taxes to the counties in which the banks were located. The City of Frankfort, and Franklin County, attempted to coerce the payment of taxes from the Farmers Bank under this act of 1876, but the Bank filed a bill in equity in the Court of Common Pleas in Franklin County to enjoin and restrain the County and City from collecting or assessing any taxes against it, upon the ground that it was exempted from such taxation by the terms of its charter as amended. That question was decided by the Common Pleas Court, in favor of the Bank, and appealed to the Court of Appeals by the County and City and the judgment of the Common Pleas Court was affirmed by the Court of Appeals in the opinion in the cases of Franklin County vs. the Deposit Bank, Bank of Kentucky, and Farmers Bank of Kentucky, reported in 87th Kentucky, page 370. Judge Bennet, who delivered the opinion of the court in these cases, took the Bank of Kentucky as the leading case, deciding that the same principles enunciated in that case *applied to the Farmers Bank*, their charters being alike, and both passed previous to 1856.

The Court distinctly decided the following propositions in the said cases. We quote from the syllabus:

1st. "The State reserves the power to make, for a valuable "consideration, a binding contract, and with respect to her own "contracts she stands upon precisely the same footing that she "does with respect to contracts made between individuals, in so "far that she can not pass any law impairing their obligation."

2d. "The charter of a corporation, created by an act of the "Legislature, providing that the corporation, in consideration "of paying to the State a specific tax or bonus, is to be released "from all other taxes, constitutes a binding contract, from which "the State can not recede without the consent of the corpora- "tion, unless the State, in making the contract, expressly reserves "the power to alter or annul it, or unless there is a general law "in force at the time which authorizes the State, by subsequent "legislation, to alter or amend it, and nothing appearing in the "charter showing that the general law is not to govern."

3rd. "Such a contract exempts the corporation from the "payment of City and County taxes, as well as from the pay- "ment of any other tax to the State, the city and county being "parts of the State, and have no power to levy and collect taxes "without authority from the State."

4th. "An act of the legislature continuing the charter, "privileges and rights of a corporation beyond the time fixed by "the original act of incorporation for their existence, does not "have the effect of creating a new charter, but merely extends "the life of the one already in existence, and, therefore, the Act "of February 14th, 1856, by which the legislature reserved the "right to alter and amend at pleasure charters thereafter "granted, does not apply to the Act extending the charters "granted prior to the Act of 1856."

5th. "Even if the extending charters of the Bank of Ken- "tucky, and the Farmers Bank of Kentucky, which acts of "extension were passed since the Act of 1856, can be regarded "as creating new charters, it is manifest, from the obligations "imposed by the acts of extension and from the nature of the "business of these corporations, although not expressed in so "many words, it was the intention of each of these acts to con- "tinue in force an irrevocable contract, and that the first section "of the Act of 1856 should not apply."

On page 330, in the opinion, the Court clearly intimates that if it were material to decide the question, it would decide that the grant to the banks was in consideration of a public service; but the Court did not deem it necessary to decided that point but passed the decision upon the ground of contract rights that the banks could not be divested of. The Court said:

"To deny the State power to make binding contracts is a "denial of its power as a sovereign."

On page 381 the Court says, in speaking of the contract of the State:

"If her contract is without any valuable consideration, it is "a *nudum pactum;* so is that of the citizen, but if there is a "valuable consideration to support it, she is bound by it, not "upon the idea that she has surrendered or bartered away her "sovereignty, but that she has exercised it in accordance with "what she deems to be for the best interest of her citizens."

After deciding that the charter constituted a contract with the State, the Court, in respone to the contention that it did not bar the counties and cities from levying and collecting taxes for city and county purposes, uses the following language on page 385:

"In this position, counsel clearly overlook the fact that the "county and city are integral parts of the State, and that they "can not levy and collect taxes without the authority of the "State conferring that right upon them, so the absurdity is "presented that the State contracts with the appellee, in con- "sideration of its paying 50 cents upon each one hundred dol- "lars of its capital stock, to release it of all tax or bonus. This "is the meaning of the language, and at the same time author- "izes its local sub-divisions to levy and collect other taxes of the "appellee, that is to say, that the State, by its contract with "the appellee deprives itself of the right to levy and collect "other taxes off the appellee, by way, notwithstanding, author- "ize all of its sub-divisions, if the appellee's property and "business were distributed in all of them, to levy and collect "other taxes off it. It seems that it would occur to one at first "blush that such a procedure would be a palpable violation of "the contract. 'Under such a contract between individuals "such a doubt could not exist.' The State, when she makes "a contract, based upon a valuable consideration, stands upon "precisely the same footing."

As to the Act of 1856 applying to the extension of these charters, on page 587 the Court says:

"There is a broad distinction between the extension of a "charter and the grant of a new one. An act which continues "the life of a charter to a period beyond the time fixed in the "charter for its expiration, and reserves the corporate organiza- "tion privileges, powers, duties and rights, is an extension of "the charter. Thus extended it is the same charter, with a "continued lease of life, under which the organization must be

"kept up; to which the company must look for its powers, "privileges, and rights by which it is to be governed and con- "trolled. The act of extension relates back to the date of the "charter. The legislature and the company are presumed to "have contracted for the extension with reference to that period "of time when the respective rights of the contracting parties "were agreed on; which agreement, in consideration of the "continuous discharge of the obligations therein expressed, to "be continued beyond the time first agreed on. (See Angell "& Aimes on Corp., section 780; People v. Marshall, Ill. Rep. "672; Exeter Bank v. Rogers, 7 N. H., 32; Kennebec Bank v. "Richardson, 1 Greenleaf, 72.)

"Here the legislature, by the Act of 15th of February, 1858, "continued the charter privileges and rights of the appellee "twenty years from the first day of October, 1864; *this extension "did not have the effect of creating a new charter, but merely "extended the life of the old one which was already in existence.* "Therefore, the Act of the 14th of February, 1856, does not "apply; for the third section expressly provides that the act "shall only apply 'to charters and acts of incorporation to be "granted hereafter.'"

And on page 388 it is manifest that it was also the opinion of this court that the charters of the Farmers Bank and the Bank of Kentucky showed ubon their face that the legislature never intended that the Act of 1856 should apply to either of said charters. On page 389, the Court distinctly says:

"The appellee (Farmers Bank of Kentucky) was chartered "in 1850, which was to continue in force until the——day of "————1880. By the fifteenth section of said charter "the appellee was required to pay annually into the State "Treasury fifty cents on each one hundred dollars of its capital "stock, which, according to said section, shall be in full of all "tax or bonus.

"By an act of the legislature, approved March 10, 1876, the "appellee's charter was extended for the period of twenty-five "years from and after the time fixed in said charter.

"*The principles announced in the Bank of Kentucky case "(supra) 'apply to this case.'*"

So we claim that those questions as to the contract rights of these two banks have distinctly decided and settled by the Kentucky Court of Appeals in favor of the banks, and that the matter is *res judicata.* The 87 Kentucky cases fix the status of these banks, and it has never been changed, except to the extent of taxing them as prescribed in the Hewitt Act.

We understand that it will be claimed by the appellees that the *proviso* in the act of extension of the Farmers Bank leaves the charter subject to the Act of 1856. Our answer to that point is: First, that it was distinctly and necessarily passed on and decided by the Court of Appeals of Kentucky in the 87th Kentucky case in favor of the Farmers Bank. The Court there held that the Act of 1856 did not apply to the Farmers Bank, and that its extention related back to the original charter and simply prolonged the life of the charter; that the third section of the Act of 1856 excepted it from that Act. The Court also decided that it was the evident intention of the legislature from the charter itself that the Act of 1856 did not apply. Second, the act of extension itself distinctly provides that "No amendment or repeal shall impair other rights previously vested." Our contract rights as to the payment of tax had previously vested, and the provision itself saved and protected them.

In 1886 what is known as the Hewitt Act was passed. The Farmers Bank accepted the provisions of this act, as above stated, and in 1893, after the adoption of the last Constitution of Kentucky, the City of Frankfort and the County of Franklin again attempted to levy and collect taxes from the said banks for municipal and county purposes, as also did the City of Henderson. The Bank sued out injunctions against the City of Frankfort and the County of Franklin, and the Farmers Bank also sued the City of Henderson, in which they set forth their contract under their charters, and the contracts under the Hewitt Act, and made the distinct issue that they could not be taxed for any purpose, or in any way, for any years except as provided in the Hewitt Act, and the Farmers Bank claimed the right to be remitted to its chartered rights in the event that the State was given the right to cancel or retire from the contract made under the Hewitt Act. These issues in all these cases were decided by the lower courts against the banks. Upon an appeal to the Court of Appeals the cases were reversed, and the Court of Appeals, speaking through Chief-Justice Pryor, decided that the acceptance of the Hewitt Act by the complainant banks in the form and manner prescribed by the Act, and by the continuous compliance with the provisions of the Act constituted an irrevocable contract; and that these banks had the right to pay these taxes as prescribed in the Hewitt Act during the existence of their charters as extended, and that the same was in full of all other taxes whatsoever, and directed the lower courts to render judgment in conformity with the opinion, and, in obedience to the mandate of the Court of Appeals, judgments were accordingly rendered by the Franklin Circuit Court and by the Henderson Circuit Court. Complete copies of the entire proceedings in all of these cases have been filed with, and made parts of, the original bills filed by these complainants, and will fully bear out and justify all of the statements made in this brief.

The judgment rendered by the Franklin Circuit Court in the Farmers Bank cases under the Hewitt Act are the same in both cases, and read as follows:

"FRANKLIN CIRCUIT COURT,
January 21, 1896.

"THE FARMERS BANK OF KENTUCKY, ... *Plaintiff*,
versus Judgment,
"THE BOARD OF COUNCIL OF THE CITY OF
"FRANKFORT, &C., ... *Defendants.*

"This day came the parties by their attorneys, and this cause "having heretofore been submitted for a jndgment conforming "to the opinion and mandate of the Court of Appeals heretofore "filed, reversing the former judgment of this Court, and the "Court being sufficiently advised, it is adjudged that Article 2, "of the Act of the General Assembly entitled 'An Act to Amend "'the Revenue Laws of the Commonwealth of Kentucky,' "approved May 17, 1896 (General Statutes, Chap. 92, Art. 2), "and the acceptance thereof, by the plaintiff, constituted a con- "tract between the plaintiff and the Commonwealth, which the "latter can not alter or change without the consent of the "former; by the terms of which contract the plaintiff can not, "during the continuance of its charter, be assessed for taxation "or taxed for State purposes in a different mode, or at a greater "rate of taxation than as provided for in said act, and can be "assessed for taxation and taxed for county and municipal pur- "poses only upon its real estate used by it in conducting its busi- "ness; that the provisions of the present constitution of this State, "and of the Act of November 11, 1892 (Art. 3, Chap. 103, Acts "1891–2–3), in so far as they were intended to provide for any "assessment of taxation of, for county and municipal purposes, "its real estate used in conducting its business, are in violation "of and repugnant to the Federal Constitution, and void; that "the Board of Valuation and Assessment provided for in said "act of November 11, 1892, had and has no authority in law to "assess or value the plaintiff's franchise for taxation, or the "Auditor to apportion or certify the same or any part of the "same, for county or municipal taxation, that the temporary "injunction which was granted in this cause at the commence- "ment of the action be and the same is now hereby made per- "petual, and the defendant be, and each of them are, perpetually "enjoined and restrained from levying upon or selling any "property of the plaintiff for the purpose of collecting any "taxes for the County of Franklin, upon the franchise or prop- "erty of the plaintiff, except taxes upon its real estate used in "conducting its business. And it is further adjudged that the

"plaintiff recover of the defendant, its cost in this action "expended."

The judgments in the Henderson Circuit Court is to the same effect, and reads as follows:

"HENDERSON CIRCUIT COURT,
"September Term, October 29, 1895.

"THE FARMERS BANK OF KENTUCKY . . . *Plaintiff*,
versus No. 860. In Equity.
"THE CITY OF HENDERSON, ET AL . . . *Defendants.*

"This cause coming on to be further heard and the man- "date of the Court of Appeals having been heretofore filed "herein, whereby said Court reversed the decision of the Hen- "derson Circuit Court, and the plaintiff now filing herein the "opinion of said Court of Appeals in which, in substance, it is "decided that neither the capital stock, surplus fund, or "undivided profits of the plaintiff bank, nor any of its prop- "erty (save and except such real estate as is specifically men- "tioned in chapter 92, article 2, section 7 of the General Statutes "of Kentucky, commonly called the Hewitt Law) shall be or is "subject to municipal taxation, or taxation by any county of "this Commonwealth, during the corporate existence of the "Bank; and defendant declining to plead further, it is therefore "adjudged that the injunction prayed for by the plaintiff herein is "granted, and the defendants be, and they are, enjoined and re- "strained from collecting from the plaintiff, the said bank, the "amount set forth in the petition as taxes and penalty claimed by "said city as assessed against said bank for the year 1893, or "any other tax or taxes, and from levying upon or selling the "real estate or any other property of the plaintiff, and the "said injunction be, and is hereby, made perpetual, also that the "aforesaid tax or penalty in the petition mentioned is illegal "and void, and that the plaintiff recover from the defendant, "the City of Henderson, the costs of this action, for which exe- "cution may be issued.

"HENDERSON CIRCUIT COURT.

"THE FARMERS BANK OF KENTUCKY, ... *Plaintiff.*
versus Judgment.
"THE COUNTY OF HENDERSON, ... *Defendant.*

"This action coming to be heard, and in appearing that the "Court of Appeals of Kentucky has rendered decision to the "effect that during the corporate existence of plaintiff under its

"present charter the capital stock, surplus and undivided profits "and other property of said bank is not subject to municipal "taxation or taxation by any county of the Commonwealth, and "that the defendant the County of Henderson sought to compel "the plaintiff to pay taxes in the sum of $541.57, the payment "of which was enjoined under plaintiff's above styled action, "filed December 1, 1894, and the defendants declining to plead "further, it is adjudged that the defendants be enjoined and re- "strained from collecting from plaintiff said sum of $541.57 and "from levying upon or selling the realty and other property "of plaintiff, and that the alledged tax and claim of said county "is adjudged illegal and void, and that the said injunction be "made perpetual, and that plaintiff recover from the defendant "the County of Henderson the costs of this action, for which "execution may be issued."

"HENDERSON CIRCUIT COURT,
"——— Term, 187–.

"FARMERS BANK OF KENTUCKY, ... *Plaintiff.*
versus Judgment.
"COUNTY OF HENDERSON, &C., ... *Defendants.*

"This action coming on to be heard, and it appearing that "the Court of Appeals of Kentucky has rendered a decision to "the effect that during the corporate existence of plaintiff under "its present charter the capital stock, undivided profits, and "surplus and other property of said bank are not subject to "municipal taxation or to taxation by any county of this Com- "monwealth, and that the County of Henderson sought to com- "pel the plaintiff to pay taxes to it in the sum of five hundred "and thirty-eight dollars and fifty cents, the payment of which "was enjoined in this action filed October 16th, 1893, and "defendants declining to plead further, it is adjudged that "defendants be enjoined and restrained from collecting from "plaintiff said sum of $538.50 and from levying upon or selling "the realty or any other property of plaintiff, and that the "alleged tax and claim of said county *is* adjudged illegal and "void, and that the said injunction be made perpetual, and that "plaintiff recover from the defendant the County of Henderson, "the costs of this action, for which execution may be issued."

These adjudications constitute a settled rule of property, and absolute finality as to all the issues raised between the parties to these suits. The City of Frankfort and the County of Franklin, and the County and City of Henderson, and the County of Scott and the City of Georgetown, are all threatening and determined to enforce the collection of taxes against the banks for municipal and

county purposes, as soon as the defendants, Samuel H. Stone, Charles Finley and G. W. Long will fix a value on the franchises of the complainants and certify it to the county clerks, and by so doing they will necessarily impair the obligations of the contract of the Farmers Bank, and thereby interfere with its constitutional rights; by so doing they will subject the bank to a multiplicity of suits, by reason of the provisions of its charter; the cities will garnishee the debtors of the bank, serve indiscriminate and innumerable attachments upon their debtors; cast a cloud upon the title to property, and produce endless confusion and irreperable injury to the bank—injuries against which it has no remedy at law.

As heretofore set forth in this brief, and fully set forth in the records filed in exhibits in the bill of complaint, the particular question as to the liability of the Farmers Bank of Kentucky to pay any taxes, for any purpose whatever, except as specified in its charter and in the modification of its charter by virtue of the Hewitt Act, has been distinctly and sharply decided by the Kentucky Court of Appeals and judgments rendered by the lower courts in conformity therewith in seven separate suits: First, in 1889, in the case of the Commonwealth and Greenup County vs. the Farmers Bank of Kentucky; second, in 1884 and 1887, in the case of the City of Frankfort vs. the Farmers Bank of Kentucky; third, in the case of the County of Franklin vs. the Farmers Bank of Kentucky; fourth, in 1895, in the case of the Farmers Bank of Kentucky vs. the City of Frankfort; fifth, in 1895, in the case of the Farmers Bank of Kentucky vs. the County of Franklin; sixth, in 1895, in the case of the Farmers Bank of Kentucky vs. the City of Henderson; and seventh, the Farmers Bank of Kentucky vs. the County of Henderson. All of the pleadings and proceedings in all these suits except the Greenup County suit, the record of which can not be found, are now before the court and fully appear in the record in these cases.

We submit to the Court that the judgments rendered by the Franklin circuit court and the Henderson circuit court in all of the cases in conformity with the opinion of the Kentucky Court of Appeals, under the Hewitt Act constitute a complete and final settlement of all of the questions involved therein, and present an absolute estoppel against the defendants to these bills of complaint, and a complete bar to any effort by all of them, or any of them to proceed to attempt in any way to value or assess for taxation any of complainants franchise, or to in any way levy or collect any taxes from complainants except as prescribed in their charter; that the defendants are estopped from denying that we have a contract and are estopped from denying that the property of the bank is exempt from municipal or county taxation. Said suits and judgments, we claim, are *res adjudicata* of all matters contained therein and established beyond question the contract of the complainant banks as set forth in the bill of complaint.

We refer the Court to the cases of Horner vs. United States, 143 U. S., 576; also Scott vs. Denold, 165 U. S., 71, and Chappel vs. United States, 160 U. S., 509. These cases decide that the court having jurisdiction by reason of a constitutional question, and having thus acquired jurisdiction, as said in the Chappel case, the court "has the power to dispose not only of the constitutional question, but of the *entire case*, *including* all questions, whether of jurisdiction or of *merits*."

To say that this court would have to decide, as an original proposition, whether the banks had a contract or not, before it took jurisdiction, would require the complainant to actually win its case on the merits before the court would take jurisdiction; this would certainly be an anomaly in jurisdictional proceedings. Upon examination of the bill upon a demurrer to jurisdiction, the court, in any case where it was at all questionable, would overrule the demurrer and take jurisdiction in order to pass upon the merits of the case, and after hearing the case, decide against the complainant, yet the jurisdiction attached at the beginning of the case, and before the real question was actually decided, and having once attached the jurisdiction goes to all questions raised in the case.

We think the decision of the Supreme Court in the case of the City of New Orleans against the Citizens Bank, recently decided, and the opinion delivered by Justice White, is conclusive of the cases at bar.

The Court will observe upon reading that case, that the opinion does not make the jurisdiction of the court turn upon its deciding that the bank had a contract as an independent or original proposition but the court takes jurisdiction of the entire case, and by reason of the judgments rendered by the Louisiana State Courts deciding the contract rights of the bank and affirmed by the Supreme Court of the State,—they decide those judgments to be conclusive of the contract rights of the parties, and jurisdiction was taken as a matter of course. The opinion seems to concede the jurisdiction as a matter of course upon the presentation of the contract in the bill, and the decision of the State Court construing it.

This Louisiana case is very similar to the case at bar; there was an extension of the charter of the bank in that case, also judgments rendered construing the contract and pleaded in the Federal Circuit Court, as *res judicata*, and the injunction was asked against the Board of Valuation and Assessment and the city. The court decides that in a suit by the bank, a judgment in favor of the bank enjoining the assessment, levy or collection of tax for one year, upon the ground that it is a violation of its contract rights, was a complete bar to any proceedings of the city or Board of Valuation to assess or collect taxes for another year. Mr. Justice White, on page 15 of the opinion, uses the following language:

"The proposition that because a suit for a tax of one year is a "different demand from the suit for a tax for another, therefore "*res judicata*, can not apply, in reality substantially denies and "destroys it. The estoppel resulting from the thing adjudged "does not depend upon whether there is the same demand in "both cases, but exists, even although there be different "demands, when the question, upon which the recovery of the "second demand depends, has under identical circumstances "and conditions, been previously concluded by a judgment "between the parties or their privies. This is the elemental "rule, stated in the text-books and enforced by many decisions "of this court. A brief review of some of the leading cases "will make this perfectly clear. In Bank vs. Beverly (1 How., "134–139), it was held that a construction of a will effecting "the rights of parties must govern in subsequent controversies "between the same parties, without reference to the different "nature of the demands. In Tioga R. R. Co. v. Blossburg, &c., "R. R. Co. (20 Wall., 137), and Mason Lumber Co. v. Buchtel "(101 U. S. 638), it was held that when the proper construction "of a contract was in controversy, the construction adjudged by "the court would bind the parties in all future disputes. In "Cromwell v. Sac. (994 U. S. 353), after a full statement of the "nature of the estoppel resulting from the thing adjudged where "the demand was the same in both cases, the court then con-"sidered the extent of the estoppel, where the causes of action "were distinct, and said (p. 353):

"'But where the second action between the same parties is "'upon a different claim or demand, the judgment in the prior "'action operates as an estoppel only as to those matters in "'issue or points controverted, upon the determination of which "'the finding or verdict was rendered. In all cases, therefore, "'where it is sought to apply the estoppel of a judgment ren-"'dered upon one cause of action to the matters arising in a "'suit upon a different cause of action, the inquiry must always "'be as to the point or question actually litigated and deter-"'mined in the original action, not what might have been thus "'litigated and determined. Only upon such matters is the "'judgment conclusive in another action.

"It is unnecessary to multiply citations of authority, as the "subject has been quite recently fully considered and passed "upon by this court. In Last Chance Mining Co. v. Tyler "Mining Co. (157 U. S., 687) where an estoppel resulting from "the thing adjudged was enforced, this court said (p. 687: "'The law in respect to estoppel by judgment is well settled, "'and the only difficulty lies in the application of the law "'to the facts. The particular matter in controversy in the "'adverse suit was the triangular piece of ground, which is

"'not the matter in dispute in this action. The judgment in "'that case is therefore not conclusive in this as to matters "'which might have been decided, but only as to matters which "'were in fact decided,' citing a number of authorities.

"It follows then, that the mere fact that the demand in this "case is for a tax for one year and the demands in the adjudged "cases were for taxes for other years, does not prevent the "operation of the thing adjudged, if, in the prior cases, the "question of exemption was necessarily presented and deter-"mined upon identically the same facts upon which the right "of exemption is now claimed."

The facts in the case relied upon as *res judicata* are practically the same as the case now before the Court.

In Mills, Gd'n, vs. the City of Hopkinsville, 11 Ky. L. R., 164, the Kentucky Court of Appeals decided that:

"A judgment for the defendant, in an action to enjoin the "collection of taxes, is a bar to an action by the plaintiff to "recover back the taxes after he has paid them. And the "judgment is not only conclusive as to the taxes for the par-"ticular year to which the action related, but also to the taxes "for subsequent years, the issue being between the same parties "and upon the same facts."

The Kentucky authorities are very clear upon the general question of *res judicata*. In Tallbott vs. Dodd, 5 Dana, 193, the court decided that:

"Judgment of a court of competent jurisdiction is, in gen-"eral conclusive, not only as to all matters determined by it, "but all incidental matters which might have been properly "litigated and decided in the same suit."

"Judgment of a court having jurisdiction is conclusive "between the same parties, and for the same cause, either in "the same or any other court."

3 Bibb, 399; 1 Mar., 526; 2 Mar., 354; and 527; 3 Mar. 435; 4 Mon., 444; 7 B. Mon., 400; 11 Bush, 362; 9 Bush, 166.

"When a matter is once put in issue and is passed on by a "court of competent jurisdiction, it can not be again litigated "between the same parties, so long as the former decision con-"tinues in force."

Davis etc., v. McCorkle, 14 Bush, 746; also see 14 Bush, 781; 78 Ky., 424; 79 Ky., 119; 81 Ky., 22; 82 Ky., 222.

In the Louisiana case the court puts considerable stress upon the fact that the mode of taxation as to the Louisiana Bank had been a rule of property for about sixty years, and by the construction of the charter of the Bank it had become a rule of property. We call the attention of the Court to the fact that as to these old banks, particularly, the mode of taxation and the rights of the parties have become, and have been recognized, as a rule of property in Kentucky for over sixty years, and the courts have without variation construed the statutory exemption to have existed ever since the institution of the banks until it has become a settled rule of property that, we think, this court will recognize and not overturn.

The decision fully protects the complainant from any assessment or collection of any taxes other than those enumerated in their contract under the Hewitt Act. The law, as a rule of property, has never been changed, and there was no attempt to change it by any judicial utterance until the present year, and that by the opinion recently delivered by Judge Paynter in the Owensboro cases. The Farmers Bank was not a party to any of the cases decided by Judge Paynter.

MANDAMUS.

The answer pleads that a mandamus proceeding has been instituted in the State Court by the city of Frankfort to compel the Board of Valuation and Assessment to certify the apportioned valuation of the franchises of the Farmers Bank; that this mandamus proceeding was begun before the action under consideration, and is pending, and that the injunction issued by the circuit court will be in effect an injunction against that proceeding in the State courts.

It is well settled that the pendency of a suit in a State court is no bar to a suit upon the same subject matter in a circuit or district court of the United States. See the City of North Muskegon v. Clark, 22 U. S. App., p. 522, and cases therein cited. The injunction granted by the lower court may be offered as a defense by the Board of Valuation and Assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in evidence. The sufficiency of the defense will be for that court. The lower court did not enjoin any suit at all; all it did enjoin was a certification of the taxes; that does not require the defendant to disobey an order of any other court, or restrain their prosecution of the suit therein. The above language, or the most of it, is copied from the opinion delivered by Judge Taft on page 198 of the Record, and seems to us conclusive upon this point. Furthermore, the court will find, upon

investigation of the mandamus suit, that it does not cover the year 1897, and the Board of Valuation and Assessment is not asked to make an assessment for the year 1897.

BOARD OF VALUATION NOT PARTIES.

It is claimed by counsel for the appellant that the judgments of the Franklin circuit court are not *res judicata*, because they say that the members of the Board of Valuation and Assessment were not parties to that suit, and cite *in re* Ayre, 123 U. S., page 443. An examination of the Ayre case will show that it has no application whatever to the case at bar. The point there decided was that the court would not entertain jurisdiction of the case because the State was the real party in interest, and the attempt was made to reach the State and sue it by proceedings against State officials. In the case at bar, as decided by the circuit court, the Board of Councilmen of the City of Frankfort, and the County of Franklin are the real parties in interest; the State of Kentucky has no interest whatever in the taxes sought to be collected by the city and counties. The members of the Board of Valuation and Assessment have no interest whatever in these taxes; they merely perform the ministerial duty of apportioning to the counties and cities what property they shall tax; they are simply appointed by the State or legislature to act as agents of the cities and counties in providing a mode of assessing the property of the banks—they occupy the relation to the city or county that their assessors used to do, the difference being that they are appointed by the legislature and not by the city or county. They assess the property for the municipalities and counties, hence they act as their agents; they are nothing more than the assessors of this kind of property for the cities and counties and where the assessment or apportionment is made by this Board, then the city and the county has a basis or assessment to proceed on to collect their municipal taxes, etc.

The point attempted to be made by appellant's brief in regard to judgment being an adjudication as to a matter of law under section 111 of the brief, is not well taken. The adjudication of the Franklin circuit court was upon the facts alleged in the petitions, which were all admitted to be true upon the demurrer. A judgment upon a demurrer is just as binding as if the allegations of the petition had been denied, or as a judgment upon a verdict.

Mr. Biglow, in his work on Estoppel, 5th Edition on page 56, uses the following language:

"A decision upon a demurrer which has, however, clearly "gone to the merits of the case, by being based distinctly upon "a specific allegation of the facts touching the substance of "the action of the defense, is an effectual bar to further litiga-

"tion and upon the facts admitted it is held to be as conlusive "as a verdict,"

citing Bissell v. Spring Valley, 124 U. S., p. 225, and a long list of other authorities of different States.

The very identical questions are raised now that were decided by the Franklin Circuit Court, and the Henderson Circuit Court; the appellants are attempting to do now the identical thing they were enjoined from doing in all of these suits; the records in which are now before this Court, hence the plea of *res judicata* is complete.

We have not seen the brief to be filed by the city or county of Henderson consequently we have not referred specifically to their brief. The opinion of Justice Harlan and Judges Lurton and Taft, delivered by Judge Taft upon the question of *res judicata* in this case is so full and complete upon these questions that we do not consider it necessary or proper to further elaborate our argument upon that proposition, our object in saying what we have said to the Court on this question of *res judicata* was to get before the Court in the brief the facts in regard to the matter, and call the Court's attention to some of the authorities. We do not deem it necessary, nor are we able, to add anything to the exhaustive argument on this subject in the opinion, which is on page 148 of record.

IV.

ACCEPTANCE OF HEWITT ACT CONSTITUTED A CONTRACT.

As early as 1839, in Johnson vs. Commonwealth, (7 Dana, 342), where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract as provided in the charter of the bank, the Court of Appeals of this State held that the State might enter into such contracts, and that the contract in question placed a limitation upon the power of the State. In the cases of Farmers Bank vs. Commonwealth (6 Bush, 127), and the City of Frankfort v. Bank of Kentucky, (87 Ky., 370) it was held, that the bank could not be taxed beyond its charter rate as fixed by the contract; and in numerous other cases the same doctrine has been announced.

It is plain, therefore, and will not be controverted in the argument of these cases, that the courts of Kentucky have been, and are, committed to the proposition that in each of the charters of the banks granted before 1856, exempting it from taxation for municipal or other purposes, upon condition of its payment into the State Treasury, to the revenue fund of the State, of a certain amount on each share of stock, created a valid contract which the

State can not, under the Federal Constitution, impair by subsequent legislation.

Although these charters were granted before the Act of 1856 was passed, these decisions are not based upon the ground that the charters were granted before 1856, for the legislature had no greater power, and the individual citizen no less rights, after the Act of 1856 than they had before; but they are based solely upon the ground that the provision in the charter of the bank exempting them from all taxation, except for State purposes, created a contract between the State and the banks which were protected from impairment by the Federal Constitution. If the provision in a charter granted prior to 1856 is a contract that must be complied with both by the State and the bank, what reason can be given for holding that a similar provision in a charter granted after 1856 does not create a contract? The Act of 1856 does not undertake, and was never intended to and can not have the effect of, making that a *nudum pactum* which, if done before its enactment, would have created a valid and enforceable contract, because the act reserving the right to appeal or amend all charters and grants to corporations enacted after the 14th of February, 1856, unless a contrary intent be therein plainly expressed, provides "that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously granted."

In the case of the Commissioners of the Sinking Fund v. Green & Barren River Navigation Co. (reported in 79 Ky.), the State leased for the period of thirty years the Green and Barren River line of navigation upon certain conditions and terms expressed in the contract, and in consideration that the company would maintain and keep the line in repair (and permit all boats to navigate the two rivers upon specified rates prescribed as toll. The company went into possession, made many repairs, having fully complied with its contract, until the 5th of April, 1880, when the legislature undertook to repeal so much of the original act of incorporation as leased and conveyed to the company this line of navigation, and so much of the act as gave to the company the tolls and revenues arising or to arise from said line of navigation, and authorized the Sinking Fund Commissioners to take possession. It was held in the decision referred to that the act to incorporate the Green & Barren River Navigation Co., approved March 9, 1868, coupled with the execution of the bond on the part of the company to comply with its contract, constituted a valid and subsisting contract between the State and the appellee, and was not the subject of repeal by the General Assembly.

In criticising the opinion of Judge Pryor, the court below distinguishes the Barren River Navigation Co. case from the opinion rendered by Judge Pryor in the Bank tax cases, by stating that :

"The banks surrendered nothing of value to the State, for "the limited tax exemption of the Hewitt Act, and the power "of revocation was not in any view, therefore, trammeled by "conditions."

This is not the fact as to the Farmers Bank of Kentucky, because at the time of the passage of the Hewit Act and its acceptance of the Hewitt Act it had been adjudged by the Franklin common pleas court, a court of general jurisdiction, that the Farmers Bank of Kentucky, by virtue of its charter, had a contract with the State to pay 50 cents on the $100.00 par value of its capital stock in full of all taxes or bonus, and having this right so adjudged to it, it necessarily parted with it when it accepted the provisions of the Hewitt Act, or at least waived it for the purposes of the Hewitt Act; this we think, was a valid consideration, fully sufficient to support the contract. Moreover, this judgment of the common pleas court was afterwards affirmed by the Court of Appeals of Kentucky.

Such has been the construction given the Act of 1856 by the State courts since its adoption, and to these cases the attention of the court will be called further on.

That the provision in the bank charters exempting banks from taxation, except for State purposes, created a contract, which the legislature could not by subsequent legislation impair, is expressly recognzied in the Act of 1856, and that the State may surrender its right to tax certain classes of property, at least for a limited time, as is the case with the banks in this instance, is too well established by the adjudications of this court to require any argument. Following the Dartmouth College case (4 Wheaton, 683), this court has repeatedly denied the authority of any legislature to impair such contracts. (See Farrington v. Tennessee, 95 U. S., 115.)

With their charter contracts sustained by the numerous decisions of the Court of Appeals of Kentucky, supported by the adjudications of this court, the Banks (the plaintiffs in error) had the right to assume that their charter contract was such as could not be impaired by the State by legislative action.

Under these circumstances the State invited the Farmers Bank (plaintiffs in error) as well as all of the other banks in the State, to waive their charter contracts and enter into a new contract as provided in the act of 1886, known as the Hewitt Law (General Statutes, chapter 92, article 11). The Farmers Bank (plaintiffs in error,) as did the great majority of banks in the State, accepted the proposition, and, up to 1897, have paid the tax, which it was agreed should be in lieu of all other taxes. It seems to us that a stronger case of a contract between the State and the banks could not be suggested. But the opposite side (defendant) admitting the force of the argument and of the agreement, says that it was

expressly provided "that this act shall be subject to the provisions of section 8, chapter 68 of the General Statutes," which is the Act of 1856, reserving the right to repeal or amend. But this provision can not, as we think, we have already demonstrated, affect the question, for the Act of 1856 (section 8, chapter 68, General Statutes) provides "that whilst privileges and franchises may be repealed, no repeal shall impair rights previously vested." And the framers of the present Constitution, of Kentucky, in order to prevent the impairment of such contracts, in section 1 of the Schedule provided that "All the laws of this Commonwealth in force at the time of the adoption of this Constitution, and not inconsistent therewith, and all rights, actions, prosecutions, claims and *contracts* of the State, counties, individuals or *bodies corporate*, not inconsistent herewith, shall continue as valid as if this Constitution had not been adopted."

The Hewitt Act and the contract made under it secures in terms to each bank exemption "from all other taxation whatever, so long as said tax (of 75 cents on each $100 of stock in the bank) shall be paid during the corporate existence of such bank." And now to hold that this exemption is, as to the State, of no force, and can be disregarded by it at its will and any other taxation imposed, because of the provision of the Act of 1856, embraced in section 8 of chapter 68 of the General Statutes, would not only be manifestly unjust, but would overturn all rules as to the construction of Statutes. Where a contract vests the party with certain valuable rights, with provision in the contract that one of the parties may, at its pleasure, disregard it, it is a mere nullity. Following this plain rule of law, as well as justice, the Kentucky courts have always held such contracts inviolable; and it will hardly be claimed that the State adopted this scheme to deprive the banks of rights that they claim have been vested, and so adjudged as to some of the banks for more than half a century.

Not only have the banks surrendered their charter contracts, but they agreed to pay, and in good faith have paid, into the State treasury nearly twice as much tax, estimating property according to actual value, and we may say three or four times as much as is paid by any other kind of property, real or personal; and still further, these payments are made directly into the treasury, without the uncertainty which arises as to the assessment of all other kinds of property, and the delays which occur and the commissions expended in making such collections.

Waiving, however, for the time, the question of whether the banks created after 1856 could have successfully relied upon their charter contracts against a different mode and greater tax subsequently prescribed by the legislature, there was undoubtedly a question then existing between the banks and the State which would have been the subject of litigation, and this alone was a sufficient consideration for the contract entered into between the State and the banks.

The opinion in the case of New Jersey v. Yard (95 U. S., 110), which presented almost the identical question we are now discussing, seems to us conclusive of the case at bar; or, if not conclusive, is entitled to much consideration, by reason of the analogy between the cases. The Morris & Essex Railroad Co. was incorporated by the New Jersey Legislature in 1835. The act provided that as soon as the net proceeds of the road amounted to seven per cent. of its cost it should pay a State tax of one half of one per cent. on the cost of the road, and no other tax should be levied on it. Section 20 reserved to the legislature the right to amend or repeal the act whenever it should think proper. A supplemental Act was passed in 1836, in which the right to amend or repeal was reserved. In 1846, the legislature passed an Act similar to the Kentucky Act of 1856. Another supplemental Act to the road's charter was passed in 1865, authorizing a branch road, and by which the company was vested with all the powers and franchises given in the original and supplemental acts. The 3d section of the last-named Act enacted "that the tax of one-half of one per cent. provided in the original Act to be paid by the company to the State whenever the net earnings of the road amounted to seven per cent. upon the cost of the road shall be paid at the expiration of one year from the time when the road shall be opened and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu of all other tax whatever: *Provided*, That this section shall not go into effect until the company, by an instrument duly executed under its corporate seal and filed with the Secretary of State, shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of this Act, or this Act shall be void." The instrument prescribed by the last section was duly executed by the company. It is true that in the last Act (1865) no reservation of the right to repeal or amend was reserved, but the case was not made to turn upon that point. The court held that there was a contract, which the State could not impair by subsequent legislation. This case is commented upon at length and approved by the Kentucky Court of Appeals in the case of Commonwealth v. Farmers Bank of Kentucky (97 Ky., 599).

The opinion in the Bank-Tax cases was rendered by Judge Pryor, then Chief Justice, and was concurred in by Judges Hazelrigg, Grace and Eastin, sustaining the contention of the banks that the Hewitt Act constituted a valid contract and could not be repealed by subsequent legislation. Judges Lewis, Paynter and Guffy dissented from that opinion, Judge Paynter writing the dissenting opinion. After this case was decided, the *personnel* of the court was changed, and the opinion in the case at bar was written by Judge Paynter and concurred in by Judges Lewis, Guffy and White, Judges Hazelrigg, Burnam and DuRelle dissenting. So the original opinion in the Bank-Tax cases (some of which are now being heard with these two cases) sustained the validity of the

contract, and the subsequent decision by Judge Paynter, a majority of the court concurring, held, in the two cases now being considered of the Owensboro banks, that no such contract existed, or if such a contract had been made, the right of the legislature to repeal the contract was reserved by virtue of the Act of 1856. The Circuit Court of the United States for the District of Kentucky held, (in the cases now on appeal and considered with these two cases) that the banks (the defendants in error from that court), having been parties to the original case (the opinion written by Chief Justice Pryor), the questions there decided were *res adjudicata*, and could not be relitigated; but at the same time held that, as to all the banks not parties to that action, the repealing act of the legislature applied.

We, therefore, invite the attention of the Court to a review of the reasons given by the Circuit Court of the United States in the opinion written by Mr. Justice Taft for holding that the Legislature had the right to repeal that portion of the Hewitt Law under which these banks claim a contract existed.

In that opinion it is held, that neither the old banks nor the banks organized since the Act of 1856 and prior to the enactment of the Hewitt Act, had an irrevocable contract with the State, by which the taxes on bank stock were limited to 75 cents on each share of $100 of stock, and that the State had the right to amend the charter, or annul it, as to the rate of taxation by reason of the reservation act annexed to the Hewitt Law; and in the opinion in one of the cases—that of the Northern Bank of Kentucky v. Stone, Auditor—the court went on to say that these banks (meanin the old banks) had never any irrevocable exemption to surrender, but accepted the agreement in the Hewitt Act rather than run the risk of being subjected to a larger burden by way of taxation.

We understand it to be a well settled rule, that the Federal courts, in determining a question like the one now presented, whether a State law impairs the obligation of a contract, will not accept as binding upon them the views taken by the supreme court of a State as to whether or not a contract existed between the State and the corporation. (Douglas v. State of Ky., 168 U. S., 502; L. & N. R. R. Co. v. Palmer, 109 U. S., 256.) Recognizing this rule to its fullest extent, the attention of the court is called to the fact that, since the year 1838, from that time up to the date of the opinion rendered by the Court of Appeals of Kentucky (in the two cases from which this appeal is prosecuted, and reported in —— Ky., page ——) it has been held by that court that the bank charters prior to 1856 were irrevocable contracts, and the entire legislation of the State during this entire period has been had with that view. (See Johnson v. Commonwealth, 7 Dana, 342; Farmers Bank of Ky. v. Commonwealth, 6 Bush, 127; City of Frankfort v. Bank of Kentucky *et al.*, 87 Ky., 370.)

The highest court in the State having settled the question as to these charter contracts of the old banks by repeated decisions for so long a period, it seems to counsel that, as between the State and these corporations, there were some rights created, both by legislation and judicial utterances from time to time, that had to be, and were, surrendered by the old banks when they accepted the provisions of the Hewitt Law. All the old banks, as well as the legislative and judicial departments of the State government, recognizes the right of the old banks to stand upon their charter contracts; and it was never contemplated that the reservation of the power to amend or repeal the Hewitt Law applied to this manner of taxation as agreed upon by both parties to the agreement. The right of all the banks had been determined; and the State, for the purpose of having uniformity of taxation, and to prevent the sacrifice of banking capital by onerous local burdens, resolved, by the consent of the banks, to establish that equality that would protect capital in commercial centers and enable the banks in larger cities to maintain an existence.

Many of the banks (termed "country banks") refused to accept the provisions of the Hewitt Law; and in the county where the writer resides all the tax, State, county and town combined, did not exceed 70 cents; and it must, therefore, be apparent that there was a consideration moving the legislature to enact this beneficial statute, by which all of the banks were made equal in the way of taxation, and these institutions relieved of a burden which, if imposed, would destroy the business in commercial cities and retard the growth and prosperity of the State. It is a fact known by all business men, and one of which the courts take judicial knowledge, that the rate of taxation now imposed on the banks exceeds greatly the burden placed upon the real and personal estate of the citizen; and if any inequality exists, it is favorable to the citizen as distinguished from the corporation. That there was a consideration for this difference in the mode and amount of taxation is manifest; and if judicial decisions could confer rights or create that sort of doubt that left even the question of taxation in uncertainty, it is sufficient ground for making a full adjustment of the claims of the old banks by such an agreement as is contained in the Hewitt Law—and the consideration not only affecting the old banks, but every bank accepting its provisions, as it could not have been intended to tax one bank at a greater rate than another.

As was said in McCullough v. Maryland (4 Wheaton):

"The unrestrained power of taxation is the power to des-
"troy; and with a burden of taxation on banking corporations
"of two and a half dollars to the hundred, to which is to be
"added the expenses of the banking institution, the doors of
"the bank must be closed and the money invested elsewhere."

The Court of Appeals of Kentucky, in the case of Sinking Fund Commissioners v. Green & Barren River Navigation Co. already referred to, held that the repeal of so much of the charter of the corporation as deprived it of its contract rights was in violation of the Constitution. And in the case of Commonwealth v. Owensboro Railroad Co. (reported in 95 Ky., page 60), there was an act passed providing that, "All railroads which may hereafter be built in this Commonwealth, under existing charters, or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of the Commonwealth for the period of five years from the date of the beginning of the construction of the new road." The State claimed the right to repeal the law, and attempted to coerce the payment of taxes within the five years. The Court in response to the argument in favor of the payment of the tax, and the application of the Act of 1856 to its provisions, said :

> "It is sufficient to say to this proposition, which, even at "first blush, strikes us as extraordinary and unjust, if attempted "to be applied to those of the appellees who accepted the "offer of the State, and expended their money on its pledge, that "the act of 1856, reserving the right to repeal or amend char- "ter privileges granted by the legislature to particular persons, "has no application to the law of 1884, which, as said before, "was a general law and affected all alike who accepted its pro- "visions or acted on the strength of them."

The act of 1856 was in full force when the two cases of the Green & Barren River Navigation Co. and the Owensboro Railroad Co. were decided.

It is claimed in the opinion in the cases from the Circuit Court of the United States, District of Kentucky, that there is but little, if any, analogy between the case of New Jersey v. Yard and the cases now being considered. It will be recollected in the case of New Jersey v. Yard that the reservation of the power of repeal was inserted in the original act of 1835, and subsequently the general law, reserving the like power applicable to all charters, was enacted. It is true this Court, in determining the question before it in New Jersey v. Yard, laid much stress on the legislative purpose and intent of passing the act of 1865, and that to construe the act of 1865, under which it is claimed the contract was made, as carrying with it the power to repeal would be inconsistent with the legislative purpose.

So we maintain in this case: To say that the banks all over the State were required to go through the form of having their stockholders consent to this contract, and then have it reduced to writing and filed with the Governor of the Commonwealth, and further

agreeing to surrender all their charter rights, it would be unreasonable to hold that the legislature never contemplated making a contract that was binding according to its terms; and to adjudge that the legislature had the power, at its next session after this contract was made, to repeal it, would be inconsistent with the legislative purpose and a fraud upon the rights of these corporations.

It was said by the able judge in the opinion in the case of New Jersey v. Yard: "Can it be believed it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day?" The same question may be well asked in this case; and the only response that has been made to such a question by the able judge delivering the opinion of the United States Circuit Court is, that there was no consideration for the agreement and no valid exemption prior to that time in any of the bank charters; and if this response is deemed sufficient, it may well be said that the provision of the Hewitt Law, under which this contract is claimed to exist, stands repealed.

It is argued that in the present case there was an express reservation of the power to repeal annexed to the agreement, and this being the case there can be no room for construction. Section 4 of the Hewitt Act by its provisions requires the banks to waive and release all rights they have under the acts of Congress, or under the charters of the State, looking evidently to the fact that the State banks had rights already adjudicated by the courts of Kentucky, and the national banks rights reserved to them by Congressional enactment.

The distinction between the power of the legislature—as said in the Bank Tax Cases—to repeal an article from which a contract arises, and the right to destroy the contract itself when based on a consideration, is manifest; and while, under the present Constitution, the exercise of the taxing power can not be relinquished, the power or right to discriminate in imposing taxes as between the various classes of property has been often recognized by the Appellate Court of Kentucky under the provisions of former Constitutions. There has been no exemption of the banks or their stock from taxation by reason of the Hewitt Act, but the State, recognizing the necessity for uniformity and equality in taxation in taxing such institutions, enacted the Hewitt Law requiring the surrender of the rights of the old banks, under their respective charters, as well as the national banks, and at the same time increased the State taxation upon these banks, in order that no unjust discrimination should exist between corporate and individual property.

V.

APPEAL OF FARMERS BANK vs. CITY OF GEORGETOWN, &c.

WE NOW CALL THE ATTENTION OF THE COURT TO THE QUESTIONS ARISING IN CASE NO. 386 UPON THE APPEAL OF THE FARMERS BANK OF KENTUCKY vs. SAMUEL H. STONE ETC., PARTICULARLY AGAINST THE CITY OF GEORGETOWN AND THE COUNTY OF SCOTT.

The assignment of errors in this case are as follows:

"And the said complainant further says that said decree is erroneous and against the rights of the complainant, because the court erred in dismissing the complainants bill as to the County of Scott and the City of Henderson.

Second. Because the court erred in not deciding that the complainant's contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to the City of Georgetown or the County of Scott for any purpose whatever.

2. Because the court erred in not issuing an order of injunction against the defendants Samuel Stone, Chas. Finley, and George Long, enjoining them from making an assessment in any way upon the stock of complainant at its bank, at Georgetown, for municipal or county taxation, and it erred in not enjoining the said Stone from making any apportionment of complainant's capital stock to the bank at Georgetown for taxation for any purpose whatever.

Wherefore the complainant prays that the said decree as to the City of Georgetown and the County of Scott be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of complainant's bill of complaint."

The opinion of the circuit court delivered by Judge Taft, on the question raised by the appeal of the Farmers Bank of Kentucky vs. the City of Georgetown, etc., was delivered in the case of the Northern Bank of Kentucky vs. Bourbon County, in which County one of the branches of the Northern Bank was situated. The mother bank was not a party to the litigation. See opinion on page 218 of record. In the case at bar the status of the parties is different. The Farmers Bank of Kentucky, at Frankfort, Ky., is the mother bank, and, as shown from the allegations of the bill filed in this case, and the petition filed in the Franklin Circuit Court against the Board of Councilmen of the City of Frankfort, and against the County of Franklin, the mother bank paid all of

the taxes against the bank, including its branches, that accrued to the State under and by virtue of the Hewitt Act, and the circuit court, in deciding that such payment was in full of all taxes that could be collected from the bank as a whole, necessarily adjudicated that no other taxes could be collected from the bank by any of the municipalities where its branches were in existence, the whole, necessarily, including all of its parts.

On page 7 of the record is the following allegation in the bill of complaint:

"The complainant, through its cashier, made its report and "paid into the State treasury in 1886 the full tax required by "the act described in the foregoing paragraph, and which is "commonly known as the 'Hewitt Act,' and in conformity with "said Hewitt Act, has made its reports in proper form to the "auditor of public accounts on the 1st day of July in each and "every year up to this time, and, until the year 1893, paid into "the State Treasury, on or about the 1st day of July of every "year from 1886, the full tax required by the Hewitt Act, being "75 cents on each share of its capital stock, and a tax at the "same rate as real property was assessed by the State, upon its "surplus, undivided profits and accumulations in excess of 10 "per cent. of its capital stock. These reports continued to be "made by the complainant; but on July 1, 1893, the auditor "refused to receive the tax under the Hewitt Law, although the "complainant tendered the same. He refused to receive it on "the 1st of July, 1894, although the complainant again tendered "the same. The complainant paid the same about the first of "July, 1895, and on or about the 1st of July, 1896, and in the "spring of 1896, at the request of the auditor, and after certain "litigation had been determined in its favor, paid to the auditor "the difference between the amount paid by it on July 1, 1893, "and July 1, 1894, and the amount which it tendered at these "times, and which was the amount due under the Hewitt Law; "so that it is now true that the complainant (that is, the mother "bank) has every year, down to and including 1895, paid the "full tax called for under its charter; and from 1886 to 1896, "the full tax called for under the Hewitt Law. It has also, "during this period (1886 to 1896), paid in full to the munici- "palities where its banking houses are situated the full tax "thereon."

These same allegations are substantially set forth in the petitions against Franklin County and the Board of Councilmen of the City of Frankfort, covering the period of time up to which they were filed. See pages 66 and 67 of record; also pages 83 and 84 of record.

These allegations are all admitted to be true and show that all of the taxes that could possibly have been collected from the bank

or its branches had been paid to the State, by the mother Bank, and it was adjudged by the Franklin circuit court that no other taxes could be collected from the bank for municipal or county or any other purpose, and we claim that these decisions as to the mother bank necessarily include the branches, and are *res judicata* as to the entire bank, which of course includes its branches. We think that in the multitude of cases before the circuit court, it must have overlooked this view of the case.

We also claim that these judgments in the Farmers Bank cases are *res judicata*, not only as to the city of Frankfort and the County of Franklin, but also as to the City of Georgetown, County of Scott, upon the ground that they are necessarily privies to the judgments in those cases; the same questions decided in the Franklin and Henderson cases are decisive of any question that might be raised as between the bank and County of Scott or the City of Georgetown. It would be impossible for either of these parties to escape having the identical question again decided if they were to attempt to tax the bank, and their not making any attempt to tax the bank until now is tantamount to their acquiescing in, and consenting to, the status of the bank as fixed by these decision.

Furthermore, the doctrine of *res judicata* applies to them because the State of Kentucky was practically a party to these old suits. It was represented by its Attorney-General, as the records will show, and he claimed that the banks were liable for municipal and county taxation. The Sheriff of Franklin County, a constitutional officer who represents the State, was a party to all of the suits against Franklin County. Thus we have the principal before the court, and all the integral parts of the State are bound by its acts. It is certainly *res judicata* as to the State, and why not to the counties and cities? It is only through the State that the counties and cities can acquire the right to tax; and if the State, through which they must claim, was a party or privy to these proceedings, and was bound by them, why is'nt its integral parts and all of its subdivisions likewise bound?

As said by Judge Bennet in 87 Kentucky, in illustrating the absurdity of the States being bound by its contracts and at the same time authorizing its subdivisions to collect a tax from the bank:

> "The State, by its contract with the appellee, deprives itself "of the right to levy and collect other taxes off the appellee, but "may notwithstanding authorize all of its subdivisions, if the "appellee's property were distributed in all of them, to levy and "collect other or additional tax off of it."

This, he says, would be a palpable violation of the contract: so, upon the same principles, applicable to principal and agent, it

would be an absurdity to say that the State of Kentucky was stopped by these judgments, and yet its subdivisions and integral parts, whose only claim is through the State, are not estopped? The whole is greater than any of its parts, and the estoppel should be made to apply to all of the counties and municipalities of the State.

We respectfully ask that the judgment of the Circuit Court in favor of the Farmers Bank of Kentucky and against the Board of Councilman of the City of Frankfort, The County of Franklin, The City of Henderson and the County of Henderson and S. H. Stone, etc., be affirmed, and that the judgment dismissing the bill as to Scott County and the City of Georgetown, etc., be reversed.

JNO. W. RODMAN,
Counsel for Farmers Bank of Kentucky.

W. S. PRYOR,
J. W. RODMAN,
Of Counsel.

(16972.)

Supreme Court of the United States.

SAMUEL H. STONE, AUDITOR, ET AL., *Appellants*,
vs.
DEPOSIT BANK OF FRANKFORT.

BRIEF FOR DEPOSIT BANK OF FRANKFORT.

The following facts alleged in the bill of complaint in this case are not disputed:

The appellee, Deposit Bank of Frankfort, was created a body-corporate and politic by an act of the General Assembly of the Commonwealth of Kentucky, approved March 3rd, 1863, and was thereby authorized to transact the general business of a bank in the city of Frankfort for a period of twenty years from that date. The bank was organized under its charter in 1867, and has continuously, since then, been transacting the banking business.

By the general laws in force in the State of Kentucky in the year 1863, and continuously thereafter, until March 8th, 1871, banks doing business in the State were required to pay to the State 50 cents on each $100 worth of capital stock of each bank; and, by an amendment to this bank's charter, on March 8th, 1871, it was provided that the tax or bonus then paid by the bank should, in the future, be in full of all taxation, except city taxes, on real estate owned by it. The tax or bonus

referred to was the 50 cents on each $100 of its capital stock required by the general law to be paid by all the banks in Kentucky.

By another act of the General Assembly of Kentucky, approved February 23d, 1882, all the privileges and franchises granted to said bank under the act of March, 1863, as amended by the act of March 8th, 1871, were extended and continued in force for a period of twenty years from February 23d, 1882.

This bank paid each year the taxes required by its charter, 50 cents on each $100 worth of its capital stock, up to and including July 1, 1886, since which date it has paid 75 cents on each $100 worth of its stock under its contract under the Hewitt Bill hereinafter referred to.

By the settled course of the decisions of the Court of Appeals of the State of Kentucky, which is the highest court in said State, the meaning and effect of the aforesaid provision of this bank's charter has been fixed and determined.

By a decision of that court, rendered June 5th, 1888, the judgment of the Franklin Common Pleas Court was affirmed, by which judgment the said court decided that the Commonwealth could not tax this bank at a greater rate than 50 cents on each $100 of the value of its stock, which included all taxation of all kinds, State, county and city, city taxes on real estate owned by it alone excepted. That suit was a proceeding by the county of Franklin against this bank to assess its property for county taxation and to compel the bank to pay county taxes under authority of an act of the Legislature, approved March 18th, 1876, entitled "An act to make taxation equal and uniform in counties where an ad valorem tax is levied by the court."

This attempt to make the bank pay county taxes was by distraint upon its property, and the bank filed a bill in equity in the said Common Pleas Court against the county and its sheriff, enjoining and restraining the collection of any tax from it upon the ground that the bank was exempt from such taxation by

the aforesaid charter amendments, and it was alleged that the said act of 1876 was void in so far as it attempted to repeal or impair the said exemptions, and the county and its said sheriff were duly brought before the court, and upon full hearing, the said Common Pleas Court rendered a judgment exonerating the bank from the payment of the tax and awarded the injunction prayed for. The county appealed from that judgment to the Court of Appeals, where the said judgment was affirmed. The entire record of that suit is filed with the bill and is marked Exhibit A, and may be found on page 12 of this record.

By another act of the Legislature of Kentucky, approved May 7th, 1886, and known as the "Hewitt Bill," it was provided that cashiers of all banks in the State should annually, thereafter, on the first day of July of each year, make a report of the condition of the bank to the Auditor of Public Accounts, and should pay into the State Treasury 75 cents on each $100 of the capital stock of the bank, and should, in addition, pay into the said treasury on their surplus, undivided profits and undivided accumulations, in excess of 10 per cent. of their capital stock, the same rate of taxation as was paid on real property; and it was provided that such payment should be in full of all tax, State, county and municipal, except that the real estate owned by the banks and used in conducting their business, should be liable for county and municipal taxes, and the following condition was annexed upon which any bank was to be entitled to such exemption, to wit:

> "That each of said banks, institutions and corporations, by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all rights under acts of Congress or under the charters of the State banks to a different mode, or a smaller rate of taxation, which consent or agreement, to and with the State of Kentucky,

shall be evidenced by writing under the seal of each bank and delivered to the Governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such banks."

This bank complied fully with the condition above stated and did give its consent in writing to the levying the tax, and did agree to pay the same and to release all rights it had under its charter to a different mode or smaller rate of taxation. See page 4 of this record.

The bank insists that by its acceptance of the terms of the said "Hewitt Bill," it has an irrevocable contract, by the terms of which the bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of the bank.

The bank continued to pay annually the amount of tax due from it under this act, on the 1st day of July in each year, up to and including July, 1893, on which date the Auditor of Public Accounts refused to receive the tax under the said "Hewitt Bill," basing his refusal upon the act of the Legislature of Kentucky, passed in 1892, which act it was claimed repealed the aforesaid "Hewitt Bill."

By article 3 of that act it is provided, in substance, that every bank, in addition to other taxes imposed upon it by law, shall pay taxes upon its franchise to the State, and local taxes thereon to the county, State, town or taxing district where its franchise may be exercised. And the Auditor, Treasurer and Secretary of State are, by the act, constituted a board of valuation and assessment for fixing the value of said franchises. This board is authorized to fix the value of the capital stock of the bank and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the State and in the county where situated, and the remainder thus found is

to be the value of the corporate franchise subject to taxation in said act, and this value is to be apportioned by the board upon the several taxing jurisdictions entitled to collect the taxes. It is made the duty of the Auditor to certify to the County Clerk of the counties where any portion of the corporate franchise of the banks shall be liable for any local taxation, the amount thereof for county and State taxes, and the collecting officer for county and State is then directed to collect the taxes.

It is further provided that, in event the banks fail to make such report and to pay such taxes, a penalty of 10 per cent. shall attach upon the tax, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum, and any bank failing to pay its tax, penalty and interest, after becoming delinquent, is to be deemed guilty of a misdemeanor, and, upon conviction, is to be fined for each day it remains unpaid.

The amount of tax which this bank would be required to pay under this act of 1892 is very largely in excess of the amount it was required to pay by its contract under the Hewitt law, and it is alleged that said act of 1892 violates the Constitution of the United States, and particularly the clause thereof which prohibits any State from passing a law impairing the obligation of contracts.

It is also charged in the bill that the aforesaid method of taxation violates the Constitution of the State of Kentucky, which provides that the General Assembly shall not impose taxes for the purposes of any county, city or town, but may, by general laws, confer upon the proper authorities thereof respectively the power to assess and collect such taxes, and it violates said Constitution in that the said law provided for the assessment of the capital stock of corporations by a State board of valuation and assessment, and provides for the certification of such value by the said board to counties and municipalities where any such stock is situated or franchise employed, giving the said board the right to apportion same

among the taxing districts,and provided that said corporations shall pay to the local taxing districts, local taxes thereon.

The county of Franklin and the city of Frankfort atempted to collect taxes from this bank under the valuation of its capital stock and franchise made by the said State board for the year 1893, and this bank instituted suit in the Franklin Circuit Court against the said county and its sheriff, claiming the benefit of its said contract under the Hewitt law, and prayed the court to establish the same and enjoin the county and its sheriff from attempting to collect any tax contrary thereto.

That court rendered a judgment against the bank, which judgment was appealed by the bank to the Court of Appeals of Kentucky, which reversed the said judgment of the Circuit Court and upheld the bank's contract and ordered a judgment be entered in the Circuit Court in conformity with its mandate, and the judgment was so entered and a copy thereof is filed with the bill, as Exhibit B, and the same is set out in full on page 8 of the record.

The city of Frankfort filed its suit against the bank in which it sought to collect taxes upon the banks franchise in the years 1892-3-4, as assessed by the said board, and defense was made to that suit by the bank that it was exempt from such tax by its aforesaid contract under the Hewitt law.

The issues were made by the pleadings upon that proposition, and as a suit by the bank was then pending in the same court against Franklin county, in which exactly the same question was raised, namely, the validity of the said contract under the Hewitt law, it was agreed between the said bank and city that said suit should remain on the docket and abide the decision of the question in the suit against the county, and upon the return of the mandate to the Circuit Court in the county case, judgment was rendered in the said city case in conformity with the opinion of the Court of Appeals, sustaining the bank's said contract, a copy of which judgment is filed and copied on page 9 of the record.

It is alleged that by the aforesaid proceedings it has been finally and fully adjudicated, that the bank's said contract is valid and enforcible, and that no greater tax can be collected from it than thus provided for in the said Hewitt law.

It is further charged that the appellants were threatening to value the franchise of the bank under the act of 1892 for the years 1894-5-6-7 and to certify such value to the county clerk of Franklin county, to be placed in the hands of the county and city collecting officers for collection, all of which was in violation of the bank's contract and would cause a cloud upon the bank's franchise, and would cause a multiplicity of suits, and damage it in a way that could not be repaired or estimated at law, and that the bank has no remedy at law against such threatened wrongs, and the bank prayed that the appellants should be perpetually enjoined from valuing its said franchise or capital stock for taxation and from certifying the same to the county or city for taxation.

This suit, together with the suit of the Farmers Bank of Kentucky and the Bank of Kentucky, and a number of other banks in Louisville, which had brought similar suits in the same court, was heard in May, 1897, by Circuit Justice Harlan and Circuit Judges Taft and Lurton, at Nashville, upon motion of the banks for an interlocutory injunction and upon the demurrers of the defendants to the bill. The defendants (appellants here) also filed a plea to the jurisdiction of the court and an answer, but the case was heard upon the said motion and demurrer only. See pages 59 and 71 of record.

On June 25th, 1898, the demurrer and the plea of the defendants were both overruled, and thereupon the bank filed its replication to the answer of the defendants. And thereupon, by consent, the cause was submitted for final decree, and the judgment appealed from was rendered by the court. See page 63 of record.

The courts elected one each of the banks representing the several classes of questions to be passed upon, and rendered its

opinion at length in the cases of the banks selected and merely referred in the opinion in suit of each separate bank, to the particular class it belonged to. The questions presented by the bill of this bank were disposed of by the opinion of the court in the case of the Bank of Kentucky, on page 65 of record. The opinion in this case may be found on page 114 of the record, and reads as follows:

> "Taft, Circuit Judge, delivered the opinion of the court: In an injunction suit brought by the Deposit Bank of Frankfort against the county of Franklin, in the Franklin Circuit Court, to prevent the collection of any taxes under the revenue act of 1892, in excess of those imposed by the Hewitt act, it was expressly adjudged on appeal, by the Court of Appeals that the bank had, by its due acceptance of the terms of the Hewitt act, an irrevocable contract of exemption from taxation in excess of that imposed by the Hewitt act, and that the revenue act of 1892 violated this contract. In a similar injunction suit brought by the bank against the city of Frankfort, a decree, in all respect similar, was entered on the same ground. In accordance with our decision, in the case of Bank of Kentucky against Stone, just decided, we must, therefore, grant the motion for a preliminary injunction, and overrule the demurrer to the bill."

By the assignment of errors (page 121) appellants rely, for a reversal, upon the following errors:

1st. That the demurrer to the bill was overruled.

2d. That the court overruled their plea to the jurisdiction.

3d. That the city's offer to file an amended answer June 25th, 1898, was refused.

4th. That the pleas of res judicata were allowed.

5th. That the injunction prayed for was granted.

We take it that the substantial errors indicated in the assignment, are, first, as to jurisdiction; second, the plea of res judicata; and, third, the pendency of an appeal in the Court of Appeals, from the judgment in the city case.

The two first propositions were argued at great length upon the hearing in the lower court, and are so ably and exhaustively considered in the opinion rendered by Judge Taft, that we refer this court to that opinion (page 71 of the record) as the strongest and clearest statement of the law on those two points. (As before stated in this brief, the opinion in Bank of Kentucky case, page 71, was made to apply to this case. See page 114.)

We feel incompetent to add anything to the arguments of the learned judge, in support of the conclusions reached by him, in favor of the jurisdiction, and the pleas of res judicata.

PENDENCY OF APPEAL IN COURT OF APPEALS.

This point arises upon the refusal of the Circuit Court to permit the city to file an amended answer in which it is alleged that it has taken an appeal from the judgment of February 1st, 1896, which is relied on in the bill as res judicata, which appeal is still pending. But that amendment was properly refused, because it did not state a fact bearing on the issue. It did not allege that the judgment had been reversed, which is the only averment that would present the estoppel resulting from it. And being an agreed judgment, and entered in compliance with the opinion of the Court of Appeals, it is difficult to see how it can be reversed.

No question is better settled than that any judgment of a court of competent jurisdiction, is binding upon the parties to it, and their privies until reversed.

State v. Neuer, 9 Pet., 8; Cock v. Halsy, 16 Pet., 75; Huff v. Hutchinson, 14 Howard, 586; Bryan v. Kenut, 113 U. S., 179; Parkhurst v. Burdell, 6 Am. St. Rep., 384.

But upon this point we are not left to general principles of the law, the Kentucky Statutes settles it conclusively, and in very few words. This is the provision of the Kentucky Code of Practice on that subject:

"Section 747. An appeal shall not stay proceedings on a judgment, unless a supersedeas is issued."

No supersedeas has been issued in this case, and the judgment is, therefore, wholly unaffected by the appeal. But a supersedeas would only have prevented the issue of execution upon the judgment, and would not, in any manner have prevented the estoppel resulting "from the thing adjudged."

See Parkhurst v. Burdell, 6 American State Reports, 384; Ellis v. Clark, 19 Arkansas, 420; 70 American State Reports, 603; Todlock v. Accles, 20 Texas, 782; 73 American Decision, 213; Nill v. Cunpunt, 16 Indiana, 107; 79 American Decision, 411; Bank of N. A. v. Wheller, 28 Connecticut, 433; 73 American Decision, 683; Taler v. Hovey, 117 Massachusetts, 108, and Bigelow on Estoppel, 287.

Third. As to judgment being void because it enjoins the city from collecting taxes from the bank.

We do not think the assignment of errors is sufficiently definite to entitle appellants to an examination of this question, but the following facts exhibited in the record, are submitted, for the convenience of the court if it shall decide that the point is within the assignments of errors.

The suit in which the judgment was rendered, was a petition in equity by the city against the bank, in which the claim for taxes is briefly stated with a prayer for judgment for the amount of the taxes and penalites (record page 44).

The answer of the bank (page 46) is in two paragraphs, in one of which it denies the alleged indebtedness, and in the other it sets out at length its claim to exemption from payment of the taxes sued for by reason of its contract under the "Hewitt Bill," and concludes with the prayer for relief as follows:

"Wherefore, the defendant prays that the petition be dismissed; that the defendant's contract under the Hewitt Bill be sustained and declared valid and binding by the court;

that the plaintiff be enjoined and restrained from assessing or attempting to assess, and from collecting or attempting to collect from the defendant any tax upon the defendant's property or franchise, except upon any real estate defendant may hereafter acquire, if any, and it prays for costs and all other proper relief."

No demurrer or reply was filed to this answer by the city, and no objection was made in any manner to the relief asked, and under the rules of pleading laid down in the Kentucky Code of Practice, the bank was entitled, as a matter of right to the judgment it had prayed for. And, independent of the agreement, the court would have given it, as it did, in the exact terms of the prayer.

It is wholly immaterial that no formal grounds for an interlocutory injunction were stated, as no such injunction was asked, but only as part of the final relief, and even if the injunction should be held to be unauthorized (which is the sole contention of appellants), the judgment sustaining the contract under the "Hewitt Bill"—the real thing adjudged, and the basis of the estoppel—would be as effectual here, as if no injunction had been included in its terms.

All these questions as to the validity of the judgment, are wholly foreign to this appeal, since they amount to no more than a collateral attack upon it, which this court will not consider. Such questions may be raised upon the appeal to the Court of Appeals, but not here.

But the judgments are copied below, in order that the court may the more readily examine them together, if it shall decide to pass upon the facts themselves. They are found on pages 43 and 51 of the record, and read as follows:

(Pages 43 and 44.)

FRANKLIN CIRCUIT COURT.

February 1, 1896.

"Deposit Bank of Frankfort
"versus
"Franklin County, &c. } Judgment.

"The plaintiff having heretofore filed a notice accepted by the defendant's attorney, together with the mandate and opinion of the Court of Appeals in this action, and the defendants by their attorneys waiving the filing of said mandate in the clerk's office as required by law, and consenting to the submission of the case for judgment at this time, it is now ordered and adjudged in accordance with the mandate and opinion of the said court in this action, that article 2, of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17th, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present Constitution of this State and of the act of November 11, 1892 (article 3, chapter 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except its real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had, and has no authority in law to assess or value the plaintiff's franchise for taxation, or the Auditor to apportion or certify the same or any part of the same,

for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of this action be, and the same is now, hereby made perpetual, and the defendants, and each of them, are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise or property of the plaintiff, except upon its real estate.

"And it is further adjudged that the plaintiff recover of the defendants its costs in this action expended.

"To all of which the county of Franklin excepts and prays an appeal to the Court of Appeals, which is granted.

(Pages 51 and 52.)

FRANKLIN CIRCUIT COURT.

February 1st, 1896.

"Board of Councilmen of the city of Frankfort, Plaintiff,
"versus
"Deposit Bank of Frankfort, Defendant. } Judgment.

"It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the Court of Appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the county of Franklin, &c., were defendants, and in the other the Commonwealth, for the use of said county, was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the Court of Appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the Court of Appeals filed in said two cases, that the Court of Appeals has sustained

the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt Bill, which is the same contract relied on as a defense in this case; it is now ordered and adjudged that article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17th, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth, which the latter can not alter or change without the consent of the former; by the terms of which contract the defendant can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present Constitution of this State and of the act of November 11th, 1892 (article 3, chapter 103, Acts 1891-2-3), in so far as they were intended to provide for any assessment or taxation of the defendant's property, rights of property or franchise except its said real estate, are in violation of, and repugnant to, the Federal Constitution and void; that the board of valuation and assessment, provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the Auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action, be, and the same is now hereby, granted, and that the defendants be, and each of them are, perpetually enjoined and restrained from levying upon, or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate; and it is further adjudged that the defendant recover of the plaintiff its costs in this action expended. To all of which the Board of Councilmen of the city of Frankfort, except and pray for an appeal to the Court of Appeals, which is granted."

These judgments are set out in full in the bill, and there relied on, as a complete estoppel against the claims of the appellants, county and city, and certified copies of the entire proceedings in the suits in which said judgments were rendered, are filed with the bill, and appear in this record as Exhibit "B," on pages 31 to 42, Exhibit "C." pages 43 and 44, and Exhibit "D," pages 44 to 52.

No appeal has been prosecuted from the judgment in the case of Franklin county, although an exception was taken and an appeal granted, *but the two years within which the appeal might have been prosecuted have elapsed, and none can now be prosecuted.*

The agreed facts recited in the judgment (page 5), are, that there were two other suits then pending in the same court against this bank by the county of Franklin and its officers for the purpose of collecting taxes from the bank; that the defense to those suits relied on by the bank was that it had a contract exemption under the Hewitt law, which was the same defense relied on by the bank in its answer to the city suit; that the two county cases had been appealed to the Court of Appeals; that the suit of the city should stand upon the answer filed by the bank until the decision by the Court of Appeals in the county case, and the liability of the bank to the taxes claimed in the city suit should be settled and determined by the decision of the Court of Appeals, the defense relied on by the bank being exactly the same in all three cases; and "*it appearing to the court by the mandates and opinions of the Court of Appeals filed in said two cases that the Court of Appeals had sustained the defense set up and relied upon by the bank in said two cases, based upon the contract under the Hewitt bill,*" the judgment was rendered in the exact words of the judgment in the county case.

That the agreement was made, is *conclusively* shown by the judgment itself, and it is not to be supposed that this court will

consider for a moment any attack that may be made in this collateral proceeding upon the validity of that judgment.

But the agreement was a most reasonable one, in any view that could be taken of it. Two appeals were then pending in the Court of Appeals, upon precisely the same question, conducted on both sides by the same counsel, and it was for the greater convenience of the court, and counsel, and to avoid unnecessary costs, that the agreement was made to allow the third case to stand on the docket of the Circuit Court, to be there decided exactly as it would have been had it gone to the Court of Appeals.

It will be noticed that the suit of the city was filed August 22d, 1894 (record, page 44), and that the bank's demurrer to that petition was overruled September 23d, 1894, on which date the answer was filed, and no step was taken, or order made in the case until February 1st, 1896, when the judgment complained of was rendered. No demurrer or other pleading was ever filed to the answer of the bank, although the suit remained on the docket from September, 1894, to February, 1896. What more persuasive evidence could be produced in support of the agreement between counsel, recited in the judgment.

HEWITT BILL.

We think it has been clearly shown that as to this bank, the judgments relied on, establish conclusively its contract under the "Hewitt Bill," and it is not thought necessary to argue that proposition independently of the adjudications as it will be very fully and ably argued by counsel for several of the banks where cases are heard with this one, and which have no pleas of *res judicata*.

An affirmance of the judgment appealed from is respectfully asked.

FRANK CHINN,
Counsel for Deposit Bank of Frankfort.

KENTUCKY BANK TAX CASES.

There were twenty-six of these cases in all. Of these, five were decided on the 3d of April, 1899, and are reported in volume 173, U. S. Reports, viz.: CITIZENS' SAVINGS BANK OF OWENSBORO *v.* OWENSBORO, at page 636; DEPOSIT BANK OF OWENSBORO *v.* OWENSBORO, at page 662; DEPOSIT BANK OF OWENSBORO *v.* DAVIESS COUNTY, at page 663; FARMERS' AND TRADERS' BANK OF OWENSBORO *v.* OWENSBORO, at page 663; OWENSBORO NATIONAL BANK *v.* OWENSBORO, at page 664; five were affirmed May 15, 1899, by a divided court, viz.: No. 356, STONE *v.* BANK OF KENTUCKY; No. 357, LOUISVILLE *v.* BANK OF KENTUCKY; No. 360, STONE *v.* LOUISVILLE BANKING COMPANY; No. 361, LOUISVILLE *v.* LOUISVILLE BANKING COMPANY; No. 387,

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STONE *v.* DEPOSIT BANK OF FRANKFORT, all argued February 28 and March 2, 1899, and the others are reported below.

STONE, Auditor, *v.* FARMERS' BANK OF KENTUCKY.

FARMERS' BANK OF KENTUCKY *v.* STONE, Auditor.

Nos. 885, 886. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court; and, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, is affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

THESE appeals were taken from a decree rendered in a suit in equity brought by the Farmers' Bank of Kentucky against Samuel H. Stone, auditor, Charles Findly, secretary of State, and G. W. Long, treasurer of the Commonwealth of Kentucky, constituting a state board of valuation and assessment; the board of councilmen of the city of Frankfort; the county of Franklin; the city of Henderson; the county of Henderson; the city of Georgetown; and the county of Scott. The object of the bill and of an amended and supplemental bill was to restrain the valuation of the franchise of the complainant under the provisions of a revenue act of Kentucky, enacted November 11, 1892, as also the certification of such valuation and the collection of taxes thereon for the years 1895, 1896, 1897 and 1898.

It was averred in the bill that the complainant was chartered on February 16, 1850, to endure until May 1, 1880; and that in and by the fifteenth section of the charter of complainant it was provided as follows:

"It shall be the duty of the cashier of the principal bank,

on the 1st day of July, 1851, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth fifty (50) cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full for all tax or bonus: *Provided*, That no tax shall be paid until said bank goes into operation: *And provided further*, That the tax or bonus hereby proposed to be imposed on each share of stock in this bank, or such as shall hereafter be imposed on each share, is hereby set apart and forever dedicated to the cause of education on the common school system; and that whenever the same, or any part thereof, shall be diverted otherwise by legislative enactment, said bank shall then be exonerated from the payment of any tax or bonus whatever."

It was further averred that on March 10, 1876, the charter of the bank was extended to May 1, 1905, by the following enactment:

"SEC. 1. That the charter of the Farmers' Bank of Kentucky as amended be extended for the period of twenty-five (25) years from the termination of its charter as therein fixed: *Provided*, That said charter and amendments shall be subject to amendment or repeal by the general assembly by general or special acts: *And provided further*, That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It was then averred that after the extension of the charter, in consequence of an attempt of the county of Franklin to collect a tax from the bank for county purposes, under the authority of an act of Kentucky passed in 1876, which statute, it was alleged by the bank, was in violation of the charter exemption of the bank, the complainant brought, and carried to a successful termination in 1888, in the Court of Appeals of Kentucky, a suit to enjoin the county named from collecting the taxes complained of. The judgment rendered was pleaded as *res judicata*.

The enactment, on May 17, 1886, of a law, commonly denominated as the Hewitt Act, relating to the taxation of

banks, was next stated in the bill. An acceptance of the terms of that act was averred, which it was claimed constituted an irrevocable contract with the complainant. It was next alleged that on November 11, 1892, the legislature of Kentucky passed a revenue act which subjected banks in the State to county and municipal taxation, and to a much greater rate of taxation than was provided in the Hewitt Act. Complainant then pleaded as *res judicata* judgments rendered in 1895 and 1896 in its favor by courts of the State of Kentucky, in suits brought by the bank to enjoin attempts to collect from it alleged franchise taxes under the supposed authority of the revenue act of 1892. The defendants, who were parties to the suits in question, were averred to be the county of Franklin and the sheriff of that county; the board of councilmen of the city of Frankfort; the city of Henderson; and the county of Henderson and its sheriff. The several decrees, it was alleged, conclusively established that the acceptance of the Hewitt Act constituted an irrevocable contract with the bank as respected taxation, and that the revenue act of 1892, in certain particulars, impaired such contract, and in so far as it did so was in violation of the Constitution of the United States and void.

Certain of the defendants filed pleas to the jurisdiction. All the defendants demurred to the bill, and some filed answers, to which plaintiff filed replications. The demurrers and pleas were overruled, and the cause was heard upon the pleadings and attached exhibits. On January 21, 1898, a final decree was entered sustaining the claims of *res judicata* made in the bill, and granting the relief prayed for so far as respected the assessment, certification and collection of franchise taxes for the benefit of the defendants the board of councilmen of the city of Frankfort, the county of Franklin, the city of Henderson and the county of Henderson. It was held, that by the judgments relied upon by complainant, it had been conclusively adjudicated as to those defendants that the Hewitt Act constituted an irrepealable contract, and that the provisions of the revenue act of 1892 in conflict with that act impaired the terms of such contract, and were void.

(88 Fed. Rep. 987.) The decree adjudged that as to the defendants the county of Scott and the city of Georgetown, who were found not to have been either parties or privies to the records and decrees constituting *res judicata*, that no irrevocable contract had been established, by judgment or otherwise, and as to those defendants the bill was therefore dismissed. From the decree thus entered both parties appealed to this court.

Mr. Ira Julian for Georgetown and Scott County. *Mr. Henry L. Stone* for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court. The decree, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, must be affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons, Tax Collector*, 173 U. S. 636.

And it is so ordered.

STONE *v.* BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 362. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Citizens' Savings Bank v. *Owensboro*, 173 U. S. 636, followed to the point that in the case of a bank whose charter was granted subsequently to the year 1856, and which had accepted the provisions of the Hewitt Act,

Statement of the Case.

and had thereafter paid the tax specified therein, there was no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act.

The agreement set forth in the statement of facts between the city of Louisville, the sinking fund commissioners of that city, represented by the city attorney, and the various banks of that city acting by their attorneys, was not a valid agreement, within the power of an attorney at law to make.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced, or before he has been retained to commence one; and if, under such circumstances, he assumes to act for his principal, it must be as agent, and his actual authority must appear.

An equitable estoppel which would prevent the State from exercising its power to alter the rate of taxation in this case should be based upon the clearest equity; and the payment of the money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

THE bill in this case was filed in 1897 by the Bank of Commerce, a citizen and resident of the city of Louisville in the State of Kentucky, for the purpose of obtaining an injunction restraining the defendants from assessing the complainant and from collecting or attempting to collect any taxes based upon the assessment spoken of in the bill, and for a final decree establishing the contract right of the complainant to be taxed in the method prescribed by the act of May 17, 1886, known as the Hewitt Act, the terms of which it alleged it had accepted. The bill sought to perpetually enjoin the defendants from assessing the franchise or property of the complainant in any other manner than under that act. The material provisions of the Hewitt Act are set out in the opinion of the court, delivered by Mr. Justice White, in the case of the *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

In 1891 Kentucky adopted a new constitution, section 174 of which, providing for the taxation of all property in proportion to its value, is also set forth in the above-cited case.

The legislature of the State in 1892 passed an act in relation to the taxation of banks and other corporations which was in conflict with the Hewitt Act, and provided for taxing the

banks in a different manner from that act, and also subjected the banks to local taxation, the total being much more onerous than that enforced under the Hewitt Act.

The complainant was incorporated under an act of the legislature of Kentucky approved February 10, 1865, and it had all the powers granted by that act and the several amendments thereof as alleged in its bill.

There were various other banks in the city of Louisville which also alleged that they had accepted the terms of the Hewitt Act, and by reason thereof had a valid contract with the State that they should be taxed only under the provisions of that act.

The complainant alleges in its bill that early in the year 1894 a demand was made on the part of the defendant the city of Louisville, based upon the act of 1892 and the ordinance adopted in pursuance thereof, for the payment of a license tax equal to four per cent of its gross receipts into the sinking fund of the city. The banks denied their liability to pay any tax other than that provided in the Hewitt Act, and hence arose the differences between the city and the banks.

No litigation had been commenced for the purpose of testing the questions at issue between the city and the banks, although negotiations looking to that end had been in progress between the city attorney of Louisville and the members of the sinking fund board, on the one hand, and the counsel for the various banks and trust companies on the other. There is set forth in the bill of the complainant the action of the sinking fund board as follows:

"SINKING FUND OFFICE, *Feb'y* 13, 1894.

"A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund

from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

"After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

"First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for state taxes and the amount they would be required to pay for state taxes under the provisions of what is known as the 'Hewitt bill.' This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

"Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and

will receive therefor the obligations of the sinking fund as above described.

"Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

"A true copy. Attest: J. M. Terry,
Secretary and Treasurer."

Following the above, the complainant's bill contains what is termed a "Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville," which stipulation reads as follows:

"It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

"First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

"Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

"A. Banks whose charters had been granted prior to 1856.

"B. Banks whose charters had been granted subsequent to 1856.

"C. National banks.

"It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

"Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky representing class A, the Louisville Banking Company representing class B, and the Third National Bank representing class C, and these banks respectively applied for a writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

"It was distinctly understood and agreed at the time, and this agreement was made for the best interests of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further

reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation, until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For Banks, Trust and Title Companies of the City of Louisville.

H. S. BARKER, *City Att'y.*

Approved: C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy. Attest: HUSTON QUINN.
ARTHUR PETER.
M. MCLOUGHLIN."

The Louisville Banking Company was one of the banks which brought an action for the purpose of testing the question of its liability to taxation. The charter of that company was granted subsequent to the year 1856, and, in that respect, it was like the defendant bank. It also claimed to have accepted the provisions of the Hewitt Act. In the litigation which followed, the Louisville Banking Company was adjudged by the Court of Appeals of Kentucky to have an irrepealable contract throughout its charter existence to be taxed under the Hewitt Act, and judgment pursuant to that adjudication was entered in favor of that company. The complainant herein claimed the benefit of the foregoing adjudication, and the Circuit Court allowed it, and gave judgment as follows:

"1. That the complainant is entitled to the benefit of the proceedings taken in the case of the *Louisville Banking Company* v. *R. H. Thompson, Judge, etc.*, in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the Court of Appeals of Kentucky, wherein the Louisville Banking Company was appellant and the said R. H. Thompson, Judge, etc., and the city of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

"2. That it is *res judicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered and decreed that the defendants Samuel H. Stone, Charles Findley and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11, 1892, or certifying the same to the city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the constitution of the State of Kentucky and any provision of the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties or franchises, other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant."

The defendants appealed directly to this court from the judgment of the Circuit Court, under the provisions of section 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, because the case involved the application of the Constitution of the United States, and because a law of the State of Kentucky was claimed to be in contravention of that Constitution.

Mr. Henry L. Stone for Louisville. *The Attorney General of Kentucky* filed a brief for Stone.

Mr. Alexander Pope Humphrey, Mr. Frank Chinn, Mr. James P. Helm and *Mr. John W. Rodman* for the banks.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

We have already decided, in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, that in the case of a bank whose charter was granted subsequently to the

year 1856, and which had accepted the provisions of the Hewitt Act, and had thereafter paid the tax specified therein, there was nevertheless no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act. And in the same case we held that the bank was properly taxed under the act of the legislature of Kentucky passed in 1892. Unless the complainant is right in its contention that it is a privy to the judgment in the case of the Louisville Banking Company, (mentioned in the foregoing statement,) and that the question is *res judicata* in its favor, the complainant has failed to make good its claim to be exempted from the provisions for its taxation under the act of 1892. The Circuit Court has held that the complainant was entitled to be regarded as privy to the judgment above mentioned in favor of the Louisville Banking Company, 88 Fed. Rep. 398, and that it could therefore avail itself of the judgment in that case as *res judicata*.

The sole question to be determined in this case is as to the validity and effect of the agreement above set forth. The complainant herein was not in fact a party to the judgment in the *Louisville Banking Company case*, and it can only obtain the benefit of that judgment by virtue of the agreement.

The commissioners of the sinking fund form a separate and distinct corporation from the city of Louisville, and no right is shown to sign or make the agreement for itself or to bind the city thereby. The agreement is not signed by the mayor, nor is it pretended that there was any action on the part of the general council of the city authorizing the making of the agreement. It was signed by the city attorney, and if he had no power to sign on behalf of the city there is nothing to create any liability on its part by virtue of the agreement, unless the payment of the money therein spoken of operates by way of estoppel to prevent the city from setting up the invalidity of such agreement. The effect of the payment of the money will be adverted to hereafter.

Upon its face there is no agreement even formally made between the city of Louisville and the banks of which the complainant herein is one, unless the signature of the city

attorney makes a valid agreement for the city. When the agreement was made no suit had been commenced by any of the parties; no litigation in regard to matters in dispute was pending. Prior to the making of the agreement it was a question altogether in the future as to what means should be adopted, and what suits commenced, for the purpose of establishing the rights of the various parties, as claimed by them. The question as to what course should be pursued was not one of law only. It was also one of policy. The stipulation actually entered into was of an administrative as well as of a legal nature, involving the administration of the law regarding taxation and the best means of determining the legal questions involved in the dispute, while at the same time obtaining, so far as possible, payment of the taxes claimed by the commissioners of the sinking fund as due from the various banks and trust companies. These were questions which an attorney would have no power to decide, and concerning which he would have no power to make any agreement.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit, or the giving of authority to commence one, there is nothing upon which the authority of an attorney to act for his client can be based. If before the commencement of any suit an attorney assumes to act for his principal it must be as agent and his actual authority must appear, and if it be not shown it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties. The authority of an attorney commences with his retainer. He cannot while acting generally as an attorney for an estate or a corporation accept service of process which commences the action without any authority so to do from his principal. This was directly decided in *Starr* v. *Hall*, 87 N. C. 381, and *Reed* v. *Reed*, 19 S. C. 548, so far as regards a personal defendant, but the same rule would follow in case of a corporation unless authority to appear were specially given.

When an attorney has been retained he has certain implied powers to act for his client, in a suit actually commenced, in the due and orderly conduct of the case through the courts. In cases of suits actually pending he may agree that one suit shall abide the event of another suit involving the same question, and his client will be bound by this agreement. *Ohlquest* v. *Farwell*, 71 Iowa, 231; *North Missouri Railroad Company* v. *Stephens*, 36 Missouri, 150; *Eidam* v. *Finnegan*, 48 Minnesota, 53; *Gilmore* v. *American Central Insurance Company*, 67 California, 366; 1 Lawson's Rights, Rem. & Pr., section 173, page 292; 1 Thompson on Trials, section 195.

One case has gone to the extent of holding the attorney's authority to agree that the case of his client should abide that of another, included his right to agree that the case should abide that of another involving the same question, although his client was not a party to that case and had no power to interfere in its prosecution or defence. *Scarritt Furniture Company* v. *Moser*, 48 Mo. App. 543, 548.

There might perhaps be some doubt about the correctness of a decision which so extended the power of the attorney. It would be carrying the authority of an attorney a good way to thus hold. It is not, however, in the least necessary for us to decide the question in this case.

All the above cases relate to the authority of the attorney after the actual commencement of suit and after the jurisdiction of the court has attached and the agreements made were in the discharge of the duties owing as between attorney and client, and subject to the supervision and power of the court itself.

Nothing of the kind exists in the agreement here in question. It is more than a mere agreement of an attorney to abide the event of a decision in an actually existing suit. This agreement was not in the execution of the general power of an attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that, and of a different nature. As we have said, the question to be determined was one of policy as well as of law; eminently one for the consideration of the city authorities, its

mayor and its general council, aided and assisted by the advice of the attorney of the city. But it was a decision of a corporate nature, and not one to be decided by any but the corporation, and it was one which we think was beyond the power of an attorney to make while acting merely in his capacity as attorney before suit brought and without specific authority.

We are also of opinion that as city attorney he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual. The power of an attorney to conduct an actually existing suit, and in its proper conduct to agree to certain modes or conditions of trial, cannot be enlarged by implication, so as to embrace a power on the part of an attorney, before litigation is existing and before he has been retained to conduct it, to enter into an agreement of the nature of this one. It might be convenient to have such power and the commencement of a suit and a retainer to defend may be a mere technicality, but the power of an attorney depends upon the authority given him to commence a suit or to defend a suit actually brought, and he has no power as an attorney until such fact exists.

Section 2909, Revised Statutes of Kentucky, provides that —

"There shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members, of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

We do not think this section gave him the power to bind the city by the agreement in question. He is undoubtedly the retained attorney of the city in every suit brought against it, and it would have been his duty to take charge of the litigation when it should arise between the banks and the commissioners of the sinking fund or the city of Louisville. That is, when the suit was commenced, the statute operated in place

of a retainer in case of a personal client. When suits were commenced against the city it was his duty to defend them, but he had no power to appear for the city as a defendant in a suit which had not been commenced or to accept service of process and waive its service upon the proper officer, without authority from that officer. Merely as city attorney, he had no larger powers to bind his clients before suit was commenced than he would have had in the case of an individual in like circumstances. There must be something in the statute providing for the election or appointment of an attorney for a corporation that would give such power; otherwise it does not exist. We find nothing of the kind in the statute cited. The Supreme Court of New York held, at special term, that the counsel to the corporation of the city of New York had no greater powers than an ordinary attorney to bind his client. *People* v. *Mayor &c. of New York*, 11 Abb. Pr. 66.

The agreement here in question, it is perceived, is much more extensive than a mere agreement to abide the event of another suit, and it is quite plain that it embraces more than the attorney had the right to bind the city to, even if an action had then been commenced and the agreement was made in that action. However imperative may have been his duty to save costs and expenses to the city, he was not authorized on that account to enter into agreements of the nature of this one, where no suits had been commenced against the city and the commencement of which he had no power to provide for.

Nor do we see that the commissioners of the sinking fund were granted any power to make the stipulation in question; certainly none to bind the city of Louisville. Our attention has not been drawn to any statute giving them power to make an agreement of this nature.

Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporation, and they must guide their conduct accordingly. *Murphy* v. *Louisville*, 72 Kentucky, 189.

As a result, we think the stipulation was not a valid one,

binding either the commissioners of the sinking fund or the city of Louisville.

It is contended, however, on the part of the complainant that the payment of the money to the commissioners of the sinking fund, pursuant to the provisions of the stipulation, and its receipt by them, estops the city of Louisville from asserting the invalidity of the stipulation. The claim of complainant on this branch of the case is in substance that it has the right under the agreement to the benefit of the judgment in favor of the Louisville Banking Company as *res judicata* in its favor, because the city, having received the money by virtue of the agreement, is estopped by that fact from insisting upon its invalidity.

The money was paid to the commissioners of the sinking fund and not to the city, which is a separate and distinct corporation. No corporate act on the part of the city is shown since the payment which recognizes or approves it. There is no ratification by the city of Louisville of this unauthorized act of its attorney. In speaking of the act of the attorney as unauthorized we do not mean to reflect in the slightest degree unfavorably upon the conduct of the city attorney, which seems by this record to have been prompted solely by a regard for the best interests of the city and by the most scrupulous good faith. We speak only of the act as one for which the law would not hold the city answerable.

But let us look for a moment at the position occupied by the respective parties and the facts which surround this alleged estoppel upon the city, and for this purpose the invalidity of the agreement is assumed. The banks of which complainant was one, at the time this agreement was entered into, conceded that they were liable to the payment of taxes under the Hewitt Act, and denied that they were liable to pay taxes under the act of 1892. The city, on the contrary, asserted the right to tax under the act of 1892, and the question became one for judicial decision. The banks paid the moneys spoken of in the agreement, and proceedings were inaugurated to test the legal question involved in the dispute.

It is alleged on the part of the complainant that the taxes under the act of 1892 were and are greater in amount than under the Hewitt Act, and it is not alleged or contended that the amount of moneys paid by the various banks was any greater than would have been due and payable under the act of 1892. That is, the banks have in fact paid no more than they ought to have paid if they had complied with the provisions of the act of 1892. This court has just decided in the *Owensboro case* (above cited) that the claim, on the part of the banks, of an irrepealable contract under the Hewitt Act was not well founded, and that the banks (so far as concerns that contention) have been liable to pay taxes under the act of 1892 ever since that act was passed. The complainant now asserts that because the banks paid the money which they did under the agreement above mentioned, (although such money was certainly no more than they were legally bound to pay under the act of 1892,) therefore the city is estopped from setting up the invalidity of this agreement. The result would be that complainant by virtue of the judgment in the *Louisville Banking Company case* could only be taxed under the Hewitt Act for the remainder of its corporate existence, although the act of 1892 is a perfectly valid act under which, but for the judgment above mentioned, the complainant would be liable to much greater taxation than the Hewitt Act provides for. We think these facts form no basis for the equitable estoppel claimed by the complainant. The payment of money by complainant under the agreement, when it ought to have paid at least as large a sum under the act of 1892, but which it refused to pay under that act, because it denied the validity thereof, we think is not the basis for an appeal to the equitable powers of a court. As a result of the judicial inquiry, it is seen that the banks have been at all times liable to pay taxes under the act of 1892. The fact that they disputed this liability and paid the money under an agreement which did not admit the validity of the act of 1892, forms no basis for this equitable estoppel, when the fact appears that the moneys actually paid were certainly no more than the banks were liable to pay under

the disputed act. If, however, it were found that the banks had paid at any time an amount greater than they would have been liable to pay under the act of 1892, the city, by the passage of the ordinance approved August 6, 1895, provided a means for crediting any bank with the amount of such overpayment. In no way, therefore, has the complainant been legally damaged by the payment of the money to the sinking fund. The only thing that may be said is, that by virtue of the agreement, the complainant paid, and the sinking fund received, the money at the times mentioned, which otherwise would have been refused; but when we come to consider that, although the legal question was in dispute, the right was really with the city, and the banks were really liable to pay taxes under the act of 1892, we think the payment they then made under the agreement would form no equitable estoppel in favor of complainant. If so, it would thereby be enabled to secure for itself the benefit of the plea of *res judicata*, and would thus prevent the application of the act of 1892 to it during its corporate existence. This result would not, in our opinion, be an equitable one, and as complainant has not in reality suffered legal injury by the payment of the money, there is no basis for the support of an estoppel.

An equitable estoppel which is to prevent the State from receiving the benefit of an exercise of its power to alter the rule or rate of taxation for all the time of the existence of a business corporation, should be based upon the clearest equity. It is fitly denominated an equitable estoppel, because it rests upon the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights. The payment of money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not seem to work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

Nor does the fact that the complainant bank, upon the execution of the agreement, omitted to sue and obtain

judgment against the city, add any force to the claim of estoppel.

The complainant, it must be assumed, knew the invalidity of the agreement because of the lack of power on the part of those who signed it to bind the city or the sinking fund as a corporation. There was no dispute as to facts, and no misrepresentations were made. The law made the invalidity. Knowing the agreement to be invalid, the omission to sue forms no ground upon which to base the estoppel. The complainant had no valid agreement upon which to stand, and if it omitted to sue it was at its own risk. There would seem to be no reason of an equitable nature springing out of the facts herein why the complainant should not hereafter be bound to pay the taxes prescribed in the act of 1892.

We think the judgment of the Circuit Court should be reversed and the case remanded with instructions to dismiss the bill, and it is so ordered.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

No. 363. LOUISVILLE *v.* THE BANK OF COMMERCE. Appeal from the Circuit Court of the United States for the District of Kentucky. MR. JUSTICE PECKHAM. In the above case the same question is involved that has just been determined in No. 362, and there will be a like order reversing the judgment and remanding the case to the Circuit Court with directions to dismiss the bill.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

FIDELITY TRUST AND SAFETY VAULT COMPANY *v.* LOUISVILLE.

SAME *v.* STONE, Auditor.

LOUISVILLE TRUST COMPANY *v.* LOUISVILLE.

SAME *v.* STONE, Auditor.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 406, 407, 408, 409. Argued February 28, March 2, 1899. — Decided May 15, 1899.

On the authority of *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, and *Stone* v. *Bank of Commerce*, *ante*, 412, the decrees below are affirmed.

In these cases the respective trust companies who are appellants, all four being Kentucky corporations chartered subsequent to the year 1856, filed their respective bills to enjoin the assessment and collection of certain taxes. The want of power to assess and collect the taxes complained of was in each bill made to depend upon two substantially identical grounds, which were briefly these:

First. That a legislative act of the State of Kentucky, passed in 1886, and designated as the Hewitt Act, had created an irrevocable contract between the State and the complainants, from which it arose that the taxes sought to be enjoined could not be assessed and collected without violating the clause of the Constitution of the United States forbidding impairment by a State of the obligations of a contract.

Second. That in a suit previously brought by the Louisville Banking Company, a Kentucky corporation, it had been finally decided by the Court of Appeals of the State of Kentucky that the act in question (the Hewitt Act) had created in favor of the corporations accepting its provisions an irrevocable contract, which could not be impaired without violating the Constitution of the United States. It was averred in each of

Counsel for Louisville.

the bills that, although the complainants were not parties to the suit brought by the Louisville Banking Company, they were each, nevertheless, privies to the record and decree rendered therein, because of a certain agreement, which, it was averred, had been entered into between the complainants, the commissioners of the sinking fund and the city of Louisville, through the city attorney, from which the privity relied on was asserted to have been created. The agreement in question was stated in full in each of the bills. By virtue of the privity thus asserted the decree rendered in favor of the Louisville Banking Company was pleaded as establishing conclusively, by the estoppel arising from the thing adjudged, the irrevocable nature of the contract springing from the Hewitt Act and the want of power to impair it by assessing or collecting the taxes in controversy. The court below decided that the complainants were not privies to the decision in the case of the Louisville Banking Company, because there was such a difference between the business of a banking company proper and that of a trust company that neither the commissioners of the sinking funds nor the city attorney of the city of Louisville had lawful power to agree that the liability of the trust companies to taxation should abide the result of the case brought by the Louisville Banking Company to test the right to tax it contrary to the contract which it was charged the Hewitt Act had embodied. Because of the want of privity held not to exist, for the reason just stated, the court below decided that the plea of the thing adjudged was untenable. On the merits of the case, the court below held that, as each of the complainants had been chartered after the year 1856, subsequent to an act adopted by the Kentucky legislature in that year, reserving the right to repeal, alter or amend all charters thereafter granted, there was not an irrevocable contract, and, hence, that the levy of the taxes complained of did not impair contract obligations. For these reasons the court sustained demurrers to each of the bills, and dismissed them. 88 Fed. Rep. 407.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, Mr. Frank Chinn, Mr. James P. Helm and *Mr. John W. Rodman* for the banks.

MR. JUSTICE PECKHAM, after making the above statement, delivered the opinion of the court.

It is unnecessary to determine whether the distinction between the business of a bank and that of a trust company was such as to cause it to be illegal to have agreed that the liability of the trust companies to taxation contrary to the Hewitt Act should abide the result of the controversy as to the Louisville Banking Company, since we have just decided in *Samuel H. Stone, Auditor, et al.*, v. *Bank of Commerce*, No. 362, *ante*, 412, that, irrespective of any distinction which might exist between the business of a bank *eo nomine* and that of a trust company, the commissioners of the sinking fund and the city attorney were without power to have made the agreement upon which the complainants relied in order to establish that they were privies to the decision in favor of the Louisville Banking Company. The plea of the thing adjudged depending upon the existence of privity being thus disposed of, there remains only to consider the alleged existence of an irrevocable contract arising from the Hewitt Act. That no such contract arose from that act as to corporations chartered after 1856, or whose charters were extended subsequent to that year, was decided in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636. Indeed, the opinion in that case and the opinion announced in *Stone* v. *Bank of Commerce*, *supra*, are decisive against the appellants, who were complainants below, as to every issue which arises for decision on these records, and the decrees below rendered are therefore

Affirmed.

THIRD NATIONAL BANK OF LOUISVILLE *v.* STONE, Auditor.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 404. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The assertion in this case of an irrevocable contract with the State touching the taxation of the plaintiff, arising from the Hewitt Act, is disposed of by the opinion of this court in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

The taxes which it was sought to enjoin in this suit were imposed upon the franchises and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal because in violation of the act of Congress.

THE statement of the case will be found in the opinion of the court.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

MR. JUSTICE WHITE delivered the opinion of the court.

The appellant, a banking corporation organized under the National Banking act, and whose charter was renewed on August 6, 1894, for a period of twenty years, filed its bill to enjoin the assessment of certain taxes for the years 1895, 1896 and 1897. The grounds of relief set out in the original and amended bills were substantially as follows: First. That the corporation had accepted the terms of an act of the general assembly of the State of Kentucky, denominated as the Hewitt Act, from which it resulted that there was an irrevocable contract protecting the bank from all municipal taxation and from all state taxation except such as was imposed by the Hewitt Act. The provisions of the Hewitt Act thus relied on were fully stated in *Citizens' Savings Bank of Owensboro* v.

Owensboro, 173 U. S. 636. Moreover, it was alleged that on the 18th day of June, 1894, the city of Louisville, having theretofore attempted to collect from the bank certain license taxes, contrary to the terms and conditions of the contract created by the Hewitt Act, the bank commenced suit to prohibit the collection of said taxes, and that these proceedings culminated in a decree of the Court of Appeals of the State of Kentucky prohibiting the collection of the taxes in question, on the ground that the bank had an irrevocable contract, arising from the Hewitt Act, which could not be impaired. The bill specifically alleged that the decree thus rendered by the Court of Appeals of the State of Kentucky constituted the thing adjudged, and, by the presumption arising therefrom, established beyond power of contradiction the existence of the irrevocable contract right. In addition, the bill alleged that the taxes in question were illegal, because they were imposed on the franchise and property of the bank in violation of the act of Congress with reference to the taxation of national banks by the respective States. Rev. Stat. § 5219. The taxes were, moreover, averred to be in violation of the act of Congress, because they were discriminatory, and, in addition, were illegal, because they were, in certain designated respects, repugnant to the constitution and laws of the State of Kentucky.

An opinion was filed by the court holding that as well in this case as in another case considered at the same time relating to the taxes for the years 1893 and 1894, demurrers to the bills should be overruled and motions for preliminary injunctions granted. 88 Fed. Rep. 990. The record, however, establishes that, subsequently, on the attention of the court being directed to the fact that the term of the original charter of complainant had expired in the interval between the levy of taxes for the years 1894 and 1895, (the charter having been renewed and extended on August 6, 1894,) the court entered a decree in the case at bar sustaining demurrers to the original and amended bills and dismissing the suit. From the decree so made this appeal was taken.

The assertion of an irrevocable contract arising from the

Hewitt Act is disposed of by the opinion in *Citizens' Savings Bank* v. *Owensboro*. The contention that the presumption of the thing adjudged takes this case out of the ruling in that case, is without foundation, because the suit brought to prohibit the collection of the taxes and in which the judgment relied on was rendered related to taxes for years prior to the expiration of the charter and before the same was renewed. Indeed, the suit wherein the judgment relied upon as constituting *res judicata* was rendered was commenced before the expiration of the original charter. Manifestly, as decided by the court below, a decree establishing the existence of an irrevocable contract, exempting or limiting the bank from taxation for one charter term, is not the thing adjudged as to whether the bank was subject to taxation during a new period of existence derived from a renewal of its original charter life, for, however persuasive the reasons supporting the conclusion that the corporation could not be taxed during its original charter, it was obviously impossible to have decided that the same rule applied to an extension, which only commenced after the initiation of the suit, wherein was rendered the decree relied on as constituting *res judicata*. A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen. For these self-evident reasons, in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, where a plea of *res judicata* as to a contract right of exemption was maintained, after the renewal of a charter, the court eliminated from consideration all the judgments which had been rendered prior to the period when the amended charter took effect.

These considerations would render it necessary to affirm the judgment but for the fact that the taxes which it was sought to enjoin were imposed upon the franchises and property of the bank and not upon the shares of stock in the names of the shareholders. It follows therefore that they were illegal, because in violation of the act of Congress. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

The decree below must therefore be reversed and the case be remanded for further proceedings in conformity to this opinion, and it is so ordered.

LOUISVILLE *v.* THIRD NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 364. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Third National Bank of Louisville v. *Stone, Auditor*, *ante*, 432, followed in holding that taxes like those here in question are illegal, because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders.

THE case is stated in the opinion of the court.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

MR. JUSTICE WHITE delivered the opinion of the court.

The appellee, the Third National Bank, filed its bill to enjoin the collection of certain taxes, relying upon grounds in all respects like unto those alleged in case No. 404, *ante*, p. 432. There was, however, this difference between the facts of the latter case and those arising on this record: In this case the taxes sought to be enjoined were levied prior to the renewal of the charter of the bank. Because of this difference the court below concluded that the want of power to assess and levy was conclusively established by the presumption of the thing adjudged arising from the decree of the Court of Appeals of Kentucky, to which we have referred in case No. 404. We need not, however, consider the question of *res judicata* upon which the court below based its conclusion, as we have in case No. 404, just announced, held entirely without reference to the plea of *res judicata*, that taxes in form exactly like those here in question were illegal because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders. It follows, therefore, that the decree below which restrained the collection of the taxes was correct, and it is therefore

Affirmed.

LOUISVILLE *v.* CITIZENS' NATIONAL BANK.

CITIZENS' NATIONAL BANK *v.* STONE, Auditor.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 365, 405. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Third National Bank of Louisville v. *Stone, Auditor, ante,* 432, and *Louisville* v. *Third National Bank, ante,* 435, followed.

THE case is stated in the opinion.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, Mr. Frank Chinn, Mr. James P. Helm and *Mr. John W. Rodman* for the bank.

MR. JUSTICE WHITE delivered the opinion of the court.

The Citizens' National Bank was organized on the 8th day of August, 1874, its charter being stipulated to endure for a period of twenty years. On April 1, 1894, the charter was renewed and extended for twenty years. The bank in these two cases filed its bills to enjoin the collection of certain taxes on the ground that by the effect of a statute of the State of Kentucky, usually referred to as the Hewitt Act, an irrevocable contract had been entered into between the State and the bank, from which it resulted that the taxes complained of could not be levied without impairing the obligations of such contract. It was moreover averred that the existence of this contract had been judicially determined in a suit between the Third National Bank and the city of Louisville, to which suit the Citizens' National Bank, although not a party, was a privy because of certain agreements alleged to have been made between the city of Louisville and the bank at the time the suit was brought by the Third National Bank. In consequence of this fact it was alleged that the existence of the contract between the Citizens' National Bank and the State had been

judicially determined, and the decree to that effect was pleaded as *res judicata.* In addition, the taxes in question were alleged to be illegal, because imposed upon the franchise and property of the bank, and because they were discriminatory, and they were averred besides to be illegal under the state constitution and laws. The lower court held that the plea of *res judicata* established an irrevocable contract as to the taxes for years prior to the date of the extended charter, but that the thing adjudged did not conclude that there was an irrevocable contract as to taxes imposed after the date of the extension of the charter, because such taxes were not and could not have been in controversy in the cause in which the prior judgment had been rendered. Upon these grounds, in the second case, that is No. 405, it decided that the complainant was without right to relief, and in the first case, No. 365, that it was entitled to the relief sought.

These two cases are in all material respects identical with the cases of *The Third National Bank of Louisville* v. *Samuel H. Stone, Auditor of Public Accounts, et al., ante,* 432; and *City of Louisville* v. *The Third National Bank, ante,* 435, which have been just decided. For the reasons given in the decisions rendered in those cases, it is ordered that the decree below rendered in No. 365 be, and the same is hereby, affirmed, and that rendered in No. 405 be, and the same is hereby, reversed, and that the last-mentioned case (viz., No. 405) be remanded to the court below with directions to take such further proceedings as may be in conformity to this opinion, and it is

So ordered.

FIRST NATIONAL BANK OF LOUISVILLE *v.* LOUISVILLE.

SAME *v.* STONE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 635, 634. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The decision of the court below that taxes imposed upon the franchise or intangible property of a national bank may be regarded as the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress in that respect, was erroneous and is reversed.

THE case is stated in the opinion.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

MR. JUSTICE WHITE delivered the opinion of the court.

In these two cases the appellant filed its bills to enjoin the assessment and collection of certain taxes. The grounds upon which the prayer for relief in each case was rested were substantially as follows:

First. That the taxes in question were levied upon the franchise and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal; second, that the taxes were discriminatory, because, as a consequence of the exemption of certain state banks from taxation by special contract, the property of the bank was taxed at a higher rate than other moneyed capital, in violation of the act of Congress; and, third, that the taxes were illegal, because not in conformity to the state constitution and certain provisions of the state laws.

The court below decided that, although the taxes were im-

posed or contemplated to be assessed on the franchise or intangible property of the bank, nevertheless they were the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress. It moreover held that the remaining grounds were without merit. 88 Fed. Rep. 409.

The law under which the taxes in question were levied is the same one which was considered in *Owensboro National Bank, Plaintiff in Error*, v. *The City of Owensboro and A. M. C. Simmons*, 173 U. S. 664. The theory of equivalency upon which the court below decreed the taxes to be legal was in that case fully examined, and held to be unsound.

It follows that the decrees below rendered in these cases were erroneous. It is therefore ordered that said decrees be

Reversed, and the cases remanded to the lower court with directions for such further proceedings as may be in conformity with this opinion.

LOUISVILLE *v.* BANK OF LOUISVILLE.

STONE, Auditor, *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 359, 358. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Stone v. *Bank of Commerce*, 174 U. S. 412, affirmed and applied to the point that the agreement of the commissioners of the sinking fund of Louisville and the attorney of the city with certain banks, trust companies, etc., including the Bank of Louisville, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

Citizens' Savings Bank of Owensboro v. *Owensboro*, 173 U. S. 636, also affirmed and applied.

On questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption.

Statement of the Case.

THE Bank of Louisville in these two cases filed its bills to enjoin the collection of certain taxes. The matters to which the bill in the first case (No. 359) related were certain franchise taxes for the years 1893 and 1894, the assessment and certification of valuation whereof had been made prior to the filing of the bill. Those covered by the bill in the second case (No. 358) were, generally speaking, like those embraced in the preceding suit, but were for different years — that is, for 1895, 1896 and 1897, and by an amendment the taxes of 1898 were also included. These taxes, however, had not been certified at the time the bill was filed, and the relief contemplated was the enjoining of the valuation of the franchise and the certification of the same for the purposes of taxation, as well as the subsequent collection of the taxes to be levied thereon. Omitting reference to the averments distinctly relating to the jurisdiction in equity, the case made by the bills was this:

It was alleged that the bank was chartered on February 2, 1833, to endure until January 1, 1853; that pursuant to an act approved February 16, 1838, the provisions of which had been complied with, the charter existence was extended for nine years; that by an act of February 15, 1858, duly accepted by the bank, its charter privileges were continued in full force for twenty years from the 1st of January, 1863; and finally that by an act of May 1, 1880, which the bank had duly accepted, its charter was extended for twenty years from January 1, 1883. It was alleged that by the sixth section of the original charter it was provided, among other things, that the cashier of the bank "shall on the first day of July, 1834, and on the same day annually thereafter, pay unto the treasurer of the State twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank; provided, that the legislature may increase or reduce the same; but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank." The tax, the bills admitted, by an act approved February 12, 1836, had been increased to fifty cents a share.

Statement of the Case.

In general language, it was averred that by certain decisions rendered by the courts of Kentucky in the years 1838, 1869 and 1888, it was held that similar language to that contained in the charter of complainant constituted a contract preventing a higher rate of taxation than that provided for in the charter, and that from all or some of these decisions it resulted that the extension of an original charter, under the law of Kentucky, carried with it all the rights and privileges, including the limit of taxation, contained in the original charter. No decision, however, prior to 1880, by the Kentucky Court of Appeals, was referred to, holding that the mere grant of a charter, or an extension thereof, was not subject to repeal, alteration or amendment, if such power was reserved, by a general law, in force when the charter was enacted or the extension was granted. There was no averment that the complainant was either a party or a privy to the suits in which the decisions referred to had been rendered.

In both bills it was averred at length that the general assembly of the State of Kentucky had enacted the statute known as the Hewitt Act, and that the bank had accepted its provisions. This act and its acceptance, it was asserted, constituted an irrevocable contract, protected from impairment by the Constitution of the United States, thus securing the bank against any form of taxation other than that provided in the Hewitt Act. It was in both bills then declared that in 1894 the city of Louisville, asserting a right to collect taxes from the bank, in violation of the contract embodied in the Hewitt Act, for the purpose of testing the right of the city to do so, an agreement was entered into between the commissioners of the sinking fund, the city of Louisville through the city attorney, and the attorneys of the complainant and of other banks and trust companies, by which representative suits were to be brought, and it was agreed that the liability of the complainant to any other taxation than that imposed by the Hewitt Act should abide the result of the test suits in question; that in compliance with this agreement a suit was brought by the Bank of Kentucky, which like the complainant had been originally chartered before 1856, in which last-

named year an act had been passed in Kentucky reserving the right to repeal, alter or amend all charters subsequently granted, subject to certain exceptions provided expressly in the act of 1856, and that this suit had culminated in a final decree by the Court of Appeals of Kentucky holding that the Hewitt Act was an irrevocable contract, and that the banks which had accepted it were not liable to any other taxation than that therein specified. Averring that the suit brought by the Bank of Kentucky was the test suit contemplated by the agreement, as determining the liability of the complainant to other taxation than that imposed by the Hewitt Act, the decree in the suit of the Bank of Kentucky was pleaded as *res judicata*. In addition, the bills asserted that if the Hewitt Act was held by this court not to constitute an irrevocable contract, then the complainant was entitled to be restored to its rights under its charter as extended, and was consequently not subject to the particular taxes, the assessing and collection of which it was the object of the bills to prevent.

The court below held that the complainant, by virtue of the agreement referred to, was a privy to the decree rendered by the Court of Appeals of the State of Kentucky in favor of the Bank of Kentucky in the test case in question, and hence decided that the plea of *res judicata* was well taken. From its decrees enforcing these conclusions the appeals in both these cases were taken.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The unsoundness of the plea of the thing adjudged, upon which the lower court rested its decision, results from the opinion announced in *Stone* v. *Bank of Commerce*, *ante*, 412, and *Louisville* v. *Same*, *ante*, 428. It was there held that the

agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the complainant bank, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and therefore that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

The want of foundation for the assertion that the Hewitt Act created an irrevocable contract between the complainants and the city is also disposed of by the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro.* There is no ground for distinguishing this case from the one last referred to. True it is that the original charter of the complainant differs somewhat from the charter of the Citizens' Savings Bank of Owensboro, inasmuch as the charter of the Citizens' Savings Bank contained simply a limitation of taxation to a fixed rate, whilst the charter now in question, although establishing a stated rate, provided that the named rate might be reduced or increased, but *should not be increased beyond a maximum sum.* This limit as to the power to increase, it has been argued, took the case out of the reach of the act of 1856, since it was a plain expression of the legislative intent that there should be no increase beyond the maximum stated.

At the time the charter was extended, in 1880, the act of 1836 had increased the limit of taxation, fixed by the original charter, to the maximum therein allowed of fifty cents on each share. Conceding, *arguendo*, that the charter, as thus extended, carried with it, into the new period, the limitation of taxation fixed by virtue of the original charter and by the act of 1836 increasing the sum to fifty cents on each share, nevertheless the case is covered by the decision in the Citizens' Savings Bank of Owensboro, *supra.* There is nothing in the extending act expressing the plain intent of the legislature that the charter as extended should not be subject to the repealing power reserved by the act of 1856. The act of

extension, therefore, was not taken out of the general rule arising from the act of 1856, that is to say, it was not embraced in the exception mentioned in that act, saving from the power to repeal, alter or amend "all charters and grants of or to corporations or amendments thereof" when "the contrary intent be therein plainly expressed." No such intent being plainly expressed in the extending act, it follows that the charter as extended was subject to repeal. It is impossible, in consonance with reason, to conceive of an unlimited irrepealable contract right when there is no unlimited irrepealable contract from which the right can be derived. And yet to such conclusion does the reasoning necessarily conduce which asserts that a repealable charter gave rise to an irrepealable contract right. Granting that the extending act in substance amounted to a reënactment in so many words of the provision found in the original charter, such provision as reënacted became but a part of a whole contract which was subject to repeal. The right to repeal, embracing the whole, covered also necessarily the provisions found in the whole. The limitation of taxation in the original charter was during the life of the corporation. If carried forward by the amendment it was only for the new period, that is, during the extended charter. But for all this extended period the charter was subject to repeal, at the will of the legislature, and the power to terminate the charter involved the correlative right of ending those stipulations which were only to last during the charter. The argument that, although the power to repeal the charter was reserved, the power to alter the taxation, without repealing the charter, did not arise, is but a form of stating the proposition which we have already noticed, and which amounts to the assertion that the lesser is not contained in the greater power. We must construe the extending act as a whole, especially in view of the origin and implied import of acts reserving the power to repeal, alter or amend, as fully stated in *Citizens' Savings Bank of Owensboro* v. *Owensboro*. We think that the extending act was subject to the reserved power of repeal, free from limitations inconsistent with the exercise of the right. The elementary general rule is that on

questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption. We cannot imply from the mere presence in the extended charter of the limitation of taxation, found in the original charter, a restraint on the power to repeal, alter or amend, when such restraint does not flow from the provisions of the extending act taken as a whole. It results from the fact that the extended charter was subject to repeal, that the complainant had no irrevocable contract limiting the power of the State to tax. Having no such right, it, of course, cannot assert that it must, if the Hewitt Act was not an irrepealable contract, be restored to the contract rights existing at the date of the enactment of the Hewitt Act. The non-existence of the prior right precludes the thought that a restoration could be possible.

From the foregoing reasons it follows that the decrees below rendered were erroneous, and they must be and are

Reversed, and the cases remanded with directions to dismiss the bills, and it is so ordered.

MR. JUSTICE HARLAN dissented on the ground that there was privity, and therefore *res judicata.*